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Targeting the Proceeds of Crime: Bottlenecks in International Cooperation

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1. Introduction

Since the eighties of the last century, the legislation on confiscation of the proceeds of crime has developed into an important instrument in the fight against all forms of crime. This development was stimulated to no small degree by the drafting of various international treaties and conventions. The most important of these are the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (1990), the Council of Europe Criminal Law Convention on Corruption (1999), the International Convention for the Suppression of the Financing of Terrorism (1999), the United Nations Treaty Against Transnational Organized Crime (2000), and the (revised) Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005). Not only obligations to make confiscation possible on a wide scale in national legislation arise from these treaties and conventions. Ample attention is paid as well to the possibilities and duties of international cooperation in confiscation matters. Attention has also been devoted for some time within the European Union to the possibilities to confiscate the proceeds of crime. This is evident, for example from the drafting of the Framework Decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property,¹ on the basis of which the Member states must provide for ample confis-

¹) OJ 2005, L 68/49.

cation possibilities in relation to diverse offences. In line with this, international cooperation in confiscation matters is also being examined, as evidenced by the recently drafted Framework Decision on the execution in the European Union of orders freezing property or evidence² and Framework Decision on the application of the principle of mutual recognition to confiscation orders.³

Previous research has shown that implementation problems occur in the practice of international cooperation in confiscation matters. In a study focusing on the Netherlands, mention is made, for example of the inadequate central direction of legal assistance and cooperation processes and the varying degree of willingness to cooperate internationally in confiscation matters.⁴ An evaluation within the European Union (carried out in 1999 and 2000) mentions similar problems in virtually all countries of the European Union.⁵ Subsequently, various provisions were made to improve the problems identified. The extent to which that improvement has been achieved at present has not been mapped out by the European Union. These studies were rather brief for various reasons, or did not focus (specifically) on the practice in confiscation matters. Because of this, the knowledge of and insight into – stated concisely – the functioning of international cooperation in practice in major confiscation cases has remained limited. In the recent evaluation of major confiscation cases in the Netherlands, international cooperation is mentioned hardly or at all.⁶ A recently completed study into the legal basis and practical execution of international mutual assistance requests does, however, explore the international dimension. Nevertheless, it is limited to cooperation in ‘ordinary’ criminal matters and largely leaves confiscation practice out of consideration.⁷ The limited knowledge about the functioning of international cooperation in confiscation matters in actual practice was therefore the reason for the study, a report of

²) OJ 2003, L 196/45.

³) Council Documents 14622/04 and 13564/06 (presse 274).

⁴) J.M. Nelen & V. Sabee, *Het vermogen te ontnemen* (The Hague 1998), p. 215–228.

⁵) Council Documents 10972/2/99 REV 2, 10832/00 and 14918/2/00 REV 2. See also the Final Report on the first evaluation exercise — mutual legal assistance in criminal matters, OJ 2001, C 216/14.

⁶) C. Schaap, B. Bruin & B. van Vliet, *Evaluatie grote ontnemingszaken* (Capelle aan den IJssel 2004).

⁷) C. Fijnaut, T. Spapens & D. van Daele, *De strafrechtelijke rechtshulpverlening van Nederland aan het buitenland: de politieke discussie, het juridisch kader, de landelijke organisatie en de feitelijke werking* (Zeist 2005). See also C. Rijken, *Trafficking in persons. Prosecution from a European perspective*, (The Hague 2003).

which is made in this article.⁸ We carried out the study on commission from the Research and Documentation Centre of the Dutch Ministry of Justice.

Our study was intended to provide insight into the procedures of international cooperation in confiscation matters, the bottlenecks occurring in this and the consequences of international cooperation for the confiscation of illegally obtained assets. To gain such insight, the cooperative relations between the Netherlands, Belgium, Turkey, Spain and the United Kingdom were studied by means of file study, telephone and face-to-face interviews, an expert meeting and the circulation of a questionnaire. An orientation took place as well to the legal framework of international cooperation at international and European level (see § 2). In this study, two clusters of research questions were answered. The first cluster relates to the way in which international cooperation in confiscation matters runs in practice. On the one hand, this concerns a description of the organisation of the process of international cooperation in the Netherlands, Belgium, Turkey, Spain and the United Kingdom (§ 3.1). On the other hand, it concerns the analysis of the available figures to give quantitative insight into the extent, nature and results of international cooperation in confiscation cases (§ 3.2). The second cluster of research questions concerns the bottlenecks which occur in the process of international cooperation in confiscation matters between the Netherlands and Belgium, Spain, Turkey and the United Kingdom (§ 4.1). Besides these bottlenecks, stock is taken of the causes of and reasons for these bottlenecks, as identified by the respondents (§ 4.2). In addition to this broad stocktaking, a concise further consideration is given to the causes of and reasons for the bottlenecks identified. Attention is devoted as well to several bottlenecks in the organisation of the process of international cooperation in confiscation matters which the respondents have not explained as such, but which, in our opinion, nevertheless should be deemed as having influence on that process (§ 4.3). These concern practical execution on the one hand, but, on the other hand, several bottlenecks can be mentioned against the background of the extension of international and European legislation, such as non-compliance with applicable rules laid down in that legal framework, or those arising from legal barriers to international cooperation in confiscation matters (§ 4.4). Following this, we discuss several possible solutions for the bottlenecks identified (§ 5). To conclude this article, we deal with a recent Draft Decision of the European Union for the purpose of designating or establishing central contact points in the Member States to promote international cooperation in confiscation matters. On

⁸) J.A. Moors & M.J. Borgers, *Knelpunten in de internationale samenwerking in ontnemingszaken*, (Tilburg/The Hague 2006) (full text available on the internet, <<http://www.iva.nl>>). See also M.J. Borgers, J.A. Moors & J.B.H.M. Simmelink, *Internationale samenwerking in ontnemingszaken* (Nijmegen 2006).

the basis of the results of the study presented, we make a brief strength/weakness analysis of this Draft Decision (§ 6).

2. The Legal Framework

In the introduction, we already mentioned different international and European legal instruments which are important for international cooperation in confiscation matters. The obligations ensuing from these are wide-ranging. This concerns providing for broad powers of financial investigation, freezing, seizure and confiscation, which can also be exercised at the request of another country. Besides this, it concerns, for example possibilities for information exchange and the transfer and takeover of confiscation proceedings. It would be going too far here to discuss the international and European legal instruments in detail. One aspect nevertheless does demand explicit attention in the light of the study discussed here. Unlike in the international treaties and conventions, in European legislation, explicit attention is paid to the *organisation* of international cooperation in confiscation matters. The basis for this lies in the Joint Action on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from crime (1998)⁹ and the Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of the instrumentalities and proceeds of crime (2001).¹⁰ In summary, this concerns the following standards:

- a) Member States should work more diligently in several respects in providing legal assistance in the identification, tracing, freezing, seizure and confiscation of assets. It is, for example, important that:
 - providing legal assistance is given the same priority as the taking of similar measures in national proceedings;
 - the settlement of formalities and processing of any additional mutual assistance requests which are necessary should run as quickly as possible;
 - the requesting Member State is adequately informed about – obstacles in – the course of the handling of a mutual assistance request.
- b) Member States which make a request for legal assistance to another Member State ensure that this request is concrete and substantiated, in accordance with the applicable rules.

⁹⁾ OJ 1998, L 333/1.

¹⁰⁾ OJ 2001, L 182/1.

- c) Member States should take measures to guarantee an efficient handling of mutual assistance requests, for example by making a user-friendly guide available, encouraging direct contacts between the actors involved and by providing appropriate training courses.

These standards together can be considered as a yardstick on the basis of which it can be determined whether countries – at any rate the Member States of the European Union – are performing properly at the level of international cooperation in confiscation matters.

In surveying the European set of instruments, it is striking that the attention paid to the practical aspects of international cooperation in confiscation matters concentrates on the Joint Action on against money laundering and the Framework Decision on money laundering. The framework decisions following this – the Framework Decisions on the freeze order, confiscation powers and mutual recognition of confiscation decisions – seem on the other hand to be aimed at creating a simplified and more mandatory legal framework for international cooperation, based on the principle of mutual recognition. This changed somewhat recently, when a political agreement was reached on the Draft Council Decision concerning arrangements for cooperation between Asset Recovery Offices of the Member States. In § 6, we devote further attention to this Draft Decision.

3. The Process of International Cooperation in Confiscation Matters

3.1. Organisation

It clearly emerged from our study that the way in which international cooperation in confiscation matters takes place has both an international, or bilateral, and a national dimension. The international, or bilateral, dimension relates to the agreements – whether or not at European level – made between countries to assist each other in confiscation matters. These agreements entail, concisely stated, that at the request of another country, a country gathers evidence, seizes objects or assets, or enforces a confiscation sanction. The central authorities and enforcement authorities of the countries involved communicate and interact on the basis of these rules. To a certain extent, the international and particularly the European regulations prescribe the way in which such interaction should run.

International agencies – Interpol, Europol and/or Eurojust – are sometimes involved in the interaction between the authorities and enforcement organisations of the countries concerned, or networks are used, formalised or not, such as the European Judicial Network and/or the Camden Assets Recovery Inter-Agency Network (CARIN). These are facilitating agencies and networks. They take over an act in the cooperation process, accelerate that act, or furnish relevant information

to foster the international co-operation. These international agencies do not take over the execution and completion of existing legal assistance procedures.

The national dimension of international cooperation encompasses all activities performed in one's own country with a view to international legal assistance. These not only include the execution of incoming requests, but also the preparation and monitoring of outgoing requests. The way in which cooperation runs between states is determined primarily by national legislation and the way in which the processing and handling of mutual assistance requests is organised at national level. In addition, most international rules exert influence only on the legal context of the cooperation, not or hardly at all on the organisation of the cooperation process.

Several characteristics emerge in our study from the description of international cooperation process between the Netherlands, Belgium, Turkey, Spain and the United Kingdom which give reason for a few summarising comments:

- To send mutual assistance requests, various channels are used – often simultaneously. In all countries, the formal sending runs in any case through the central authority, which has the job of reviewing the requests, registering them and forwarding them to the central authority in the requested state. In the Netherlands and Belgium, to that extent, it involves a formal act by the central authority, because mutual assistance requests are often sent directly to the competent implementing body in the requested state, with a copy to the central authority in one's own country, which in turn forwards the request to the central authority in the requested state. The central authority takes a central position formally in each country. The importance of informal contacts and networks is, however, increasing in practice.
- The countries studied did not make more than incidental use of the services of institutionalised international organisations, such as Interpol, Europol and Eurojust. Only Spain makes intensive use of the Interpol channel to send mutual assistance requests. The form and role of network organisations like the European Judicial Network (EJN) and, in particular, CARIN are more in line with the practice of international cooperation than those of Interpol, Europol and Eurojust.
- In the countries studied, the execution of mutual assistance requests takes place at a decentralised level. The requests are presented to the authorities who are authorised under national law to exercise the authority to which the request relates. In practice, the accent lies on international cooperation between decentralised authorities.
- In the countries studied, no specific implementing bodies are designated for handling the mutual assistance requests in confiscation matters. Centres of

expertise in the field of confiscation, such as the BOOM in the Netherlands and the COIV in Belgium, have no specific, substantive tasks in the field of international cooperation in relation to confiscation. In practice, however, they play a facilitating role.

3.2. *Figures*

For the situation in the Netherlands, it has not proved possible to map out the current number of incoming and outgoing mutual assistance requests relating to confiscation, the results of those requests (the size and value of the objects and assets which have been frozen or seized prior to judgment and/or which have been confiscated) and the way in which cooperating partners share the costs and benefits of confiscation procedures completely or reliably on the basis of the available figures. Registration by the central authority (BIRS) is incomplete. Registration by the public prosecutors offices of most district courts and appeal courts is lacking, and can hardly be reconstructed because there is no overview of confiscation files with an international component, nor of files in connection with the execution of incoming mutual assistance requests in confiscation matters. It is therefore not possible to give an indicative idea of the quantitative state of affairs with respect to international cooperation in confiscation matters.

4. Bottlenecks in International Cooperation in Confiscation Matters

4.1. *Taking Stock of Bottlenecks*

In taking stock of the factors which, according to the respondents, have a negative effect on the process of international cooperation in confiscation matters, we examined bottlenecks in the various bilateral cooperative relations which are directly connected to the process of international cooperation. In addition, attention was paid to causes and reasons in national (confiscation) practice which affect the bottlenecks in the process of international cooperation. This stocktaking showed that bottlenecks identified are not, or only to a limited extent, linked to the stages of the confiscation process and/or the specific bilateral cooperative relations. Although, in certain parts, bottlenecks or causes and reasons can be pointed out which are indeed related to a specific stage or a certain cooperative relationship, most of the important bottlenecks are general in nature.

4.1.1. *Bottlenecks in Bilateral Cooperative Relations*

Regarding the bilateral cooperative relations of the Netherlands with Belgium, Spain, Turkey and the United Kingdom, a rough idea emerges from the stocktak-

ing, naturally based on the experience and perceptions of the respondents. This 'bilateral idea' can be summarised as follows.

The relations between the Netherlands and Belgium can generally be considered good to very good. Important factors in this context appear to lie in the common language area, geographical and cultural proximity and the close contacts between the expertise centres of the two countries (BOOM and COIV). The relations between the central authorities are good as well. Where problems arise, they are usually related to freezing orders/seizure or execution, seldom or never to the investigation stage. A specific bottleneck mentioned is the regularly occurring scanty substantiation of Belgian mutual assistance requests relating to confiscation. As the cause of the bottlenecks, the respondents mentioned the limited priority given to confiscation in both countries.

The relations between the Netherlands and the United Kingdom are also experienced as good. According to the respondents, language problems usually do not occur. In studying the files, however, it became evident to the researchers that unprofessional translations of the documents into English sometimes contain irritating linguistic errors, and that professional translations sometimes misrepresent specific legal terms relating to a confiscation matter. The substantiation of mutual assistance requests relating to confiscation is in order, even though there are complaints from the British side about the wording in so far as it relates to the issue of the (ownership) relationship between the suspect/convicted person and the objects to be seized. The differences between the legal systems, especially on the part of the Netherlands, are considered as a complicating factor, but this does not seem to hinder cooperation very much in day-to-day practice. Dutch respondents experience the British organisation of the confiscation of the proceeds of crime as complex because of the multitude of implementing organisations involved. British respondents point out what in their view is the laconic attitude of the Netherlands with respect to asset sharing.

In relation to Turkey, the Netherlands acts mainly as the requesting state and not the requested state. Regarding the cooperative relations with Turkey, Turkish respondents state that the framing of Dutch mutual assistance requests is inadequate. On the part of the Netherlands, there are different opinions on the depth of the investigation conducted at the request of the Netherlands. As far as the way in which people address one another is concerned, it is striking that the Turkish respondents sometimes consider the Dutch manner of operation as haughty and impatient. According to Dutch respondents, communication difficulties also occur if Dutch police officials directly contact the Turkish judges involved. To make the cooperation successful, the Turkish authorities need to be given insight in good time into the matter on which the countries are to cooperate, and the communi-

cation should run as far as possible between persons with equivalent positions. In practice, the cooperation generally seems to run satisfactorily.

With respect to Spain, the Netherlands also acts mainly as the requesting state. Respondents point out that the execution of mutual assistance requests in Spain takes relatively a lot of time, the contacts are formal and the Spanish authorities hardly ever request additional explanation if a mutual assistance request is inadequately substantiated. Dutch respondents experience that Spanish authorities do not give any priority to international cooperation (in confiscation matters). In addition, it is difficult for the Netherlands to contact the persons in Spain who are directly involved in executing requests, for example because communication is usually possible only in Spanish. They also state as well that there is hardly any feedback from Spain on the execution of a request. In addition, there is an insufficient view in the Netherlands of the way in which legal shape is given to the powers required for confiscation.

4.1.2. Generic Bottlenecks

From the perspective of international cooperation, several bottlenecks are ‘generic’ in nature. These bottlenecks occur in most or even all of the cooperative relations studied.

Inadequate Substantiation and Framing of Mutual Assistance Requests

The substantiation and framing of mutual assistance requests relating to confiscation is flawed. Not enough relevant information is given, and not enough account is taken of the legal requirements applicable in the requested state.

Language Barriers

Language barriers play a part in practically all the cooperative relations studied. Mutual assistance requests are usually translated into the language of the requested state by a professional translator or interpreter, but the translation is not always adequately in line with the (legal) terminology used in the requested state. Furthermore, the knowledge and material expertise of translators and interpreters is not always sufficient and sufficiently verifiable when it comes to dialects in a foreign language.

Cultural Barriers

The lack of intercultural communication competencies on the part of the cooperating partners and the communication routes available to them proves to be a bottleneck. This bottleneck is expressed in the fact that, in practice, not enough account is taken of the expectations foreign cooperating parties have of each other regarding the way in which they want to be treated. If communication takes place in the process of international cooperation between persons whose positions are

on different levels, this can be an obstacle. It proves difficult to rate the value of the quality and yield of services provided by foreign agencies and persons during the investigation, confiscation and execution stages.

Insufficient Insight into the Chain of Cooperation

Formally, the cooperation between agencies involved in an international confiscation matter is adequately regulated. A major bottleneck is that the working method of central authorities is experienced as inert, non-transparent or unclear, partly as a result of the long processing time of mutual assistance requests. Consequently, current insight is frequently lacking into the progress of the execution of a mutual assistance request. Regarding all cooperative relations studied, practically all respondents pointed out the fact that in the practice of confiscation matters, the police and judicial authorities work in separate circuits: each with its own working culture, performance criteria and views on confiscation as a weapon in the fight against organised crime. Because of this, problems regularly occur with respect to treatment and communication, sometimes aggravated by cultural barriers.

Successful Cooperation in Confiscation Matters Depends (Too Much) on Personal Contacts

Successful cooperation in executing a mutual assistance request – in all stages of the confiscation procedure, but particularly in the seizure and execution stages – is linked to personal contacts. The building of personal relationships, preferably through meetings, was a success factor in all countries studied. In contrast, the lack of a personal network, or the lack of incentives to build and maintain a personal network, hinders the practice and constitutes a bottleneck in international cooperation in confiscation matters.

International Organisations Play No or Hardly Any Role

In the current practice of international confiscation matters, limited use is made of the expertise and services of the Europol/Interpol channel, or of other internal organisations and services. This has more to do with the fact that international organisations are often experienced as bureaucratic, slow and formal, rather than lack of familiarity with the possibilities of those services or the provision of information regarding financial investigation.

Lack of International Agreements: Custody and Management, Asset Sharing, Processing Times

Practice in the seizure and execution stages of the confiscation procedure is hindered by the lack of unambiguous agreements on the custody and management of seized objects and assets. Each of the countries studied has its own rules and procedures in this field, which are often not sufficiently known in the requesting state. The fact that no clear and binding agreements on asset sharing are in force at present is also a burden on international cooperation between judicial authorities.¹¹ Finally, no clear, widely accepted and applied standards are available for processing times of mutual assistance requests.

4.2. Stocktaking of Cause and Reasons

No clear distinction can be made on the basis of the research results between the bottlenecks in international cooperation in confiscation matters and their causes and reason. The respondents explained the causal connections only to a limited degree. The following causal connections were mentioned with respect to the major bottlenecks:

- The lack of knowledge of and experience with the legal systems of the countries with which cooperation takes place leads to an inadequate, flawed framing of mutual assistance requests.
- The inadequate securing of acquired knowledge in the organisation and the lack of transfer of knowledge between organisations results in (i) many police and judicial staff having too little specific knowledge of (the rules relating to the organisation of) international cooperation in confiscation matters and (ii) fragmentation of the limited expertise available.
- No or insufficient recognition of cultural differences – for example regarding the need for the personal presence of a public prosecutor during a work visit to another country – delays the processing time of a mutual assistance request.
- Lack of experience with and insight into intercultural competencies results in the in-adequate explanation of expectations of international cooperation.
- The working method of central authorities is inert and non-transparent, which, for example often makes the processing times of mutual assistance

¹¹⁾ In the new Framework Decision on the application of the principle of mutual recognition to confiscation orders (see footnote 3) some rules are given for asset sharing. These rules only apply between member states of the European Union.

requests too long and prevents insight into the progress of the execution of a mutual assistance request.

- The usually long processing time of confiscation matters leads to (i) loss of relevant knowledge and network, partly due to the frequent interim rotations of staff, (ii) relocation of the suspect's assets, in so far as they have not already been attached, and (iii) an increase in the willingness to accept a settlement, whereas settlements are usually poorly understood by requested states which have frozen and seized assets at an early stage.
- The scant (material and immaterial) investments by the police and judicial authorities in the planning and financing of work visits abroad, as well as in building and maintaining formal network contacts, makes existing contacts mostly dependent on individuals.
- Police and judicial authorities devote little attention to the management and securing of knowledge and experience present with their own organisations or departments, which causes expertise to disappear or at least become less easily available.
- The aforementioned inadequate deployment of available persons with knowledge of financial investigation in the Netherlands is blamed on (inadequate anticipation of) little advancement within Financial Support Bureaus (BFOs), career prospects outside the police and problems in the flowback from national to regional sections.
- The perception of Europol and Interpol as bureaucratic and slow-operating agencies, as well as lack of familiarity with the specific services of these agencies, has resulted in little use being made of these channels in practice.
- The lack of clear agreements on asset sharing is sometimes a reason for not entering into international cooperation. The fact that the rules and procedures of the requesting and requested states are not sufficiently known sometimes results in lack of clarity with respect to the management of confiscated objects.
- A lack of registration and the (inadequate) quality of the existing registration systems results in an inadequate overview of the practice of cooperation in international confiscation matters, and sometime hinders a successful execution of confiscation orders as well.

4.3. Further Consideration of Causes and Reasons

Together, all bottlenecks and their causes and reasons give a gloomy picture from the viewpoint of the organisational preconditions needed for successful international cooperation. The main reason for this is that many of the bottlenecks ascertained prove to be very persistent. A large number of the problems identified did, after all, emerge from the study conducted by the European Union on the basis of the Joint action establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime.¹² Although the countries involved have developed several useful initiatives since then, largely the same problems are still noticeable.

The list of causal connections the respondents mentioned to explain the bottlenecks they identified in the process of international cooperation in confiscation matters can be supplemented and deepened – on the basis of a comparison of the different sources of information, as well as from a synthesising and interpretive point of view.

Bottlenecks and Causes, at International and National Level

According to the perception of the respondents, neither the difference between bottlenecks and their causes, nor the distinction between bottlenecks at national and international level is sharp. Several respondents also showed that no sharp dividing line can be drawn between bottlenecks on the one hand and causes and reasons on the other. In addition, the respondents' level of perception, in practically all cases, is based on their knowledge and functioning in their own state. Experiences with problems in national cooperation in confiscation matters are sometimes automatically extrapolated to and thematised as a bottleneck in international cooperation, even though they were not actually identified in relation to that international level in the study. Although the respondents identified such bottlenecks in the light of international cooperation in confiscation matters, and situated them at international level, they are often bottlenecks existing mainly at national level, or also at national level – outside the context of international cooperation – and should therefore be characterised as causes of bottlenecks rather than as bottlenecks in international cooperation. Consequently, it is evident from further consideration of all these bottlenecks in international cooperation in confiscation matters that few bottlenecks actually emerged which relate specifically to the level of international cooperation. Practically all bottlenecks have causes which are rooted in the national organisation of the process of international cooperation. This can be explained by the fact that, in essence, international cooperation in

¹²⁾ See the documents in footnote 5.

confiscation matters does not have any international organisational framework. International cooperation does, after all, take place between the different countries. In addition, responsibility for the implementation of international cooperation at national level may well be assigned to the central authorities, but in practice various agencies are involved in its implementation. Neither the central authorities nor the centres of expertise provide a closely-knit framework for cooperation in and exchange of knowledge for the purpose of confiscation matters. From the field, the central authorities are not viewed as nor deemed influential enough to operate as a 'player' in the practice of international confiscation matters. The significance of international organisations such as Europol and Interpol – which could potentially form an actual organisational framework at international level – proves also to be limited in that respect for the time being. Where bottlenecks occur – and particularly where persistent bottlenecks are concerned – this is usually connected with and caused by the national (preconditions of) organisation of the process of international cooperation.

Vision on the Significance of Confiscation

Behind most of the causes and reasons mentioned by the respondents to explain major bottlenecks in international cooperation in confiscation matters, there is a feeling that confiscation is still given little priority as a weapon in the fight against internationally organised crime. This affects the international and European level, but applies at national level mostly to the judiciary, the public prosecution service and especially the police. This indicates a discrepancy between policy formation on the one hand and policy implementation on the other. Politically, there seems to be some support – at European level as well as in the Netherlands – for making intense efforts to confiscate the proceeds of crime, both nationally and internationally, but, apparently, not much of this is noticeable yet at implementation level. European institutions, the national governments and the central authorities therefore lack an explicit vision on the significance of confiscation in the fight against international organised crime and – as follows logically from this – a clear mission to increase its use for the purpose of international confiscation matters. This has a demotivating effect in practice, according to the research results, causes problems in the chain of cooperation and hinders the accumulation and exchange of knowledge.

Accessibility and Quality of Information

Various electronic sources of information are available at national and international level to collect information with which an international mutual assistance request for confiscation can be prepared. These sources prove sometimes to be unknown and are not usually used systematically, despite a widely-felt need for information at execution level, and despite the fact that the substantiation and framing of mutual assistance requests is regularly flawed in practice. It is therefore interesting

to ascertain that the respondents did not consider the accessibility and quality of information as a bottleneck. The fact that many respondents express their need for information, but apparently do not fully use the sources of information already available, indicates the need for a more logical and consistent management of information which specifically supports the practice, and brings together expertise in the fields of international cooperation and confiscation from the police and judicial authorities. The importance of practically usable and widely available information to facilitate international cooperation in confiscation matters has been recognised for a long time. In the Joint Action on the identification, tracing, freezing, seizing and confiscation of the instrumentalities and proceeds from crime (1998), the then Member States of the European Union agreed to prepare user-friendly guides. This agreement has not been adequately kept.

4.4. Legal Perspective

Compliance with these European standards regarding international cooperation in confiscation matters, as described in § 2, is not a matter of course within the cooperative relations studied. The listed bottlenecks in international cooperation can be characterised partially as failure to comply with (part of) European legislation. Systematic guarantees for compliance with this legislation are lacking or inadequate.

It must be ascertained as well that no direct consequences are attached to non-compliance or inadequate compliance with the European rules. This is linked with two circumstances. First of all, it appears that within the European Union, the previously pronounced attention for the practical aspects of international cooperation has weakened. This is not expressed because the binding nature has been removed from the relevant rules, but is due to the fact that the rules enacted later are primarily aimed at development and application of the principle of mutual recognition in confiscation matters. That mainly takes the form of obligations for Member States to organise national legislation so that cooperation in the (near) future can take place on the basis of that principle in order to allow cooperation within the European Union to run more simply and efficiently. The older and new European rules still serve the same purpose as far as that is concerned, but in the current European rules,¹³ there is no accent on the organisation of execution practice, and with that, the signal to the Member States to pay systematic attention to international execution practice has become weaker. Secondly, there is no follow up to the evaluation study conducted in 1999–2001 on the basis of the Joint Action

¹³) For the new Draft Council Decision concerning arrangements for cooperation between Asset Recovery Offices of the Member States, see our comments in § 6.

establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime. Although the Member States have to report on the implementation of the Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime – this procedure has not been completed –,¹⁴ the reports are not yet in the nature of a systematic follow-up study into the current functioning of the practice of international cooperation and into the implementation of the recommendations drafted on the basis of the aforementioned evaluation study. Supervision from the European Union of compliance with the practical standards is limited.

If the existence of some of the bottlenecks identified in international cooperation in confiscation matters can be traced to non-compliance or inadequate compliance with legally binding European standards, it is plausible to conclude that a solution for those bottlenecks can be found in promoting compliance with those practical standards. This could include further development and concretisation of the existing practical standards and/or strengthening the supervision of compliance with them. Testing these possible solutions could be well combined with the (further) advancement of the principle of mutual recognition in confiscation matters.

Finally, the study shows that a number of bottlenecks are connected with the powers and formalities arising from the framework of international treaties and conventions and European rules. Although an expansion of some parts of that framework is conceivable and can also be considered desirable – for example as far as the development of a standard for the framing of mutual assistance requests is concerned, or rules relating to cooperation with respect to civil confiscation – it cannot be determined that essential legal rules are lacking. The bottlenecks discussed here, such as the formal and mandatory intervention of central authorities, have a more organisational than legal connotation. The solution of such bottlenecks requires adjustments to the organisation of the cooperation process, rather than the amending or supplementing of legal rules and regulations.

5. Possible Solutions

Partly on the basis of suggestions by the respondents, three possible solutions have appeared on the boards with which most of the bottlenecks can be removed or reduced:

¹⁴⁾ See for the reports of the Commission, based on the reports of the member states, COM(2004) 230 final and COM(2006) 72 final.

- highlighting the importance of a well-oiled organisation of the cooperation process in confiscation matters in the fight against internationally organised crime;
- supplying knowledge, not only about the relevant legal aspects, but also – and especially – about the practical realisation of international cooperation in confiscation matters;
- directing practical realisation on the basis of two primary objectives: facilitation and monitoring.

The possible solutions outlined here will initially have to be worked out and implemented in the countries involved in international cooperation in confiscation matters. To enable this, the necessary (policy) choices will have to be made. The focus is essentially on three dilemmas: Which tasks should be organised at national level and which at international (European) level? Which tasks – at national level – are to be organised centrally or decentralised? To what extent does the process of international cooperation have to be organised formally, or is room to be left for informal initiatives and courses of action? With a view to the observation that many bottlenecks in international cooperation in confiscation matters and their causes have proved very persistent, it is important to emphasise that not only (policy) choices have to be made, but compliance with agreements made also needs to be supervised at international and national level. In the past decade, the situation seems to have worsened rather than improved. The European institutions and national central authorities have a task in reversing this development.

Even though the focal point in realising improvements in the cooperation process lies at national level, the international agencies involved can also make a contribution. The role of the European Union in the context of European legislation has already been discussed. It should not only be emphasised here that agencies such as Europol and Eurojust can play a clearer role in execution practice, but also that they can fulfil an important facilitating function. Precisely because these agencies have brought together specialists in the field of international cooperation from all Member States, they would not only be able to set up a practical, useful network and fulfil a network function, but could also convert the expertise they have gathered into actual tools, such as user-friendly guides (European and for each country). Although Europol and Eurojust are already developing the necessary initiatives in this area, they have thus far proved inadequately able to bring the added value of their products to the attention of their prospective customers.

6. A Network of Contact Points: The Way Forward?

A blueprint of *the* model of international cooperation in confiscation matters, as has proved to be the case, cannot actually be given. This does not, however, mean that the results of the study discussed here into the bottlenecks in international cooperation in confiscation matters cannot in any way be put into operation with a view to facilitating such cooperation. What is possible, for example, is to identify the weaknesses and strengths of new proposals. To conclude this article, we want to carry out a similar analysis – in brief – of the proposal to provide for a network of central contact points, with a view to facilitating international cooperation in confiscation matters. CARIN, established in 2004 as an informal association of police and judicial bodies in the field of confiscation of the proceeds of crime, envisages (among other things) the establishment of central contact points in the participating countries. In addition, a political agreement was reached in the European Union on the Draft Council Decision concerning arrangements for cooperation between Asset Recovery Offices of the Member States, which is intended to support this CARIN initiative.

6.1. *The Draft Council Decision*

In December 2005, Austria, Belgium and Finland submitted a proposal for a decision on an arrangement for cooperation between the national asset recovery offices for the confiscation of assets.¹⁵ This is a decision within the meaning of Art. 34 (2) (c) of the EU Treaty, which is not aimed at any approximation of the laws and regulations of the Member States, but relates in essence to the organisation of execution practice. In June 2006, a political agreement was reached on the Draft Council Decision, after it had undergone the necessary amendments during the negotiations. Judging by the most recent public Council document, the following obligations will ensue from the Draft Council Decision.¹⁶

The Draft Council Decision is in line with the establishment of CARIN, the purpose of which is, *inter alia* to create a network of central contact points for matters relating to confiscation of the proceeds of crime. CARIN is an informal network that cannot take any binding decisions. The Draft Council Decision supports the initiative of CARIN by creating an obligation for the Member States of the EU to establish central contact points. On the basis of Art. 1 (1) of the Draft Council Decision, each Member State must set up or designate a “national Asset Recovery Office”. This national Asset Recovery Office is charged with facilitating the tracing and identification of – stated briefly – proceeds of crime, in so far as

¹⁵) Council Documents 15628/05 and 15628/05 ADD 1.

¹⁶) Council Document 10357/06.

they can be seized and/or confiscated in criminal or civil proceedings. Although the original draft stipulates that each Member State may set up or designate only one national Office, Art. 1 (2) now allows the setting up or designation of two Asset Recovery Offices. In so far as other units in a Member State are also engaged in the tracing and identification of proceeds of crime, this Member State may nominate a maximum of two Asset Recovery Offices as contact point(s).

The national Asset Recovery Office – for the sake of convenience, the existence of one national Asset Recovery Office per Member State will hereafter be assumed – is for the purpose of exchanging information and best practices, “upon request and spontaneously” (Art. 2 (1)). For the exchange of information upon request, Art. 3 of the Draft Council Decision refers to the rule to be adopted on the basis of the draft Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union. This draft Framework Decision relates to police cooperation in the EU, more particularly to the exchange of information between police authorities. This information exchange is limited to information which can be obtained without the use of coercive measures. The information exchanges cannot be used automatically as evidence in a criminal case.¹⁷ It is clear from the reference to this draft Framework Decision that the draft Decision limits cooperation between national Asset Recovery Offices to information exchange at police level.¹⁸ The information must be useful for the tracing and identification of proceeds of crime. The spontaneous exchange of information is permitted on the basis of Art. 4 of the Draft Council Decision within the limits of the national law of the Member State that provides the information. Art. 7 contains the obligation to exchange best practices concerning the tracing and identification of proceeds of crime between the national Asset Recovery Offices.

As stated, the primary task of the Asset Recovery Offices is to facilitate cooperation at the level of the exchange of information.¹⁹ It is possible for an Asset Recovery Office to place an incoming request with another unit in the Member State. From the Council documents relating to the Draft Decision, it is clear, however, that national Asset Recovery Offices are pursued which are more than just a postbox

¹⁷) Council Document 13986/5/05 REV 5.

¹⁸) See also art. 10 paragraph 2 Draft Council Decision: ‘So long as the Member States have not yet implemented the Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, references to the Framework Decision in the present Decision shall mean the applicable instruments on *police cooperation* between the Member States.’

¹⁹) Council Documents 7259/06 ADD 1, p. 5, and 6589/2/06 REV 2, p. 2.

and (thus) possess the expertise needed to execute requests.²⁰ The Draft Council Decision does not, however, set further standards for the organisation and working method of the national Asset Recovery Offices. Nor does it make any difference what status – administrative, police or judicial – the national Asset Recovery Offices have or acquire, as long as this does not hamper the cooperation (Art. 2 (2)).

6.2. A Strength/Weakness Analysis

Creating a network of central contact points for cooperation in confiscation matters entails that the focal point of the organisation of this cooperation will remain at national level. Nevertheless, centralisation and concentration will take place to a certain degree because the network of central contact points will simplify and channel the communication and interaction between the countries involved. In this way, the central contact points form a layer which in a certain sense rises above the national level, without the existence of a (formal) European institution or organisation. With this, the choice is not made for a new model or a new approach. After all, in ‘ordinary’ international cooperation in criminal matters, central authorities have existed for years. At the level of the confiscation of the proceeds of crime, the role of these authorities is not evaluated positively. This does not mean that a network of central contact points could never facilitate international cooperation in confiscation matters. Working with central contact points has several potential strengths which, with due regard for the right preconditions, could also be achieved in practice.²¹

A network of central contact points offers the possibility to assign several important tasks unambiguously to these contact points. For instance, the contact points could actively disseminate information and knowledge, to other contact points as well as to the relevant national authorities. Overseeing execution practice, particularly by registering incoming and outgoing requests – or orders by means of instruments of cooperation based on mutual recognition – and the actions taken on this basis, could also be among the responsibilities of the contact point. Furthermore, the contact points could be the link between international authorities (such as Europol and Eurojust) and the countries involved. Another advantage of a network of central contact points could be that informal contacts could arise relatively easily between (the staff of) these contact points.

From the results of the study discussed here, it is fairly easy to deduce the preconditions to allow a network of central contact points to function properly. The first and perhaps most important precondition is that the central contact point

²⁰⁾ Council Document 5644/06, p. 2.

²¹⁾ See also the recommendations of Fijnaut, Spapens & Van Daele, *op. cit.*, p. 308–317.

is able to exert influence in its own country. Not only should the position of the central contact point as a pivot in international cooperation be respected, in both an organisation respect and concerning expertise. The central contact point should also be able to rely on the necessary execution capacity of the police and judicial authorities. If the central contact point only acts as a 'mailbox', there will be no adequate guarantee that incoming and outgoing requests will be executed with the necessary expeditiousness. The central contact point itself must, of course, also have the necessary capacity available, on the one hand to process the incoming and outgoing requests with the necessary expeditiousness and, on the other, to build and maintain its information and knowledge function. Moreover, the activities of the central contact point should be framed within or alongside those of the central authority in the field of 'ordinary' international cooperation. This could mean that the central contact point would be part of that central authority in relation to confiscation of the proceeds of crime, but also that there would be two different authorities, each with a clearly delineated field of work, which, where necessary, could coordinate their activities – including the registration of incoming and outgoing requests. If the preconditions mentioned here are not observed, a serious risk would arise to the success of a network of central contact points. Fulfilment of the preconditions still requires the necessary choices. In our opinion, these choices are so country-related that it would not be very meaningful to deal further with them in a general sense. It should be noted, however, that supervision must be exercised in one way or another over the proper functioning of the central contact points. For this purpose, a supranational supervisory body could be created, preferably composed of representatives of the national contact points, but it is also conceivable that mutual evaluations could be carried out of and by the various national central contact points (peer review) in a European or CARIN context.

If one examines the Draft Council Decision, several weaknesses can be identified. First of all, the very limited field of work of the national Asset Recovery Offices is striking. The tasks of the national Asset Recovery Offices are explicitly limited to exchanging information at police level, whereas international cooperation takes place largely at judicial level. The possibility to provide for two national Asset Recovery Offices per Member State is rather unfortunate as well, in view of the lack of clarity and competency problems which the designation of two contact points can entail. It is also striking that no consideration at all is given in the Draft Council Decision to the (possible) role and position of Europol and Eurojust in relation to the national Asset Recovery Offices. It is remarkable as well that hardly any preconditions are mentioned or emphasised which must be fulfilled to enable cooperation between the national Asset Recovery Offices to run properly. Numerous matters can easily be pointed out regarding which *nothing* is regulated in the

Draft Council Decision. Think of such issues as the registration and monitoring of the processing of incoming and outgoing requests. Nothing is said either about other important issues. Should the national Asset Recovery Offices process all requests and orders with the same expeditiousness, should other (major) cases be given priority, or are certain (minor) cases precisely avoided? And who supervises the proper functioning of the national Asset Recovery Offices and in what way? All in all, therefore, the Draft Council Decision concerning cooperation between national Asset Recovery Offices cannot be considered as anything but a modest step – or, better said: a declaration of intent – in the desired direction.