Legal Assistance in Criminal Matters by Belgium, Germany and France with Regards to the Netherlands

Summary

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Introduction

Over the past years crime problems have increasingly become international in scope and dimension. In the seventies and eighties, cross-border crime mainly concerned trafficking of illegal goods, especially illicit drugs. Nowadays, internationally operating criminal groups may be involved in all sorts of criminal activities, including petty crime. As a result, law enforcement cooperation has become ever more important for the police and judicial authorities of different countries. Although, over the past decades, many initiatives have been taken to enhance law enforcement cooperation and the legal framework for mutual assistance in criminal matters, effective cooperation is still considered to be a problem. Thus, international criminals are still enabled to stay one step ahead of the police and the judiciary.

From a practical point of view it is an important question which difficulties with regard to law enforcement cooperation occur and how these should be resolved. Empirical scientific research can provide a contribution to answering this question. In the past five years, Tilburg University and the Catholic University of Leuven (Belgium) have cooperated closely with regard to this topic in a number of research projects.1

Our latest project, reported in this book, focuses on the assistance in criminal matters requested by the Dutch police and judicial authorities from their counterparts in Belgium, Germany and France. The project was aimed to complement an earlier study of the way incoming requests for mutual legal assistance from member states of the European Union, were handled by the Dutch legal authorities.2

In this study, firstly, the existing legal framework for law enforcement cooperation between the Netherlands, Belgium, Germany and France is analysed (part 1). Secondly, the formal legal framework for executing requests for mutual legal assistance in Belgium, Germany and France is described, especially with regard to requests sent from the Netherlands, (part 2). The third part of the study focuses on the organisational measures that have been taken by the police and the prosecution services in Belgium, Germany and France with regard to mutual assistance in criminal matters. The fourth part of the study concerns practical law enforcement cooperation


during criminal investigation cases that were executed in the Netherlands, and required the assistance of Belgium, Germany or France.

Part four of this research comprised an empirical study of legal assistance in criminal matters. Firstly, the National Uniform Register of Requests for Mutual Legal Assistance (Landelijk Uniform Registratiesysteem International Rechtshulp in Strafzaken, LURIS) was used to gain insight in the number of requests sent, the subjects referred to, and the addressees in Belgium, Germany and France.

Practical cooperation has been studied in ten criminal investigation cases started by the Netherlands, which required substantial legal assistance from the authorities of the before mentioned countries. These investigations considered forms of serious and organized crime, as well as murder, kidnapping, and cases of hostage-taking. Regarding these cases court files were studied. Also members of the public prosecution service and the police involved in these cases were interviewed, both in the Netherlands and abroad.

To conclude with, general cooperation in criminal matters between the Netherlands, Belgium, Germany and France, was discussed with a number of experts, for instance officials from the Dutch Centers for International Legal Assistance (Internationale Rechtshulpcentra, IRC) and liaison officers from the police.

The international legal framework for handling requests for mutual legal assistance

The international legal framework for handling requests for mutual legal assistance, which also applies to Belgium, Germany and France, comprises a patchwork of international treaties. The basic principle of law enforcement cooperation incorporated in these treaties is that the parties involved will provide assistance in criminal matters in the broadest sense. Whenever a request for mutual legal assistance is received it shall be followed up, provided that procedural requirements are met.

Although the legal framework for law enforcement cooperation was primarily devised for cases of serious and organized crime, letters rogatory are in practice also filed with regard to relatively minor breaches of the law such as, for instance, traffic offences. Fijnaut et al (2005) concluded that the majority of the requests for mutual legal assistance received by the Netherlands did not relate to investigation of serious or organized crime. The system for law enforcement cooperation is thus burdened with a large number of simple requests, for which it was not designed. Therefore, the question can be raised whether primarily the European Union, should adopt policies to limit the system for legal assistance in criminal matters foremost to serious and organized crime. With regard to relatively minor offenses with international dimensions, other means could be developed. For instance, a European index of wanted people could be set up. Another possibility is to allow Member States to make automated searches in the registration data of other Member States.

A second topic requiring attention is the principle of mutual recognition with regard to judicial cooperation, within the European Union. Our study shows that mutual recognition and mutual assistance in criminal matters cannot be seen as entirely separate forms of law enforcement cooperation, but as parallel instruments instead. The introduction of the principle of mutual recognition has lead to a dual
system for law enforcement cooperation, which to a certain extent has added to complexity for professionals in the field. Even if, for instance, the Council Framework Decision of the European evidence warrant for obtaining objects, documents and data for use in proceedings in criminal matters will formally be accepted and implemented by the Member States, mutual assistance in criminal matters will to a certain extent still be necessary to obtain evidence from abroad.

The legal framework for handling requests for mutual legal assistance by Belgium, Germany and France

The second part of the study concerns the legal framework for handling incoming requests for mutual legal assistance from the Netherlands that is applicable in Belgium, Germany and France. This framework is made up by international treaties on the one hand, and by national law and regulations on the other hand.

Our analysis shows that requests for mutual legal assistance have to meet only limited requirements with regard to form and content. Basically the requesting party needs to file a written document, containing the necessary information for the receiving party to respond adequately. The international legal framework allows the competent Dutch authorities to send requests for mutual legal assistance directly to the competent body in Belgium, Germany or France, without the necessity of involving higher or national authorities. Answers as well as documents and physical evidence can also be sent directly to the (local) police or prosecution service responsible for the particular criminal investigation in the Netherlands. Direct communication between competent authorities has had positive effects on both swiftness and results of law enforcement cooperation. On the other hand, monitoring the number of requests handled by the local authorities and the way these were executed had become more problematic.

If and how requests for mutual legal assistance are to be executed is to a large extent a matter of national law. Traditionally, the principle of locus regit actum has taken priority. In other words, letters rogatory are to be executed in accordance with the law of the country which assistance is sought after. However, the European Convention on Mutual Assistance in Criminal Matters (2000) allows guidelines to be set by the requesting party with regard to certain formalities and procedures. Thus, the principle of forum regit actum has been introduced. Its primary aim is to better ensure that evidence obtained abroad by means of requests for mutual legal assistance fits the requirements of domestic law. On the other hand, one needs to reckon with the fact that authorities who are supposed to handle these requests are generally not familiar with specific foreign rules and regulations. Therefore, preliminary consultation between the judicial authorities may be necessary to prevent problems. Also, the requesting party will usually ask permission for one or more of their detectives to be present when the request is executed.

Timely execution of requests for mutual legal assistance has always been a matter of sensitivity. In the international legal framework no specific terms are prescribed, although the European Convention on Mutual Assistance in Criminal Matters states that the addressee needs to comply with the request as quickly as
possible. However, this instruction can only be considered a declaration of intention as it cannot be formally enforced.

Execution of a request for mutual legal assistance may be refused for only a limited number of reasons. Firstly, assistance may be refused if the requested Party considers execution of the request likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country. Secondly, execution may be refused if the request concerns an offence which the addressee considers a political offence, or an offence connected with a political offence. Thirdly, assistance may be refused if the request concerns a fiscal offence. Fourthly, legal assistance may be refused in cases the party whose assistance is sought after fears arbitrariness or discriminatory treatment. To conclude with, execution of requests sent specifically from the Netherlands to Belgium, Germany or France may be refused in cases of parallel prosecution.

**The organizational framework for handling requests for mutual legal assistance by Belgium, Germany and France**

The third part of the research focused on the organizational framework in Belgium, Germany and France for execution of requests for mutual legal assistance stemming from the Netherlands. Organisational measures have been taken with regard to the police as well as the prosecution services.

To begin with, special departments of police in Belgium, Germany and France are responsible for maintaining contacts with their counterparts abroad. In Belgium and France, these departments are organized at the national level, as a part of the federal police and the *police nationale* respectively. In Germany, on federal level, the *Bundeskriminalamt* is responsible for matters of police cooperation. With regard to the federal states the same task is performed by the *Landeskriminalämter*.

With regard to the prosecution service, in France the competent authorities for law enforcement cooperation are the districts (*arrondissement*). The same applies to Germany, where incoming requests for mutual legal assistance are also primarily handled by the territorially competent *Staatsanwaltschaft*. In Belgium, however, organisation is somewhat different. On the one hand, the district prosecution services are territorially competent with regard to handling requests for mutual legal assistance which, as we have seen, may be sent directly. On the other hand, the federal prosecution service (*federaal parket*) acts as a national focal point for foreign authorities wishing to cooperate with Belgium in criminal matters. Moreover, the federal prosecution service can also facilitate, coordinate and support execution of incoming requests for mutual legal assistance. In specific cases, the federal prosecution service will itself take responsibility for the execution of incoming letters rogatory.

**The practice of assistance in criminal matters by Belgium, Germany and France to the Netherlands**

The fourth part of the study concerned the practical aspects of law enforcement cooperation with Belgium, Germany and France in criminal investigation cases
initiated by the Netherlands. Firstly, the number of requests for mutual legal assistance sent to these countries by the Netherlands has been analyzed. Secondly, the files of ten Dutch criminal investigations requiring substantial cooperation with Belgium, Germany or France, have been thoroughly studied.

In 2006, a total number of 3,785 requests for mutual legal assistance were sent from the Netherlands to Belgium, Germany and France. Belgium (1,950) and Germany (1,362) received the largest number. A total of 473 requests were addressed to France. Requests for mutual legal assistance foremost concerned illegal drugs (19%), predatory crime (including the fencing of stolen goods, 12%), fraud (12%) traffic accidents or situations in which drivers failed to stop after an accident (10%).

The larger part of these requests for mutual legal assistance was sent from districts or police regions in the south of the Netherlands. This is explained by three facts. Firstly, criminals or criminal groups involved in predatory crime in this part of the country relatively often also commit felonies in Belgium and Germany. In addition, Belgian and French bank robbers are also active in the south of the Netherlands.

Secondly, criminal groups whose members reside in different parts of the border area can foremost be found in this part of the country. These groups are for instance involved in the production of synthetic drugs, cannabis cultivation, VAT fraud, fencing of stolen vehicles, et cetera. The logistical processes of these illegal activities are split up over the borders. This development is in part due to several important Dutch criminals having moved to Belgium and, to a lesser extent, Germany.

Thirdly, the infrastructure for dealing illicit drugs to customers from Belgium and France is mainly concentrated in the south of the Netherlands. In addition, these illegal activities may lead to conflicts which may result in violence, kidnapping or murder, which also require law enforcement cooperation.

The central part of our empirical research concerned the study of law enforcement cooperation during ten criminal investigations, initiated by the Dutch police and judicial services. These cases concerned production of illegal drugs (3), kidnapping (2), armed robbery (2), theft of motorcycles, theft of cargo, and murder.

**Law enforcement cooperation with regard to Belgium**

Criminal networks are, as mentioned before, especially intertwined in the border area of the Netherlands and Flanders. As a result, criminal investigation often requires intense cooperation between the police and the judicial authorities of both countries. Our research shows that success or failure is foremost dependant on parties being able to agree upon bringing into action the required personnel and equipment for the execution of (complicated) requests for mutual legal assistance. Of course, problems following from differences in codes of criminal procedure also occur, but these come in second place. In the Netherlands, interception of conversation by telephone is widely used as an investigative technique. The Dutch police are, for instance, also allowed to tap telephones of relations of subjects under investigation, such as family members, who are not suspected of any crime themselves. In Belgium, this is not possible. Another example concerns DNA material. In Belgium, DNA samples are consequently taken in cases of predatory crime, whereas in the Netherlands this is not systematically done. Also, the Dutch code of criminal procedure is more restricted
than the Belgian with regard to the circumstances when DNA-samples can be taken from (possible) suspects. A third example concerns the fact that in the south of the Netherlands and Flanders criminals often live in houses close to the border. On several occasions Dutch criminals living in Belgium needed to be followed from their houses to the Dutch frontier, a distance often covered in less than ten minutes. Yet, a Belgian observation team had to be employed for this action, as the existing legal framework does not formally allow border-crossing observations starting on foreign territory.

Differences in organisation culture between the Dutch and Belgian police and prosecution services are firstly manifested in administrative procedure with regard to criminal investigation. In the Netherlands the process of criminal investigation is strictly organised and controlled. This benefits efficient application of personnel and equipment. However, as a result the Dutch police are often also unable to quickly respond to unexpected opportunities that do not fit with ongoing investigations. Compared to this, in Belgium the process of criminal investigation is often ad hoc, or aimed at specific phenomena, for example theft of lorries or bank robberies. This allows the police more room to manoeuvre when, for instance, an opportunity occurs to apprehend a suspect not currently under investigation.

A second important distinction with regard to organisational culture refers to the process of decision making. In Belgium it often takes time for the responsible authorities to take decisions. However, if a decision is made, those tasked with execution will do this loyally and without questioning its soundness. In the Netherlands managers take far less time to decide about certain proceedings, but any decision may be questioned by levels within the organisation responsible for its execution. On disagreement, lower ranking managers have proven to be able to frustrate decisions fairly easily, mainly by raising procedural objections or by refusing to assign the necessary personnel to the task. For the Belgians, and also for authorities from other countries, this is quite a remarkable feature of the organisational culture of the police and prosecution service – and, to be honest, of all sorts of other public bodies – in the Netherlands.

Law enforcement cooperation with regard to Germany

Law enforcement cooperation between the Netherlands and Germany is less intense when compared to Belgium. During the criminal investigation cases that were studied, requests for mutual legal assistance mainly concerned common investigation methods, for example interrogation, house searches, observation and telephone taps. The German police are generally praised by the Dutch authorities as regards the execution of requests for mutual legal assistance. It should be noted that legal assistance asked by the Netherlands in German eyes often concerns very serious types of crime, which are given high priority in terms of manpower and means. Moreover, the availability of personnel and equipment poses less of a problem in Germany because each of the federal states has a unified police force. Thus, if necessary, additional personnel can be obtained from all over the state. In the opinion of Dutch policemen organizational culture of the police of Nordrhein-Westfalen, with which they have to cooperate on most occasions, is to a large extent comparable to their own.
With regard to the prosecution service, it has already been noticed that in Germany this service is highly fragmented. In practice, this is likely to cause problems when the Dutch need to cooperate with more than one federal state during criminal investigations, as Germany lacks a central coordinating body. To a lesser extent, problems might occur in situations when cooperation with several Staatsanwaltschäften is necessary. However, as regards Nordrhein-Westfalen these difficulties are met by the fact that the Staatsanwaltschaft Aachen acts as point of entry for all requests for mutual legal assistance with regard to serious or organized crime.

Law enforcement cooperation with regard to France

Law enforcement cooperation with regard to France has been a sensitive topic, as the French have been, since the mid-nineties, very critical of Dutch policies with regard to illicit drugs and drug trafficking from the Netherlands. Yet, in the cases we have studied, cooperation with the French authorities proved to be relatively smooth. However, for this the role of foreign liaison officers of the Dutch police, stationed in Paris and Lille, is crucial.\(^3\) Their knowledge of specific French procedures often prevents major problems with regard to the execution of requests for mutual legal assistance. However, some general problems emerged from the cases studied.

Firstly, self willingness by the French authorities needs to be reckoned with. Regularly national regulations or internal rules of the police or prosecution service prevail over agreements laid down in the international legal framework to which France has committed itself. Secondly, the French prosecution service is highly fragmented, without any national contact points. If, for instance, a controlled delivery has to pass more than one district, all magistrates holding jurisdiction must comply. It goes without saying that if the Dutch request mutual legal assistance which involves more than one arrondissement, execution is very laborious. Thirdly, the large number of districts sometimes also implies cooperation with a local prosecutor who seldom receives requests for mutual legal assistance from foreign colleagues and might not be up to date with the legal framework. Moreover, as a rule the district prosecution services do not have specialists with regard to law enforcement cooperation.

The language problem – most Dutch do not speak French – proved to be less of a problem than expected. Most of the time Dutch liaison officers acted as interpreter and intermediary. Also, contacts with French authorities were maintained by public prosecutors or policemen who are fluent in French. Occasionally, conference facilities at Eurojust in The Hague were used.

General conclusion

On the basis of our research we have reached the conclusion that, in general, law enforcement cooperation with Belgium, Germany and France during complex criminal investigation cases does not come across grave structural problems. Naturally, differences occur with regard to criminal law and criminal procedure, but these can be overcome if the parties involved are willing to negotiate workable solutions.

\(^3\) French liaison officers based in the Netherlands are also used as intermediaries.
solutions. Some very unusual requests for mutual legal assistance could be executed with consent of the national authorities. Of course, magistrates and policemen, especially in districts and police regions in border areas, often have to cooperate and thus are able to gather knowledge about peculiarities in each others rules and regulations. As regards to France, the role of both Dutch and French liaison officers is essential to effective cooperation.

Problems that occur in law enforcement cooperation are primarily caused by different views upon priorities with regard to criminal investigation, which of course also determine the assignment of personnel and equipment to specific cases. In addition, the availability of necessary means to execute requests for mutual legal assistance may sometimes pose difficulties.

The Member States of the European Union still possess a great deal of sovereign autonomy with regard to criminal policy. The Reform Treaty (Lisbon), if accepted, will give the Union a greater margin to set general priorities in criminal policy and to evaluate the efforts made by the Member States in meeting the goals set in terms of capacity and quality.