The EAW: the Dutch experience

Vincent Glerum and Hans Kijlstra
29 October 2021

ImprovEAW
RESEARCH PROJECT

Questionnaire *Improving Mutual Recognition of European Arrest Warrants through Common Practical Guidelines (ImprovEAW)*

Introduction

This questionnaire is meant as a tool to:

- identify any practical problems issuing judicial authorities and executing judicial authorities may experience when dealing with EAW's which are related – either directly or indirectly – to the EAW-form and
- identify the roots of these problems.

The questionnaire consists of 5 parts.

Part 1 concerns preliminary matters.

Part 2 concerns the transposition of FD 2002/584/JHA.

Part 3 concerns problems regarding the individual sections of the EAW-form.

Part 4 concerns problems concerning providing information which are not directly related to the EAW-form.

Part 5 invites the partners to draw conclusions and offer opinions based on their experiences (or on those of their Member State's authorities). Furthermore, the partners are encouraged to make any comments, put forward any information, pose any questions and make any recommendation they feel are relevant to the project, but which are not directly related to Parts 2-4.

From Part 2 on, each set of questions is preceded by an explanation. The explanation describes the context and the background of the questions, with reference to the relevant legal provisions and the relevant judgments of the Court of Justice. It also mentions (possible) issues in order to give some guidance in answering the questions. In answering the questions, besides flagging your 'own' issues, please indicate whether the issues mentioned in the explanation-part exist in your Member State.

Besides answering the questions in the questionnaire, please submit documents you deem relevant in answering the questions and please refer to relevant (European or national) case-law and legal literature, where available and applicable, otherwise provide your own expert opinion.

Some of the questions are (partly) identical to questions from the *InAbsentiEAW* questionnaire (see, *e.g.*, Part 1 and some questions in Part 2).[1] In respect of those questions, you may want to duplicate your answers to that questionnaire, unless there is a change of circumstances.

[1] https://www.inabsentieaw.eu/wp-content/uploads/2018/10/InAbsentiEAW_QUESTIONNAIRE.pdf.

ImprovEAW
RESEARCH PROJECT

Part 1: preliminary matters

1. Please indicate who completed the questionnaire in which capacity and how much years of experience you have had in dealing with EAW cases, in particular whether you have experience as issuing and/or executing judicial authority.

Answer

The questionnaire was completed by Vincent Glerum and Hans Kijlstra.

Vincent Glerum

Professor dr Vincent Glerum is a legal advisor (a rough translation of the Dutch word *stafjurist*) specialising in European criminal law and EAW-matters at the District Court of Amsterdam (*rechtbank Amsterdam*), the Dutch executing judicial authority. His tasks at the District Court of Amsterdam consist of, *inter alia*, advising the court in more complex EAW-cases, participating in the deliberations of the court in an advisory capacity and drafting some of the court's judgments. In November 2018, Vincent Glerum was appointed to the special chair of international and European criminal law at the University of Groningen.

Vincent Glerum has over fourteen years of experience in dealing with EAW-matters. In 2003 he was asked to prepare a manual on the application of the Law on Surrender (*Overleveringswet*) for the Extradition and Surrender Chamber (*Internationale Rechtshulpkamer*) of the District Court of Amsterdam. An amended version of this manual was later published as a book.[2] In 2013, he received his doctoral degree from the *Vrije Universiteit* (Free University, Amsterdam) on the basis of a thesis on refusal grounds in extradition law and EAW law.[3] Together with Mr Hans Kijlstra, he set up a European research project on surrender and judgements *in absentia*, participated in the research and, together with professor dr André Klip and Hannah Brodersen, wrote the research report (2017 – 2019).[4] Vincent Glerum publishes extensively on the subject of extradition law and EAW law, mostly in Dutch (articles, books, commentaries, case notes).

Hans Kijlstra

Mr Hans Kijlstra is a judge at the District Court of Amsterdam since 2002. Before joining the judiciary he worked as a legal officer and manager for the government. Until 2011 he was an administrative judge and a managing judge. Since 2011 Hans Kijlstra sits as a judge in the criminal law division of the court. He set up the specialised chamber for human trafficking and chaired it for three years. He was chairman of the Extradition and Surrender Chamber for several years. Mr Kijlstra also set up the European research project on surrender and judgements *in absentia* in which six member-states of the EU participated and acted as an advisor during this project (2017 – 2019). From 2017 up to March 2020, as an international

[2] *De Overleveringswet. Overlevering door Nederland*, Den Haag: Sdu Uitgevers 2005 (The Law on Surrender. Surrender by The Netherlands).

[3] *De weigeringsgronden bij uitlevering en overlevering. Een vergelijking en kritische evaluatie in het licht van het beginsel van wederzijdse erkenning*, Nijmegen: Wolf Legal Publishers 2013 (The grounds for refusal as regards extradition and surrender. A comparison and critical evaluation in the light of the principle of mutual recognition).

[4] *The European Arrest Warrant and In Absentia Judgments*, The Hague: Eleven International Publishers 2020.

observer he took part in the process of transitional re-evaluation (vetting) of judges and prosecutors in Albania.

Methodology

The report is based on:

1. case-law research. The authors utilised the databases of the judiciary (e-archive (access restricted to the judiciary/support staff) and the website of the judiciary (www.rechtspraak.nl, public access);
2. (limited) case-file research;
3. legal literature;
4. answers given by practitioners (examining judges of various district courts/public prosecutors) to certain parts of the questionnaire;
5. interviews with practitioners:
    - examining judges in various district courts (issuing judicial authorities)
    - public prosecutors
    - officials from the Ministry of Justice and Security:
        - AIRS (Central Authority for mutual legal assistance in criminal matters and extradition): concerning the application of the *Petruhhin* judgment
        - IOS (International Transfer of Sentences, a department of DJI (Custodial Institutions Agency): concerning the application of Art. 4(6) of FD 2002/584/JHA
    - a judge in the Court of Appeal Arnhem-Leeuwarden (which examines incoming requests for mutual recognition of custodial sentences on the basis of FD 2008/909/JHA): concerning the application of Art. 4(6) of FD 2002/584/JHA;
6. *ex officio* knowledge.

Questions of a general nature and questions referring to the perspective of *executing* judicial authorities were answered on the basis of case-law research, of some case-file research, and of *ex officio* knowledge.

Some questions explicitly refer to the perspective of *issuing* judicial authorities. To answer those questions, the questionnaire was sent to each district court with the request to have at least one examining judge of each district court answer the questions pertaining to issuing EAWs. Some district courts did not respond at all. Others were not in a position to comply with our request due to time and workload constrictions. To compensate, the authors interviewed a number of examining judges in a number of those district courts on the basis of a shortlist of questions. In addition, the authors interviewed those examining judges who did comply with our request in order to verify whether we understood their answers correctly and to ask some additional questions. The material gathered in this way served as basis for the answers to those questions of the questionnaire that explicitly refer to the perspective of issuing judicial authorities.

As a check, a draft of the completed questionnaire was shared with a panel of select members of the Extradition and Surrender Chamber of the District Amsterdam before finalising that draft.

Part 2: transposition of Framework Decision 2002/584/JHA

Explanation

Part 2 concerns the national transposition of FD 2002/584/JHA. The questions aim to establish how the Member States have transposed the relevant provisions and whether they have transposed them correctly.

[When referring to (provisions of) FD 2002/584/JHA or the EAW-form, please use the consolidated English language version, available at: https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/787.]

A. General questions

Explanation

Part 2A is dedicated to the transposition of provisions regarding the EAW-form and regarding grounds for refusal and guarantees.

Art. 8(1) of FD 2002/584/JHA concerns the content and form of the EAW. In the Annex to FD 2002/584/JHA, the EAW-form is set out. Member States must implement Art. 8(1) and the Annex.

Grounds for refusal/guarantees exhaustively listed

Art. 3-5 of FD 2002/584/JHA contain grounds for refusal and guarantees. Executing judicial authorities may, *in principle*:

- refuse to execute an EAW *only* on the grounds for non-execution *exhaustively* listed by Art. 3-4a of Framework Decision 2002/584/JHA, and
- make the execution of an EAW subject *only* to one of the conditions *exhaustively* laid down in Art. 5 of FD 2002/584/JHA (see, *e.g.*, ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, C-314/18, ECLI:EU:C:2020:191, paragraphs 39-40).

The words ‘in principle’ obviously refer to ‘exceptional circumstances’ in which the principles of mutual trust and mutual recognition can be limited, such as those identified in *Aranyosi en Căldăraru* (ECJ, judgment of 5 April 2016, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198) and in *Minister for Justice and Equality (Deficiencies in the system of justice)* (ECJ, judgment of 25 July 2018, C-216/18 PPU, ECLI:EU:C:2018:586).

Transposition of grounds for refusal/guarantees

Regarding the transposition of Art. 3-5 of FD 2002/584/JHA, Member States are free whether or not to transpose:

- the grounds for mandatory refusal of Art. 3 (ECJ, judgment of 28 June 2012, *West*, C-192/12 PPU, ECLI:EU:C:2012:404, paragraph 64);

- the grounds for optional refusal of Art. 4 (ECJ, judgment of 6 October 2009, *Wolzenburg*, C-123/08, ECLI:EU:C:2009:616, paragraph 58), and

- the guarantees of Art. 5 (ECJ, judgment of 28 June 2012, *West*, C-192/12 PPU, ECLI:EU:C:2012:404, paragraph 64).

Margin of discretion

When a Member States chooses to implement the ground for optional refusal of Art. 4(6) of FD 2002/584/JHA, it must provide the executing judicial authority with 'a margin of discretion as to whether or not it is appropriate to refuse to execute the EAW' (ECJ, judgment of 29 June 2017, *Popławski*, C-579/15, ECLI:EU:C:2017:503, paragraph 21). It could be argued that the interpretation of this particular provision applies equally to *all* grounds for optional refusal mentioned in Art. 4 (cf. opinion of A-G M. Szpunar of 16 May 2018, *AY (Arrest warrant – Witness)*, C-268/17, ECLI:EU:C:2018:317, paragraph 60, with regard to Art. 4(3)).

2. Did your Member State transpose Art. 8(1) of FD 2002/584/JHA and the Annex to FD 2002/584/JHA (containing the EAW-form) correctly? If not, please describe in which way your national legislation deviates from FD 2002/584JHA. Was there any debate about the correctness of the transposition in your national law, *e.g.* in academic literature or in court proceedings? If so, please specify.

Answer

Art. 8(1) of FD 2002/584/JHA was transposed as Art. 2(2) of the Law on Surrender (*Overleveringswet*), the Annex to the FD was transposed as Annex 2 (*Bijlage 2*) to that act.

Art. 8(1) of FD 2002/584/JHA and the Annex to that FD were transposed correctly.

Art. 2(2) of the Law on Surrender uses the term '*uitvaardigende justitiële autoriteit'* instead of the term '*uitvaardigende rechterlijke autoriteit*' (Art. 8(1) of the Dutch language version of FD 2002/584/JHA). The latter term corresponds to the term 'issuing judicial authority' in the English language version of FD 2002/584/JHA. The Dutch word '*justitieel*' carries a broader meaning than the Dutch word '*rechterlijk*', as it refers not only to courts and judges, but also to public prosecutors.

Evidently, the Dutch legislator regarded the term 'justitiële autoriteit' as a synonym of the term 'rechterlijke autoriteit'. In the *travaux préparatoires*, it remarked that Art. 6 of FD 2002/584/JHA assigns all tasks related to issuing and executing EAWs to 'justitiële autoriteiten'.[5] Accordingly, the original legislation adopted to transpose FD 2002/584/JHA

[5] *Kamerstukken II* 2002/03, 29042, nr. 3, p. 9.

designated all Dutch public prosecutors as issuing judicial authorities and the public prosecutor in Amsterdam as one of the executing judicial authorities.

In the *OG and PI* and *PF* judgments, the Court of Justice of the European Union (hereafter: Court of Justice) held that the term 'issuing judicial authority' ('*uitvaardigende rechterlijke autoriteit*') is "capable of including authorities of a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that Member State", such as public prosecutors.[6] In substance, therefore, Art. 2(2) of the Law on Surrender does not deviate from Art. 8(1) of FD 2002/584/JHA.

2bis. Have infringement procedures been initiated against your Member State by the European Commission for incorrect transposition of the EAW Framework Decision? If so, on which points?

Answer
On 6 June 2021, the European Commission gave formal notice to the Netherlands under Art. 258 of the Treaty on the functioning of the European Union (TFEU) on account of non-conformity of the Dutch measures adopted to transpose FD 2002/584/JHA.[7]

With one exception (see the following paragraph), the authors of this report are not aware of the European Commission's grievances. Although the Ministry of Justice and Security made the Amsterdam public prosecutor's office aware of the details of the formal notice, the ministry nor the public prosecutor shared them with the executing judicial authority, the District Court of Amsterdam.

In the context of the decision on the execution of a Greek EAW, the Amsterdam public prosecutor's office – with prior consent of the Ministry of Justice and Security – divulged that one of the European Commission's grievances concerns Art. 26(4) and 28(2) of the Law on Surrender. These provisions contain a ground for mandatory refusal not mentioned in FD 2002/584/JHA. Pursuant to these provisions, the executing judicial authority must refuse to execute an EAW if it is established that the requested person cannot have committed the offence for which surrender is sought (see also the answer to question 6a)).

3. Did your Member State transpose *all* the grounds for refusal (Art. 3-4a of FD 2002/584/JHA) and *all* the guarantees (Art. 5 of FD 2002/584/JHA)?

Answer
With one exception, the Netherlands transposed all of the grounds for refusal mentioned in Art. 3-4a of FD 2002/584/JHA, the exception being the ground for refusal mentioned in Art. 3(1) of FD 2002/584/JHA (the offence on which the EAW is based is covered by an amnesty in the executing Member State and that Member State had jurisdiction to prosecute the offence). Under Dutch law, it is not possible to declare an amnesty.

---

[6] ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, Joined Cases C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 51; ECJ, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457, paragraph 30.
[7] INFR(2021)2743. Source: register of infringement decisions, accessible at https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN.

Again with one exception, the Netherlands transposed all of the guarantees mentioned in Art. 5 of FD 2002/584/JHA, the exception being the guarantee concerning a possible life sentence (Art. 5(2)). The *travaux préparatoires* do not explain why Art. 5(2) was not transposed in the context of the decision on the execution of an EAW. However, in the context of issuing an EAW, Art. 45(1)(b) of the Law on Surrender obliges Dutch issuing judicial authorities to give the guarantee of Art. 5(2), where appropriate.

4. Were those grounds for refusal and guarantees transposed as grounds for mandatory or optional refusal/guarantees? Do the *travaux préparatoires* of the transposing legislation and/or the parliamentary debates on that legislation shed any light on the choices made and, if so, what were the reasons for those choices?

Answer
Originally, all grounds for refusal and all guarantees that were transposed into Dutch law, were transposed as grounds for *mandatory* refusal. The *travaux préparatoires* nor the parliamentary debates on the *original* legislation adopted to transpose FD 2002/584/JHA shed any light on the choice to transpose the grounds for refusal of Art. 4 and the guarantees of Art. 5 as grounds for mandatory refusal/mandatory guarantees.

In 2021, Parliament passed a bill to effect a fresh transposition of FD 2002/584/JHA, as a result of which on 1 April 2021 (most of) the grounds for refusal transposing Art. 4 and 4a were turned into optional grounds for refusal.[8]

As far as the transposition of Art. 4a of FD 2002/584/JHA is concerned, the official explanation accompanying the government proposal to implement FD 2002/584/JHA anew states that the provision was originally transposed as a ground for mandatory refusal, because at the time the government were of the – erroneous – opinion that, other than the cases referred to in Art. 4a(1)(a)-(d), there could be no cases in which surrender could be allowed where the requested person did not appear in person at the trial resulting in the decision.[9]

5. Does the national law of your Member State, as interpreted by the courts of your Member State, contain a provision for applying the two-step test for assessing a real risk of a violation of Art. 4 and of Art. 47 of the Charter (see Part 4D)?

Answer

Not as such. In transposing FD 2002/584/JHA, the Dutch legislator originally included a ground for mandatory refusal concerning *flagrant* violations of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) in the issuing Member State (Art. 11 of the Law on Surrender).

[8] Wet van 3 maart 2021 tot herimplementatie van onderdelen van het kaderbesluit van de Raad van de Europese Unie betreffende het Europees aanhoudingsbevel en de procedures van overlevering tussen de lidstaten van de Europese Unie (wijziging van de Overleveringswet), *Stb*. 2021, 125.
[9] *Kamerstukken II* 2019/20, 35535, 3, p. 13.

In 2021, Parliament passed a bill for transposing FD 2002/584/JHA anew,[10] which included an amendment to Art. 11 reflecting the *Aranyosi and Căldăraru*[11] and *Minister for Justice and Equality (Deficiencies in the system of justice))*[12] judgments. The amended provison, which entered into force on 1 April 2021, still does not prescribe the two-step test as such, but it does provide a basis for refraining from executing the EAW if there is a real risk of a violation of the Charter of fundamental rights of the EU.

5bis. How does your Member State implement the 'dual level of protection' to which the requested person is entitled as required by the case-law of the Court of Justice of the European Union?

Answer

The 'dual level of protection' in the issuing Member State as required by the Court of Justice's case-law is, mostly, an issue with regard to the position of *public prosecutors*. Because *execution*-EAWs are always based on a final and enforceable judgment of a *court* or a *judge* and because in the Netherlands only a *judge* can issue EAWs, the authors of this report will confine their answer to this question to *prosecution*-EAWs.

The Court of Justice's case-law on the dual level of protection in the issuing Member State requires that, in case of a prosecution-EAW, the person concerned 'must be afforded effective judicial protection *before being surrendered to the issuing Member State*, at least at one of the two levels of protection'.[13] In the opinion of the authors of this report this requirement means that the decision to issue a national arrest warrant or the decision to issue an EAW must either be taken by a court in the issuing Member State (in which case effective judicial protection is, *ipso facto*, afforded before surrender) or must be subject to review by a court in the issuing Member State before surrender.

<u>The level of the national judicial decision</u>

The Court of Justice held that the concept of a '[national] arrest warrant or any other enforceable judicial decision having the same effect' in the sense of Art. 8(1)(c) of FD 2002/584/JHA 'does not (…) cover all the measures which initiate the opening of criminal proceedings against a person, but only those intended to enable, by a coercive judicial measure, the arrest of that person with a view to his or her appearance before a court for the purpose of conducting the stages of the criminal proceedings'.[14]

Under the Code of Criminal Procedure (*Wetboek van Strafvordering*) the following authorities are competent to order a measure intended to enable the arrest of a suspect:

---

[10] Wet van 3 maart 2021 tot herimplementatie van onderdelen van het kaderbesluit van de Raad van de Europese Unie betreffende het Europees aanhoudingsbevel en de procedures van overlevering tussen de lidstaten van de Europese Unie (wijziging van de Overleveringswet), *Stb*. 2021, 125.
[11] ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.
[12] ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)),* C-216/18 PPU, ECLI:EU:C:2018:586.
[13] ECJ, judgment of C-648/20 PPU, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:187, paragraph 47.
[14] ECJ, judgment of 13 January 2021, *MM*, C-414/20 PPU, ECLI:EU:C:2021:4, paragraph 53.

- a public prosecutor. Public prosecutors are competent to issue a warrant for the arrest of a defendant who is not caught red-handed for any criminal offence for which pre-trial detention (*voorlopige hechtenis*) is permitted[15] (Art. 54(1) of the Code of Criminal Procedure (*Wetboek van Strafrecht*)). The object of a warrant for arrest issued by a public prosecutor is to bring a suspect before a public prosecutor (Art. 54(1) of the Code of Criminal Procedure);
- an examining judge in a District Court. Examining judges are competent to issue an order remanding a suspect in custody (*bewaring*) (Art. 63(1) of the Code of Criminal Procedure);
- a District Court, either sitting *in camera* or at the trial. District Courts are competent, on application by a public prosecutor, to order the detention (*gevangenhouding*) of a suspect who is remanded in custody (Art. 65 (1) of the Code of Criminal Procedure). At the trial, District Courts can, *ex officio* or on the application of a public prosecutor, order the arrest (*gevangenneming*) of a suspect. If it is necessary to obtain the extradition of a suspect, District Courts can also order his arrest (*gevangenneming*) (Art. 65(3) of the Code of Criminal Procedur);
- a Court of Appeal, either siting *in camera* or at the appeal trial. In case of appeal against a first instance judgment, Courts of Appeal are competent to order the detention (*gevangenhouding*) or the arrest (*gevangenneming*) of a suspect, and to order their extension (Art. 75(1) of the Code of Criminal Procedure).

A person who is arrested in execution of an order remanding the suspect in custody issued by an examining judge or an order to detain or arrest the suspect issued by a court must be heard by the examining judge or by a judge in that court within 24 hours (Art. 77(1)-(2) of the Code of Criminal Procedure).[16]

Pre-trial detention is only possible for crimes (*misdrijven*) carrying a maximum sentence of at least four years and for an exhaustively listed number of other crimes (Art. 67(1) of the Code of Criminal Procedure). An order for pre-trial detention may only be issued if:
a. it can be shown on the basis of certain acts of the suspect or certain circumstances that personally affect him that he poses a serious risk of flight; or
b. it can be shown on the basis of certain circumstances that compelling reasons of public safety require the immediate deprivation of liberty (Art. 67a(1) of the Code of Criminal Procedure).
On appeal, an order for pre-trial detention may also be issued or extended on the grounds that a punishment or measure involving deprivation of liberty for a period at least equal to the time spent by the suspect in pre-trial detention after extension was imposed in the disputed judgment (art. 75(1) of the Code of Criminal Procedure).

In practice, public prosecutors, when preparing an application to the examining judge to issue a prosecution-EAW, usually order the arrest of the suspect themselves on the basis of Art. 54 (1) of the Code of Criminal Procedure. Therefore, in practice a Dutch prosecution-EAW is only rarely based on a national arrest warrant issued by a court or by a judge.

[15] There are three types of pre-trial detention: custody (*bewaring*), detention (*gevangenhouding*) and arrest (*gevangenneming*).
[16] Unless the suspect was already notified by the examining judge or the court of the intention of ordering his remand/detention/arrest (Art. 77(1) of FD 2002/584/JHA).

Dutch public prosecutors participate in the administration of criminal justice. Because the term 'judicial decision' in the sense of Art. 8(1)(c) of FD 2002/584/JHA covers 'all the decisions of the Member State authorities that administer criminal justice, but not the police services',[17] a warrant for the arrest of a suspect who is not caught red-handed issued by a Dutch public prosecutor is a 'judicial decision'.

However, there is room for doubt whether such a judicial decision meets the definition of a '[national] arrest warrant or any other enforceable judicial decision having the same effect' in the sense of Art. 8(1)(c) of FD 2002/584/JHA. According to that definition, the aim of that measure is the arrested person's 'appearance before a court for the purpose of conducting the stages of the criminal proceedings'. The aim of an order to arrest a suspect who is not caught red-handed is not to bring him before a court, but to bring him before the public prosecutor.[18]

Moreover, the Code of Criminal Procedure does not provide for a judicial remedy against such an order.

It is, therefore, doubtful whether a Dutch prosecution-EAW can be based on a national arrest warrant issued by a public prosecutor. Moreover, there is no need to base a prosecution-EAW on an arrest warrant issued by a public prosecutor. The Code of Criminal Procedure provides a public prosecutor with two options for obtaining a national arrest warrant issued by a court: (1) the public prosecutor can apply for an order remanding the suspect in custody (*bewaring*) and (2) the public prosecutor can apply for an arrest (*gevangenneming*) order with a view to extradition (which also covers surrender on the basis of an EAW).

<u>The level of the EAW</u>

An EAW can only be issued by a judge, *viz.* an examining judge in a District Court, thereby ensuring that at this level the judicial decision (at least formally)[19] meets the requirements inherent in effective judicial protection before surrender of the person concerned.

6.

a) Did your Member State transpose the grounds for refusal and guarantees of Art. 3-5 of FD 2002/584/JHA correctly, taking into account the case-law of the Court of Justice? If not, please describe in which way the national legislation deviates from FD 2002/584/JHA. Was there any debate about the correctness of the transposition in your national law, *e.g.* in academic literature or in court proceedings? If so, please specify.

b) If your Member State transposed Art. 4(6) of FD 2002/584/JHA, does your national legislation:

- (i) differentiate in any way between nationals of your Member State and residents,

---

[17] ECJ, judgment of 13 January 2021, *MM*, C-414/20 PPU, ECLI:EU:C:2021:4, paragraph 52.
[18] Compare ECJ, judgment of 10 March 2021, *Svishtov Regional Prosecutor's Office*, C-648/20 PPU, ECLI:EU:C:2021:187, paragraphs 39-40, concerning a Bulgarian prosecutor's decision ordering the detention of the requested person for a maximum of 72 hours. This decision aims at 'allowing that person to be brought before the court with jurisdiction to make a provisional detention order, if appropriate' (paragraph 17).
[19] See our answer to question 9a).

and, if so, in what way? According to which criteria is 'residency in the executing Member State' established?

- (ii) guarantee that, when the surrender of a national or a resident for the purposes of executing a sentence is refused, the foreign sentence is actually executed in your Member State and, if so, how?

Answer
a)

Incorrect transposition

The Netherlands did not correctly transpose the following grounds for refusal.[20]

1. Art. 2(1 and 4) in combination with Art. 4(1) of FD 2002/584/JHA.

Art. 7(1) of the Law on Surrender originally deviated from the FD in three respects:

a. the ground for refusal concerning double criminality of non-listed offences was a ground for *mandatory* refusal and, therefore, did not confer a "margin of discretion as to whether or not it is appropriate to refuse to execute the EAW" on the executing judicial authority (see the *X (European arrest warrant – Ne bis in idem)* judgment).[21]

b. an *execution*-EAW concerning a non-listed offence had to meet *two* conditions *cumulatively* (the sentence imposed had to be for at least four months *and* the non-listed offence for which the sentence was imposed had to carry a maximum penalty of at least twelve months in the issuing Member State), whereas Art. 2(1) of FD 2002/584/JHA clearly sets *alternative*[22] conditions for prosecution- and execution-EAWs.

c. both execution- and prosecution-EAWs had to meet the conditions that the non-listed offence is an offence under Dutch law *and* that this offence carries a maximum penalty under Dutch law of at least twelve months, whereas Art. 2(4) in combination with Art. 4(1) of FD 2002/584/JHA only allows for the first of those two conditions.[23]

The District Court of Amsterdam gave a conforming interpretation to Art. 7(1) of the Law on Surrender, which remedied the defects identified under b and c.[24]

The bill for transposing FD 2002/584/JHA anew, which was passed by Parliament and which entered into force on 1 April 2021, deleted the condition that the non-listed offence carries a maximum penalty under Dutch law of at least twelve months, but left the other two defects (*i.e.* a and b) as they were. However, the District Court of Amsterdam interprets the new

[20] For a more detailed exposé see Vincent Glerum, 'De Overleveringswet op de helling; de herimplementatie van Kaderbesluit 2002/584/JBZ', *Nederlands Tijdschrift voor Strafrecht* 2021 (forthcoming).
[21] ECJ, judgment of 29 April 2021, X (European arrest warrant – Ne bis in idem), C-665/20 PPU, ECLI:EU:C:2021:339, paragraph 44.
[22] ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, paragraph 22.
[23] ECJ, order of 25 September 2015, *A.*, C-463/15 PPU, ECLI:EU:C:2015:634, paragraph 27.
[24] District Court of Amsterdam, judgment of 30 October 2015, ECLI:NL:RBAMS:2015:7460.

provision in conformity with FD 2002/584/JHA: the ground for refusal is optional[25] and the condition concerning the maximum sentence in the issuing Member State and the condition concerning the duration of the sentence imposed are alternatives.[26]

2. Art. 4(6) of FD 2002/584/JHA.

Art. 6(2)-(5) of the Law on Surrender originally deviated from Art. 4(6) of FD 2002/584/JHA in at least three respects.

a. the ground for refusal concerning surrender of Dutch nationals and residents of the Netherlands for the purpose of enforcing a custodial sentence was a ground for *mandatory* refusal, whereas according to the *Popławski I* judgment the executing judicial authority must have a “margin of discretion as to whether or not it is appropriate to refuse to execute the EAW”.[27]

b. contrary to Art. 4(6) of FD 2002/584/JHA, the ground for refusal concerning surrender of nationals and residents of the Netherlands was not conditional upon an actual “undertaking” of the Netherlands to execute the sentence itself. Rather, the Netherlands merely declared itself ‘willing’ to execute the sentence, without it being guaranteed that the sentence would actually be executed in the Netherlands, which is contrary to Art. 4(6) of FD 2002/584/JHA.[28]

c. As regards residents of the Netherlands who are nationals of another Member State, the scope *ratione personae* of this ground for refusal was not in accordance with FD 2002/584/JHA. Art. 6(5) of the Law on Surrender required *each* resident, therefore also a resident who is a national of another Member State, *i.e.* a Union citizen, to hold a Dutch residence permit of infinite duration, whereas Directive 2004/38/EC does not require Union citizens who have acquired a right of permanent residence in another Member State to hold a residence permit of indefinite duration. Consequently, in applying this ground for refusal the Netherlands cannot require that Union citizens who have been lawfully resident in the Netherlands for a continuous period of five years be in possession of a residence permit of infinite duration.[29]

The District Court of Amsterdam gave a conforming interpretation to Art. 6 of the Law on Surrender, which remedied the defects identified under b[30] and c.[31] With regard to the defect identified under b the District Court voiced the expectation that the Minister for Justice and Security would adhere, as he was bound to do,[32] to that interpretation and would execute the foreign sentence forthwith. He did not do so. It is rumoured that in the case of Mr Popławski, whose surrender was refused on the basis of Art. 6 of the Law on Surrender in September

[25] District Court of Amsterdam, judgment of 15 April 2021, ECLI:NL:RBAMS:2021:1803.
[26] See, *e.g.*, District Court of Amsterdam, judgment of 6 April 2021, ECLI:NL:RBAMS:2021:1626 (implicitly, by referring to a conforming interpretation (‘kaderbesluitconform uitgelegd’) of the transposition of Art. 7(1) of the Law on Surrender.
[27] ECJ, judgment of 29 June 2017, *Popławski I*, C-579/15, ECLI:EU:C:2017:503, paragraph 21.
[28] ECJ, judgment of 29 June 2017, *Popławski I*, C-579/15, ECLI:EU:C:2017:503, paragraphs 22-23.
[29] ECJ, judgment of 8 October 2009, *Dominic Wolzenburg*, C-123/08, ECLI:EU:C:2009:616, paragraphs 50-52.
[30] District Court of Amsterdam, judgment of 26 September 2019, ECLI:NL:RBAMS:2019:7104; District Court of Amsterdam, judgment of 17 October 2019, ECLI:NL:RBAMS:2019:7754.
[31] See, *e.g.*, District Court of Amsterdam, judgment of 19 November 2019, ECLI:NL:RBAMS:2019:9098.
[32] Compare ECJ, judgment of 24 June 2019, *Popławski II*, C-573/17, ECLI:EU:C:2019:530, paragraphs 95-97.

2019, he waited until the Polish authorities sent a certificate under FD 2008/909/JHA, which they did in March 2021(!). As part of its conforming interpretation, the District Court had ruled that such a certificate was not necessary for the sentence to be executed in the Netherlands.

The bill for transposing FD 2002/584/JHA anew, which was passed by Parliament and entered into force on 1 April 2021, remedied all three defects.

3. Art. 4(2)-(5) and (7) of FD 2002/584/JHA

Recently, the Court of Justice made it clear that Member States are not allowed to turn *any* of the grounds for optional refusal of Art. 4 of FD 2002/584/JHA into grounds for mandatory refusal, not just the ground for refusal mentioned in Art. 4(6).[33] The other grounds for optional refusal provided for in Art. 4 of FD 2002/584/JHA were originally transposed as grounds for *mandatory* refusal (Art. 9(1) and Art. 13 of the Law on Surrender).

The bill for transposing FD 2002/584/JHA anew, which was passed by Parliament and entered into force on 1 April 2021, turned those grounds for mandatory refusal into grounds for optional refusal.

4. Art. 3(2) of FD 2002/584/JHA

According to Art. 3(2) of FD 2002/584/JHA, the executing judicial authority must refuse to execute an EAW, if it is informed that the requested person has been finally judged by a Member State in respect of the same acts, provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State. As a result of the legislation that entered into force on 1 April 2021, some situations in which a requested person is 'finally judged' for the same acts in a Member State and which, pursuant to that provision, constitute a ground for mandatory refusal were inadvertently turned into a ground for *optional* refusal.

This concerns the ground for refusal relating to a penal order (*strafbeschikking*) for the same act issued by a Dutch public prosecutor and the ground for refusal relating to decisions issued by a public prosecutor which definitively discontinue criminal proceedings and which were given after a determination of the merits of the case.

Member States cannot transpose Art. 3(2) of FD 2002/584/JHA as a ground for optional refusal

This provision is closely linked to Art. 54 of the Convention Implementing the Schengen Agreement (CISA) and Art. 50 of the Charter of fundamental rights of the European Union (Charter). These provisions require a Member State that is a CISA Contracting State to refrain from assisting a third state in the prosecution of a person by provisionally arresting that person with a view to extradition if it is established that the trial of that person in respect of the same acts has already been finally disposed of by another Contracting State, within the

[33] ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, paragraph 44.

meaning of Art. 54 of the CISA.[34] *A fortiori* it follows that in such circumstances these provisions require a Member State/CISA Contracting State to refrain from assisting a third State even further by actually *extraditing* the person concerned. In the opinion of the authors of the report, there is no valid reason to suppose that Art. 54 of the CISA and Art. 50 of the Charter would allow *surrender* to a Member State on the basis of an EAW if it is established that the trial of that person in respect of the same acts has already been finally disposed of by another Member State/Contracting State. Advocate General J. Kokott is of the same opinion: according to her, in issuing an EAW an issuing judicial authority is bound by Art. 50 of the Charter and issuing an EAW amounts to a measure which comes within the ambit of that provision, *i.e.* a measure amounting to prosecution.[35]

When compared to the wording of Art. 4 of FD 2002/584/JHA, it is clear that the wording of Art. 3 of FD 2002/584/JHA prohibits Member States from transposing the grounds for refusal contained in that provision as grounds for optional refusal.[36] As far the *ne bis in idem* ground for refusal is concerned, the case-law on Art. 54 of the CISA and Art. 50 of the Charter discussed in the previous paragraph provides further confirmation.

A penal order is a 'final judgment' within the meaning of Art. 3(2) of FD 2002/584/JHA
Procedures whereby further prosecution is barred, such as procedures by which a public prosecutor discontinues criminal proceedings against an accused once he has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the public prosecutor, constitute a 'final disposition' in the sense of Art. 54 of the CISA[37] and, therefore, a 'final judgment' in the sense of Art. 3(2) of FD 2002/584/JHA.[38] A penal order (*strafbeschikking*) issued by a Dutch public prosecutor meets that definition.

A decision which definitely discontinues criminal proceedings can constitute a 'final judgment' within the meaning of Art. 3(2) of FD 2002/584/JHA
Art. 54 of the CISA, Art. 50 of the Charter and Art. 3(2) of FD 202/584/JHA also apply to decisions issued either by a court or by another authority responsible for administering criminal justice in the national legal system of the Member State concerned (such as a public prosecutor) which definitively discontinue criminal proceedings and which were given after a determination of the merits of the case.[39]

Both categories of decisions are not covered by the national ground for mandatory refusal
Such decisions when taken by a *public prosecutor* are not covered by Art. 9(2) of the Law on Surrender – which aims at transposing Art. 3(2) of FD 2002/584/JHA – because the former provision explicitly requires a final judgement *rendered by a court in the Netherlands or in*

[34] ECJ, judgment of 12 May 2021, *Bundesrepublik Deutschland (Red notice of Interpol)*, C-505/19, ECLI:EU:C:2021:376, paragraph 82.
[35] Opinion of Advocate General J. Kokott of 17 June 2021, *A.B. and Others (Revocation of an amnesty)*, C-203/20, ECLI:EU:C:2021:498, paragraph 36.
[36] Compare ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, paragraph 43-44.
[37] ECJ, judgment of 11 February 2003, *Gözütok and Brügge*, C-187/01 and C-385/01, ECLI:EU:C:2003:87, paragraph 48.
[38] ECJ, judgment of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683, paragraph 45.
[39] ECJ, judgment of 5 June 2014, *M*, C-398/12, ECLI:EU:C:2014:1057, paragraphs 30 and 41; ECJ, judgment of 29 June 2016, *Kossowski*, C-484/14, ECLI:EU:C:2016:483, paragraphs 39 and 42.

another Member State (*rechterlijk gewijsde van de Nederlandse rechter dan wel van een rechter in een andere lidstaat van de Europese Unie*).

And such decisions when taken by a *court* are not covered by Art. 9(2) of the Law on Surrender because that provision explicitly requires

- a judgment of *acquittal* (*vrijspraak*) rendered by a Dutch court, a judgment holding that either the facts or the accused are not punishable (*ontslag van rechtsvervolging*) rendered by a Dutch court or a judgment rendered by a court of another Member State which materially *corresponds to* such a Dutch judgment (*een overeenkomstige onherroepelijke beslissing door een rechter van een andere lidstaat van de Europese Unie*), or

- a judgment of conviction (*veroordeling*) rendered by a Dutch court or by a court of another Member State.[40]

Both categories of decisions only constitute a ground for optional refusal
Art. 9(1)(b) of the Law on Surrender explicitly refers to a Dutch penal order for the same acts as constituting a ground for optional refusal.

Decisions issued by a court or by a public prosecutor which definitively discontinue criminal proceedings and which were given after a determination of the merits of the case are either covered by Art. 9(1)(b) where the decision was issued by a Dutch court or public prosecutor or by Art. 9(1)(c) where the decision was issued by a court or a public prosecutor of another Member State. Both provisions contain a ground for optional refusal and both provisions are intended to transpose the grounds for optional refusal of Art. 4(3) of FD 2002/584/JHA.

Conforming interpretation is possible
The defects in Art. 9 of the Law on Surrender could be remedied by the executing judicial authority: with reference to final decisions that come within the ambit of Art. 3(2) of FD 2002/584/JHA but that are covered by the ground for optional refusal of Art. 9(1)(b) or (c) of he Law on Surrender, it should always apply that ground for optional refusal.[41] That result would be in conformity with Art. 3(2) of FD 2002/584/JHA, read in the light of Art. 54 of the CISA and Art. 50 of the Charter. In a recent case, the District Court of Amsterdam did just that by deciding to apply the ground for optional refusal of Art. 9(1)(b) of the Law on Surrender in respect of a Dutch penal order for the same acts. The court held that the person concerned had been 'finally judged' in the sense of Art. 3(2) of FD 2002/584/JHA and that, contrary to Art. 9(1)(b) of FD 2002/584/JHA, refusal should be *mandatory*.[42]

Inconsistent transposition

It was the original intention of the Netherlands to transpose Art. 5(3) of FD 2002/584/JHA in such a way that a guarantee of return was a *conditio sine qua* non for surrender of a Dutch

---

[40] For a more detailed exposé see Vincent Glerum, *De weigeringsgronden bij uitlevering en overlevering. Een vergelijking en kritische evaluatie in het licht van het beginsel van wederzijdse erkenning* (PhD thesis Amsterdam VU), Nijmegen: Wolf Legal Publishers 2013, p. 533-534.
[41] For a more detailed account see Vincent Glerum, 'De Overleveringswet op de helling: de herimplementatie van Kaderbesluit 2002/584/JBZ', *Nederlands Tijdschrift voor Strafrecht* 2021 (forthcoming).
[42] District Court of Amsterdam, judgment of 23 September 2021, ECLI:NL:RBAMS:2021:5372.

national (Art. 6(1) of the Law on Surrender) or of a resident of the Netherlands (Art. 6(3) of the Law on Surrender).[43] If the issuing Member State did not give an adequate guarantee of return to the Netherlands, the executing judicial authority should refuse surrender (Art. 28(2) of the Law on Surrender).

Even though the Court of Justice has not ruled (yet) that, when transposing Art. 5(3) of FD 2002/584/JHA, the Member States must leave a margin of discretion to their executing judicial authorities, a transposition that affords the executing judicial authority the *option* of making surrender conditional on a guarantee of return seems preferable over a transposition that *obliges* it to do that. The first mode of transposition enables the executing judicial authority to assess, on a case by case basis, whether executing, in the executing Member State, a custodial sentence imposed in the issuing Member State would increase the chances of social reintegration. The second mode of transposition establishes a non-rebuttable presumption that executing the custodial sentence in the executing Member State would increase the chances of social reintegration. Therefore, the first mode of transposition is more consistent with the objective of Art. 5(3) of FD 2002/584/JHA, *viz.* enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society.[44]

Moreover, it is inconsistent to require that the Member States leave their executing judicial authorities a margin of discretion when deciding whether to apply the ground for optional refusal of Art. 4(6) of FD 2002/584/JHA – which pursues the same objective as Art. 5(3) of FD 2002/584/JHA – and, at the same time, to allow the Member States to oblige their executing judicial authorities to apply Art. 5(3) of FD 2002/584/JHA in each and every case.

In order to comply with the *Popławski* judgments, the Dutch legislator turned the transposition of Art. 4(6) of FD 2002/584/JHA into a ground for optional refusal but left the transposition of Art. 5(3) of FD 2002/584/JHA untouched. The *travaux préparatoires* do not indicate that the legislator was aware of the inconsistency between the ground for optional refusal and the mandatory guarantee of return.

The wording of Art. 6(1) of the Law on Surrender – which states that surrender for the purpose of conducting a prosecution *may be allowed* insofar as his return to the Netherlands is guaranteed ('Overlevering van een Nederlander kan worden toegestaan voor zover deze is gevraagd ten behoeve van een tegen hem gericht strafrechtelijk onderzoek en naar het oordeel van de uitvoerende justitiële autoriteit is gewaarborgd dat (…)') – lends itself to an interpretation that a guarantee of return is *not* a *conditio qua non* for surrendering a Dutch national, whatever the original intent of the legislator. This provision does not state that surrender may *only* be allowed insofar as return to the Netherlands is guaranteed. In this reading, the provision does not oblige the executing judicial authority to require a guarantee of return in each and every case of a prosecution-EAW issued against a Dutch national (or a resident of the Netherlands).[45]

---

[43] *Kamerstukken II* 2003/04, 29042, nr. 12, p. 12.
[44] ECJ, judgment of 21 October 2010, *B.*, C-306/09, ECLI:EU:C:2010:626, paragraph 52.
[45] For e more detailed exposé see Vincent Glerum, 'De Overleveringswet op de helling: de herimplementatie van Kaderbesluit 2002/584/JBZ', *Nederlands Tijdschrift voor Strafrecht* 2021 (forthcoming).

In a judgment rendered after the entry into force of the Law to Effect a Fresh Transposition of FD 2002/584/JHA (on 1 April 2021), the court ruled that Art. 6(1) of the Law on Surrender has an optional character.[46] Unfortunately, it held that that optional character resulted from the Law to Effect a Fresh Transposition of FD 2002/584/JHA. As we have seen above, that law did not amend Art. 6(1) of the Law on Surrender.

Unfortunate transposition

Originally, the Netherlands transposed the ground for optional refusal contained in Art. 4a(1) of FD 2002/584/JHA as a ground for mandatory refusal.

Although Advocate General M. Bobek was of the opinion that the *Popławski I* judgment applied by analogy to Art. 4a, *i.e.* that the executing judicial authority must have a margin of discretion and that, by consequence, the Dutch transposition of Art. 4a was an incorrect transposition,[47] the Court of Justice skirted this issue by holding that FD 2002/584/JHA "does not prevent the executing judicial authority from ensuring that the rights of the person concerned are upheld by taking due consideration of all the circumstances characterising the case before it (…)".[48] The Court of Justice has not (yet) held that when applying Art. 4a the executing judicial authority must have a margin of discretion.[49]

As it stands, it is, therefore, not certain whether the original Dutch transposition of Art. 4a was an incorrect transposition. It is clear, however, that this transposition of Art. 4a was an *unfortunate* transposition. It prevented the executing judicial authority from taking account of other circumstances that enabled it to ensure that the surrender of the requested person does not entail a breach of his rights of defence, after it had found that the cases referred to in Art. 4(1)(a)-(d) did not cover the situation of the requested person. By doing so, it contributed to a high number of refusals that might have been prevented if the ground for refusal had been an optional one.

The bill for transposing FD 2002/584/JHA anew, which was passed by Parliament and entered into force on 1 April 2021, turned this ground for refusal into an optional one.

Incorrect implementation

Whereas Art. 5(3) of FD 2002/584/JHA refers to the 'condition that the person, after being heard, *is* returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State', the Dutch transposition of

---

[46] District Court of Amsterdam, judgment of 7 May 2021, ECLI:NL:RBAMS:2021:2467. In that case, the court decided to make surrender conditional on a guarantee of return and, because the issuing judicial authority had not provided such a guarantee, to refuse surrender.
[47] Opinion of 26 July 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:609, paragraphs 70-78; opinion of 26 July 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:612, paragraphs 106-110.
[48] ECJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, paragraph 97; ECJ, judgment of 10 August 2017, *Zdziaszek*, C-270/17 PPU, ECLI:EU:C:2017:628, paragraph 108.
[49] Apparently, advocate general G. Hogan interprets this judgment as *requiring* that the executing judicial authority has a margin of discretion. See his opinion of 15 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:303, paragraph 48: 'In that context, just as the executing judicial authorities *must*, under Article 4a of Framework Decision 2002/584, *be able* to take into account all the circumstances that enable them to ensure that the surrender of a person who is the subject of a European arrest warrant does not entail a breach of his rights of defence since that provision provides (…)' (emphasis added).

that provision – Art. 6(1) of the Law on Surrender – refers to the guarantee that the person concerned *may* serve that sentence in the Netherlands ('(…) is gewaarborgd dat, zo hij ter zake van de feiten waarvoor de overlevering kan worden toegestaan in de uitvaardigende lidstaat tot een onvoorwaardelijke vrijheidsstraf wordt veroordeeld, hij deze straf in Nederland zal mogen ondergaan'). The wording of Art. 6(3) of the Law on Surrender is derived from Art. 4(2) of the Law on Extradition;[50] in the latter provision, the words 'may serve' indicate that a return of the extradited person to the Netherlands is dependent on his consent.[51] Whether Art. 6(1) of the Law on Surrender conforms to Art. 5(3) of FD 2002/584/JHA is debated elsewhere (see the answer to question 45 c)(i)).

Whether the Netherlands transposed Art. 5(3) of FD 2002/584/JHA correctly or not, the Dutch executing judicial authority – until recently – incorrectly implemented the provision adopted to transpose Art. 5(3).

Surrender of a Dutch national or resident for the purpose of conducting a prosecution is conditional upon a guarantee by the issuing Member State that "if [the person concerned] is given a definitive custodial sentence in the issuing Member State for the offences in respect of which the surrender may be authorised, he will be able to serve that sentence in the Netherlands" (Art. 6(1) of the Law on Surrender).

It is up to the executing judicial authority to assess whether a particular guarantee adequately ensures that the requested person will be able to serve his sentence in the Netherlands. With that in mind, if the surrender of a Dutch national or resident is sought for the purpose of prosecuting him for a *listed* offence, until very recently the executing judicial authority would nevertheless examine whether that listed offence constituted an offence under Dutch law. The reasoning behind this steady line of case-law was that, if a listed offence did not constitute an offence under Dutch law, under the legal regime governing the enforcement of foreign custodial sentences the guarantee of return could not be brought into effect and the person concerned would, therefore, have to serve his sentence in the issuing Member State.

After all, the legislation adopted to transpose Framework Decision 2008/909/JHA[52] - which framework decision applies *mutatis mutandis* to the enforcement of sentences in cases where surrender was conditional upon a guarantee of return "so as to avoid impunity of the person concerned" (Art. 25 of FD 2008/909/JHA) – requires double criminality with regard to *all* offences, including listed offences (Art. 2:13(1)(f) of the Law on Mutual Recognition and Enforcement of Custodial and Suspended Sentences (*Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties*)).

Having said that, examining whether a listed offence constitutes an offence under Dutch law clearly is not in accordance with Art. 2(2) of FD 2002/584/JHA, which states that listed offences give rise to surrender "without verification of the double criminality of the act". No provision of FD 2002/584/JHA could be construed as allowing the Netherlands to verify double criminality of listed offences when applying Art. 5(3) of FD 2002/584/JHA. The same

[50] *Kamerstukken II* 2002/03, 29042, nr. 3, p. 12.
[51] *Kamerstukken II* 1984/85, 18129, nr. 3, p. 16.
[52] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or detention orders for the purpose of their enforcement in the European Union (*OJ* 2008 L 327, p. 27), as amended by Council Framework Decision 2009/299/JHA (*OJ* 2009 L 81, p. 24).

holds true for FD 2008/909/JHA. Although this FD offers the option of deviating from the system of listed offences by requiring double criminality for *all* offences, listed or not, when deciding on the recognition and execution of a foreign sentence (Art. 7(4) in combination with Art. 9(1)(d) of FD 2008/909/JHA) –the Netherlands chose to exercise this option –,[53] this does not justify verifying double criminality of a listed offence when deciding on the execution of a prosecution-EAW.[54] Moreover, verifying double criminality of a listed offence when applying Art. 5(3) of FD 2002/584/JHA can lead to *impunity* of the requested person. If a listed offence is not an offence under Dutch law, the executing judicial authority will hold that the guarantee does not adequately ensure that the requested person will be able to serve his sentence in the Netherlands and will, therefore, refuse to execute the EAW.[55] This is precisely why, *in order to avoid impunity*, Art. 25 of FD 2008/909/JHA declares the regime of that framework decision applicable to the enforcement of a sentence when Art. 5(3) of FD 2002/584/JHA was applied.

If the executing judicial authority were to abandon its line of verifying double criminality of listed offences when applying Art. 5(3) of FD 2002/584/JHA, the surrendered person would serve his sentence either in the Netherlands (the sentence is recognised and enforced in the Netherlands) or in the issuing Member State (mutual recognition and enforcement of the sentence in the Netherlands is not possible, because the offence is not an offence under Dutch law). Either way, there is no risk of impunity.

Of course, both Art. 5(3) of FD 2002/584/JHA and FD 2008/909/JHA pursue the objective of "facilitating the social rehabilitation of the sentenced person".[56] Although serving a custodial sentence in the issuing Member State would avoid impunity, it could at the same time have an adverse effect on the social rehabilitation of a national or a resident of the Netherlands. The problem is that the current legislation adopted to transpose FD 2008/909/JHA *forces* the competent Dutch authority to refuse the mutual recognition and enforcement of a sentence which was imposed for a listed offence which is not an offence under Dutch law (Art. 2:13(1)(f) of the Law on Mutual Recognition and Enforcement of Custodial and Suspended Sentences). This problem could easily be solved by turning that ground for refusal into an optional one, thereby allowing that a Dutch national or resident serves his sentence in the Netherlands, if serving that sentence in the Netherlands would facilitate his social rehabilitation, even though he was convicted for an listed offence which is not a criminal offence under Dutch law.

If a prosecution-EAW was issued against a Dutch national or resident and if that EAW concerned one or more listed offences, until about June 2021 the decision of the District Court of Amsterdam contained a standard passage about double criminality of the listed offence(s).

---

[53] See the declaration of the Netherlands: *Council document* 14427/12, 1 October 2012.
[54] However, for execution-EAWs in the context of Art. 4(6) of FD 2002/584/JHA see recital (12) of the preamble to FD 2008/909/JHA.
[55] See, *e.g.*, District Court of Amsterdam, judgment of Rb. Amsterdam 21 August 2018, ECLI:NL:RBAMS:2018:6367 (not published); District Court of Amsterdam, judgment of 1 November 2018, ECLI:NL:RBAMS:2018:8959; District Court of Amsterdam, judgment of 20 August 2019, ECLI:NL:RBAMS:2019:6196; District Court of Amsterdam, judgment of 10 September 2020, ECLI:NL:RBAMS:2020:5245.
[56] ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, C-314/18, ECLI:EU:C:2020:191, paragraph 23.

Since June 2021, the District Court of Amsterdam no longer uses that standard passage, indicating that it no longer verifies double criminality of listed offences.[57]

Debate about the correctness of the transposition/implementation

The transposition and implementation of the FD-provisions mentioned above were repeatedly criticised in legal publications.[58] The transposition of some of those provisions was also criticised by the European Commission[59] and the Council of the European Union.[60]

The incorrectness of the transposition of Art. 2(1 and 4)/Art. 4(1) and Art. 4(6) of FD 2002/584/JHA was explicitly recognised by the executing judicial authority in a number of judgments. Also, the incorrect transposition led to several preliminary references by the District Court to the Court of Justice.[61]

b)

The original transposition of Art. 4(6) of FD 2002/584/JBZ

Under the *original* transposition of Art. 4(6) of FD 2002/584/JHA (Art. 6(5) in combination with Art. 6(2) of the Law on Surrender), the ground for refusal only applied to a foreign national, if that foreign national was in possession of a Dutch residence permit of infinite duration (*verblijfsvergunning voor onbepaalde tijd*). In addition, two other conditions had to be met.

In light of the *Wolzenburg* judgment, which held that the executing Member State cannot require a Union citizen with a right of permanent residence in that Member State to be in possession of a residence permit of infinite duration in order to come within the ambit of Art. 4(6) of FD 2002/584/JHA, the executing judicial authority gave a conforming interpretation to the requirement of a residence permit. A *Union citizen* was considered a resident, either if he was in possession of a Dutch residence permit of infinite duration or a document certifying permanent residence (see Art. 19(1) of Directive 2004/38/EC),[62] or if he showed that he had lawfully resided for a continuous period of five years in the Netherlands (and thus had acquired a right of permanent residence which had not been lost).[63] A *third country national*, however, was still required to be in possession of a Dutch residence permit of infinite duration

[57] See, *e.g.*, District Court of Amsterdam, judgment of 18 June 2021, ECLI:NL:RBAMS:2021:3259 (not published).
[58] See, *e.g.*, Vincent Glerum, *De weigeringsgronden bij uitlevering en overlevering. Een vergelijking en kritische evaluatie in het licht van het beginsel van wederzijdse erkenning* (PhD thesis Amsterdam VU), Nijmegen: Wolf Legal Publishers 2013, *passim*.
[59] *Annex to the REPORT FROM THE COMMISSION on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, 11 July 2007, SEC(2007) 979.
[60] *Evaluation report of the fourth round of mutual evaluations "The practical application of the European arrest warrant and corresponding surrender procedures between Member States". Report on the Netherlands*, 2 December 2008, 15370/1/08 REV 1.
[61] ECJ, order of 25 September 2015, *A.*, C-463/15 PPU, ECLI:EU:C:2016:634; ECJ, judgment of 29 June 2017, *Popławski*, C-579/15, ECLI:EU:C:2017:503; ECJ, judgment of 24 June 2019, *Popławski II*, C-573/17, ECLI:EU:C:2019:530.
[62] District Court of Amsterdam, judgment of 23 July 2013, ECLI:NL:RBAMS:2013:4824.
[63] See, *e.g.*, District Court of Amsterdam, judgment of 19 November 2019, ECLI:NL:RBAMS:2019:9098.

or a document certifying permanent residence.[64] The reason for this distinction was that the *rationale* for the *Wolzenburg* ruling is *limited* to *Union citizens*: under Directive 2004/38/EC, *Union citizens* are not *required* to hold a permit of residence and even if such a permit is provided to a Union citizen upon application, it only has declaratory and probative force.[65] The distinction was held not to amount to a discrimination on grounds of nationality (see Art 18 TFEU), because the legal order of the Union and its own citizenship constitute an objective and reasonable justification for distinguishing between nationals of other Member States on the one hand and third country nationals on the other.[66]

The ground for refusal could only be applied to a foreign national who met the condition for being a resident as discussed above, *in so far as* two other conditions were met, *viz.*:

1) the person concerned "may be prosecuted in the Netherlands for the offences on which the [EAW] is based"; and

2) the person concerned "can be expected not to forfeit his right of residence in the Netherlands as a result of any sentence or measure which may be imposed on him after surrender" (Art. 6(5) of the Law on Surrender).

As regards Dutch nationals, Art. 6(2) of the Law on Surrender did not set these two conditions for applying the ground for refusal.

However, as a rule a Dutch national may be prosecuted in the Netherlands for the offences on which the EAW is based. According to Art. 7(1) of the Penal Code, the Netherlands have extraterritorial jurisdiction concerning offences committed abroad by a Dutch national, provided that the offence is regarded as a "crime" (*misdrijf*) under Dutch law[67] and is punishable under the law of the country where it was committed. The same rule applies to offences committed abroad by foreigners with "a fixed abode in the Netherlands" (Art. 7(3) of the Penal Code). A foreigner is said to have a "fixed abode in the Netherlands" when he lawfully resides in the Netherland for a continuous period of at least five years (Art. 86b of the Penal Code), which he can prove, *inter alia*, by producing his Dutch residence permit of infinite duration. As a consequence, when a foreigner is a Dutch resident, the Netherlands can exercise extraterritorial jurisdiction concerning offences committed abroad by that resident. *In substance*, therefore, the condition concerning extraterritorial jurisdiction did not constitute a difference in treatment between Dutch nationals and Dutch residents.

Under Dutch law, it is possible to lose one's right to reside in the Netherlands as a foreigner on account of a final conviction for an offence in the Netherlands, and even a conviction in another country. In light of the objective of social rehabilitation, the condition concerning the expectation that a resident does not forfeit his right of residence in the Netherlands sought to ensure that the Netherlands would only enforce a sentence imposed on one of its residents, if

[64] See, *e.g.*, District Court of Amsterdam, judgment of 21 November 2019, ECLI:NL:RBAMS:2019:8750; District Court of Amsterdam, judgment of 3 September 2020, ECLI:NL:RBAMS:2020:4355.
[65] District Court of Amsterdam, judgment of 29 April 2014, ECLI:NL:RBAMS:2014:2454.
[66] District Court of Amsterdam, judgment of 4 October 2013, ECLI:NL:RBAMS:2013:6584, with reference to ECtHR, judgment of 7 August 1996, *C. v. Belgium*, ECLI:CE:ECHR:1996:0807JUD002179493. See also ECtHR, judgment of 18 February 1991, *Moustaquim v. Belgium*, ECLI:CE:ECHR:1991:0218JUD001231386, paragraph 49.
[67] Dutch criminal law distinguishes between crimes (*misdrijven*) and misdemeanours (*overtredingen*).

that resident, after having served that sentence, still had a right to reside in the Netherlands. To a much more limited extent it is possible to lose one's Dutch nationality on account of a foreign final conviction for an offence. The Minister of Justice and Security (*Minister van Justitie en Veiligheid*) can only revoke Dutch nationality on account of a final conviction for three categories of offences: offences against the vital interests of the Dutch State, terrorist offences, and international offences (war crimes, genocide, torture, crimes against humanity and the crime of aggression) (Kingdom Law on Dutch Nationality; *Rijkswet op het Nederlanderschap*). Moreover, in those circumstances revoking Dutch nationality is only possible if the person concerned has a dual nationality (Art. 14(8) of the Kingdom Law on Dutch Nationality). An EAW concerning a sentence imposed for one those offences on a Dutch national who also has a second nationality will be an extreme rarity. In conclusion, the condition concerning the expectation of non-forfeiture of the right of residence did not constitute a difference in treatment between Dutch nationals and Dutch residents, as – practically speaking – Dutch nationals would not lose their Dutch nationality on account of a conviction in the issuing Member State.

The present transposition of Art. 4(6) of FD 2002/584/JHA
In 2021, Parliament passed the bill to transpose FD 2002/584/JHA anew, which entered into force on 1 April 2021. As a result, to come within the ambit of the ground for refusal a foreign national now must meet only two conditions: (1) that he shows that he has lawfully resided for a continuous period of five years in the Netherlands and (2) that he "can be expected not to forfeit his right of residence in the Netherlands as a result of any sentence or measure which may be imposed on him after surrender" (Art. 6a(9) of the Law on Surrender). Because the new provision refers to lawful residence in the sense of Art. 8 sub a-e and l of the Aliens Act 2000 (*Vreemdelingenwet 2000*) and because that provision also encompasses third country nationals with a Dutch residence permit of *limited* duration, third country nationals are no longer obliged to be in possession of a Dutch residence permit of unlimited duration.

The condition regarding Dutch jurisdiction was deleted. The purpose of this condition was to prevent impunity in cases in which it was not possible to take over the execution of the foreign sentence. However, in its *Popławski II* judgment the Court of Justice held that this condition was not in accordance with Union law: Art. 4(6) does not authorise the executing Member State to refuse to execute an EAW 'in the event that a fresh prosecution, for the same acts as those which form the subject matter of the final criminal judgment pronounced against the requested person, may be brought against that person [in that Member State]'. Moreover, a fresh prosecution would violate Art. 50 of the Charter.[68]

Under the new rules, applying the ground for refusal is only possible once the executing judicial authority has established that the Netherlands can take over the execution of the foreign sentence. A refusal to execute the EAW must be accompanied by an order to execute the sentence in the Netherlands (Art. 6a(1) of the Law on Surrender), thus guaranteeing that a refusal will be followed by execution of the sentence in the Netherlands.

> Incidentally, once the District Court of Amsterdam has refused to execute the EAW and has ordered the execution of the foreign sentence in the Netherlands on the basis of Art. 6a(1) of the Law on Surrender, the Minister of Justice and Equality *must* ensure that the sentence is actually carried out according to Dutch law *with due observance of*

[68] ECJ, judgment of 29 June 2017, *Popławski*, C-579,15, ECLI:EU:C:2017:503, paragraphs 45-46.

the District Court's judgment[69] (Art. 6a(8) of the Law on Surrender). The Minister of Justice and Security cannot require that the issuing Member States forwards a certificate in the sense of FD 2008/909/JHA to the Netherlands. The decision to execute the foreign sentence has already been taken by the District Court and its judgment is final.

Pursuant to Art. 13 of FD 2008/909/JHA, as long as the enforcement of the sentence in the executing Member State has not begun the issuing Member State may withdraw the certificate. Upon withdrawal of the certificate, the executing Member State is no longer entitled to enforce the sentence. As explained above, a certificate in the sense of FD 2008/909/JHA has no role to play in the decision to execute a foreign sentence on the basis of the – transposition of – Art. 4(6) of FD 2002/584/JHA. Neither FD 2002/584/JHA nor the Law on Surrender contains any provision on (the consequences of) a withdrawal of an EAW. However, it seems reasonable that, analogous to Art. 13 of FD 2008/909/JHA, an EAW of which the execution was refused on the basis of the – transposition of – Art. 4(6) of FD 2002/584/JHA can only be withdrawn as long as the enforcement of the sentence in the executing Member State has not begun yet.

The new rules stress that it is up to the requested person to show, at the hearing by the District Court of Amsterdam, that he meets the applicable criterion, *i.e.* that he has lawfully resided – in the sense of Art. 8 sub a-e and l of the Aliens Act 2000 – in the Netherlands for a continuous period of at least five years. The reference date is the date of the court's decision on the execution of the EAW. Evidence must be provided in a timely fashion and before the hearing (Art. 6a(9) of the Law on Surrender). Registration in the Basic Personal Records Database for at least five years suffices to show continuous residence in the Netherlands, however continuous residence is also capable of proof by documentation. Having regard to the applicable provisions of the Aliens Act 2000 and/or of Union law (Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States), the lawful character of continuous residence may be shown by providing evidence of, *e.g.*, wages earned and taxes paid covering a period of at least five years. As regards Union citizens, periods of imprisonment cannot be taken into account for the purposes of the acquisition of a right of permanent residence. Moreover, periods of imprisonment *interrupt* the continuous character of residence.[70]

7. Did your Member State include in the national transposing legislation grounds for refusal or guarantees not explicitly provided for in Art. 3-5 of FD 2002/584/JHA (apart from the two-step test referred to in question 5)? If so, which grounds for refusal or guarantees?

Answer

Included in the national legislation adopted to transpose FD 2002/584/JHA is a ground for refusal which is not explicitly provided for in Art. 3-5 of FD 2002/584/JHA or in any other provision of that framework decision.

---

[69] Due observance of the District Court's judgment particularly relates to any decision to adapt the nature of the duration of a sentence (pursuant to – the transposition of – Art. 8(1)-(2) of FD 2008/909/JHA).

[70] See, *e.g.*, District Court of Amsterdam, judgment 21 November 2019, ECLI:NL:RBAMS:2019:8751, with reference to ECJ, judgment of 16 January 2014, *Onuekwere*, C-378/12, ECLI:EU:C:2014:13, paragraphs 22 and 32.

According to Art. 26(4) of the Law on Surrender, if the requested person states that he is not guilty of the offences for which his surrender is sought, he must prove his innocence at the hearing and the executing judicial authority must examine the requested person's statement ("Beweert de opgeëiste persoon niet schuldig te zijn aan de feiten waarvoor zijn overlevering wordt verzocht, dan dient hij dat tijdens het verhoor aan te tonen en onderzoekt de rechtbank die bewering"). If the executing judicial authority finds that the requested cannot be guilty of the offences for which surrender is sought – *i.e.* that it is impossible that he committed those offences –, pursuant to Art. 28(2) of the Law on Surrender the executing judicial authority must refuse to execute the EAW ("Bevindt de rechtbank (…) dat ten aanzien van de opgeëiste persoon geen sprake kan zijn van een vermoeden van schuld aan de feiten waarvoor zijn overlevering is gevraagd, dan weigert zij bij haar uitspraak de overlevering").

Although those provisions were criticised by legal commentators,[71] by the European Commission[72] and by the Council of the European Union,[73] the District Court of Amsterdam only recently recognised that Art. 26(4) and 28(2) of the Law on Surrender are not in conformity with FD 2002/584/JHA. Because a conforming interpretation of those provisions - *i.e.* an interpretation that does away with those provisions - would be *contra legem*, the District Court held that, instead, it had interpreted before and would in future continue to interpret those provisions *strictly*, thus reducing their possible application and thereby reducing possible deviations from the framework decision.[74]

According to the strict interpretation, the requested person is required to show that he cannot possibly have committed the offence mentioned in the EAW. Merely proffering an *alibi* does not suffice. As a rule, producing (written statements of) witnesses *à décharge* will not suffice. After all, the executing judicial authority is not in a position to examine the evidentiary value of those (written statements of) witnesses, because it is not in possession of the case-file.

In practice, therefore, a refusal to execute the EAW based on Art. 26(4) and 28(2) of the Law on Surrender is very rare indeed. To our knowledge, such a refusal has only occurred in two cases.[75]

---

[71] Vincent Glerum, *De weigeringsgronden bij uitlevering en overlevering. Een vergelijking en kritische evaluatie in het licht van het beginsel van wederzijdse erkenning* (PhD thesis Amsterdam VU), Nijmegen: Wolf Legal Publishers 2013, p. 622-624.

[72] *Annex to the REPORT FROM THE COMMISSION on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, 11 July 2007, SEC(2007) 979, p. 10.

[73] *Evaluation report of the fourth round of mutual evaluations "The practical application of the European arrest warrant and corresponding surrender procedures between Member States". Report on the Netherlands*, 2 December 2008, 15370/1/08 REV 1, p. 31.

[74] District Court of Amsterdam, order of 23 February 2021, ECLI:NL:RBAMS:2021:1405. In this case, the requested person was surrendered to Croatia in 2018, after having unsuccessfully argued that he had an *alibi*. He was acquitted in Croatia and requested compensation for damages: according to the surrendered person, the District Court of Amsterdam should have refused to surrender him to Croatia.

[75] District Court of Amsterdam, judgment of 10 February 2006, ECLI:NL:RBAMS:2006:AV3966; District Court of Amsterdam, judgment of 27 July 2011, ECLI:NL:RBAMS:2011:BR3388 (surrender was partially refused).

However, in a very recent case the District Court of Amsterdam ruled that a requested person had succeeded in establishing that he had an *alibi*. Following the lead of legal literature,[76] it adopted an interpretation that always leads to a result that is in conformity with FD 2002/584/JHA. Because issues of guilt and innocence are the exclusive domain of the courts in the issuing Member State, the District Court of Amsterdam's ruling that the requested person has an *alibi* cannot constitute an *independent* basis for a refusal to execute the EAW. Therefore, it must ask the issuing judicial authority for its view on that *alibi*. If the issuing judicial authority informs the District Court of Amsterdam that it does not accept the *alibi* and that it maintains the EAW, the District Court of Amsterdam is bound to follow that decision and to hold that the condition for refusal, *viz*. that the requested person cannot have committed the offence, is not met. If, on the other hand, the issuing judicial authority informs the District Court of Amsterdam that it accepts the *alibi* it will no doubt withdraw the EAW, thus precluding a decision on the execution of that EAW by the District Court of Amsterdam.[77]

B. Your Member State as issuing Member State

Explanation

Part 2B concerns the designation of issuing judicial authorities and Central Authorities by the Member States and the competence of those authorities.

Issuing judicial authority

According to Art. 6(1) of FD 2002/584/JHA, the issuing judicial authority 'shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State'. Pursuant to Art. 6(3), each Member State must 'inform the General Secretariat of the Council of the competent judicial authority under its law'.

The term 'issuing judicial authority' is an *autonomous* concept of Union law, the meaning and scope of which 'cannot be left to the assessment of each Member State'. In accordance with the principle of procedural autonomy, the only role of the Member States is to designate national authorities which meet the conditions for being issuing judicial authorities (ECJ, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, paragraphs 31-33).

The term 'issuing judicial authority' is 'not limited to designating only the judges or courts of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from, inter alia, ministries or police services which are part of the executive' (ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 50). Therefore, that term is 'is capable of including authorities of a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that Member State' (ECJ, judgment of

[76] Vincent Glerum, *De weigeringsgronden bij uitlevering en overlevering* (PhD thesis Amsterdam (VU)), Nijmegen: Wolf Legal Publishers 2013, p. 623-624.
[77] District Court of Amsterdam, interlocutory judgment of 10 June 2021, ECLI:NL:RBAMS:2021:4221; District Court of Amsterdam, judgment of 10 August 2021, ECLI:NL:RBAMS:2021:4340.

27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 51), such as a Public Prosecution Office which participates in the administration of criminal justice in the issuing Member State.

When deciding whether to issue an EAW, the issuing judicial authority 'must review, in particular, observance of the conditions necessary for the issuing of the European arrest warrant and examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant' (ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 71, regarding a prosecution-EAW; ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Procureur du Roi de Bruxelles)*, C-627/19 PPU, ECLI:EU:C:2019:1079, paragraph 31, in a case concerning an execution-EAW).

The issuing judicial authority must be capable of exercising its responsibilities objectively and independently. This independence 'requires that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive' (ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraphs 73-74).

Effective judicial protection

When a Member State conferred the competence to issue an EAW on an authority which participates in the administration of justice, *but is not itself a court* – such as a Public Prosecutor's Office –, that authority's decision to issue a *prosecution*-EAW and, *inter alia*, the proportionality of such a decision 'must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection' (ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 75). This requirement is not one of the conditions for being designated as an issuing judicial authority, but concerns the procedure for issuing a prosecution-EAW (ECJ, judgment of 12 December 2019, *JR and YC (Public Prosecutor's Office in Lyon and Tours)*, C-566/19 PPU and C-626/19 PPU, ECLI:EU:C:1077, paragraph 48). Failure to meet this requirement, means that the issuing judicial authority is not competent to issue a prosecution-EAW (according to A-G M. Campos Sánchez-Bordona, opinion of 25 June 2020, *Openbaar Ministerie (Faux en écritures)*, C-510/19, ECLI:EU:C:2020:494, paragraph 59).

Member States are given a lot of leeway as regards the requirement of effective judicial protection. Even if there is no specific remedy against the decision to issue an EAW, that requirement is met if the conditions for issuing an EAW, and its proportionality, are reviewed by a court before or at the same time as the adoption of a national arrest warrant, but also afterwards (ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Parquet Suède)*, C-625/19 PPU, ECLI:EU:C:2019:1078, paragraphs 52-53) and even after surrender (ECJ, order of 21 January 2020, *MN*, C-813/19, ECLI:EU:C:2020:31, paragraph 52).

The requirement of effective judicial protection does not concern *execution*-EAWs, as the judicial review which meets the requirement of effective judicial protection referred to in paragraph 75 of *OG and PI* is incorporated in the proceedings which resulted in the

enforceable judgment (ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Procureur du Roi en Bruxelles)*, C-627/19 PPU, ECLI:EU:C:2019:1079, paragraphs 35-36).

Central authority

According to Art. 7(1) of FD 2002/584/JHA, each MS may under certain conditions designate one or more central authorities 'to assist the competent judicial authorities'.

Central authorities are non-judicial authorities, such as a Ministry for Justice (ECJ, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, paragraph 38).

The role of central authorities in the execution of EAWs is limited to 'practical and administrative assistance' (recital (9) of the preamble to FD 2002/584/JHA) as regards the transmission and reception of EAWs and 'all other official correspondence relating thereto'. Therefore, Member States are not allowed to 'substitute the central authority for the competent judicial authorities in relation to the decision to issue the [EAW]' (ECJ, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, paragraph 39).

Member States must communicate information relating to the designated central authorities to the General Secretariat of the Council. Such 'indications shall be binding upon all the authorities of the issuing Member State" (Art. 7(3) of FD 2002/584/JHA).

Issues concerning designation/competence issuing judicial authority

Assessing effective judicial protection
If a prosecution-EAW was issued by a public prosecutor (who meets the requirements for being an issuing judicial authority), it is not clear whether the executing judicial authority should examine whether the decision to issue that EAW and its proportionality can be subject to court proceedings in the issuing Member State which fully meet the requirements of effective judicial protection. Neither is it clear what the effect should be of a finding that the national law of the issuing Member State does not provide for such court proceedings.

8.
a) Which authorities did your Member State designate as issuing judicial authorities? Did your Member State centralise the competence to issue EAWs?

b) If your Member State conferred the competence to issue EAWs on public prosecutors,

- (i) does the principle of mandatory prosecution apply, according to which a public prosecutor must prosecute each offence of which he has knowledge, and, if so, does that principle extend to the decision whether or not to issue an EAW;

- (ii) do those public prosecutors meet the autonomous requirements for being issuing judicial authorities, and, if so, describe how they meet those requirements and if not, please specify why not;

- (iii) if those public prosecutors meet the autonomous requirements for being issuing judicial authorities, can the decision to issue a prosecution-EAW taken by a public prosecutor, and, *inter alia*, the proportionality of such a decision, be the subject of court proceedings in your Member State – before or at the same time as the adoption of the national arrest warrant or afterwards – which meet in full the requirements inherent in effective judicial protection, and, if so, describe that recourse;

- (iv) is the fact that the public prosecutor meets the autonomous requirements for being designated as an issuing judicial authority and is the availability of a recourse against the decision to issue a prosecution-EAW before a court in the issuing Member State mentioned in the EAW-form?

Answer
a) Originally, all Dutch public prosecutors– *officieren van justitie* – (attached to a District Court) were designated as 'issuing judicial authority' (Art. 44 of the Law on Surrender). Because all members of the Dutch Public Prosecution Service – *Openbaar Ministerie* – are subject to specific instructions from the Minister of Justice and Security (Art. 127 of the Law on the organisation of the courts; *Wet op de rechterlijke organisatie*), they do not have the required independence vis-à-vis the executive to be recognised as 'issuing judicial authority'. Following *OG and PI ((Public Prosecutor's Offices in Lübeck and Zwickau)*,[78] Art. 44 of the Law on Surrender was amended on 13 July 2019. From then on, every examining judge in every District Court – *rechter-commissaris belast met de behandeling in strafzaken* – is competent to issue an EAW.

The wording of Art. 44 of the Law on Surrender – "Elke rechter-commissaris kan fungeren als uitvaardigende justitiële autoriteit" – seems to exclude an examining judge of a Court of Appeal (*raadsheer-commissaris*) from being an issuing judicial authority, when the case is pending before his court. The Dutch term 'raadsheer' is reserved for judges of courts of appeal or of the Supreme Court, the term 'rechter' refers to a judge of a District Court.

Because there are eleven District Courts in the Netherlands, it follows that the power to issue EAWs is not centralised.

b) Not applicable. See the answer to question 8(a).

9.
a) Who prepares the decision to issue an EAW (*e.g.* who fills in the EAW-form), the representative of the issuing judicial authority, an employee of that authority or someone else?

b) What are the formalities for issuing an EAW? Does your Member State have a (digital) template of the EAW-form?[79] If so, please attach a hardcopy of the template to the questionnaire.

c) When deciding on issuing:

---

[78] ECJ, judgment of 27 May 2019, *OG and PI ((Public Prosecutor's Offices in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456.
[79] Compare the consolidated EAW-form in word format at: https://www.ejn-crimjust.europa.eu/ejn/libcategories/EN/5/-1/0.

- a *national* arrest warrant,[80] do the judicial authorities in your Member State examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that national arrest warrant? If so,

    - (i) please describe in which way this examination takes place and which factors are taken into consideration. Please give some examples;

    - (ii) does the fact that a requested person is a Union citizen who exercised his right to free movement play any role in that examination;

    - (iii) is the possibility of issuing a European Supervision Order (ESO) pursuant to Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (*OJ*, L 294/20)[81], instead of issuing a national arrest warrant, expressly addressed in that examination, both in law[82] and in practice?

- an EAW, do the issuing judicial authorities in your Member State examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that EAW? If so,

    - (i) please describe in which way this examination takes place and which factors are taken into consideration. Please give some examples;

    - (ii) does the fact that a requested person is a Union citizen who exercised his right to free movement play any role in that examination;

    - (iii) is the possibility of issuing a European Investigation Order (EIO) pursuant to Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters (*OJ*, L 130/1)[83], in particular the possibility of issuing an EIO for the hearing of a suspected or accused person, by temporary transfer of a person in custody in the executing Member State to the issuing Member State,[84] by videoconference or other audiovisual transmission,[85] or otherwise,[86] instead of issuing a prosecution-EAW, or the possibility of

---

[80] *I.e.* a national judicial decision ordering the arrest and/or detention of a person.
[81] According to the information provided on the website of the European Judicial Network, only Ireland has not transposed FD 2008/829/JHA yet.
[82] *I.e.*: does your national law expressly oblige the competent authority to take into account such a possibility and to expressly mention in its decision that it has done so?
[83] This directive does not apply to Ireland.
[84] See Art. 22(1) of Directive 2014/41/EU and recital (25) of the preamble to that directive. In this regard, it is of note that the execution of such an EIO may be refused when the person concerned does not consent (Art. 22(2)(a) of Directive 2014/41/EU).
[85] See Art. 24(1) of Directive 2014/41/EU and recitals (25) and (26) of the preamble to that directive. In this regard, it is of note that the execution of such an EIO may be refused when the person concerned does not consent (Art. 24(2)(a) of Directive 2014/41/EU).
[86] An EIO can also be issued for hearing an accused or suspected person on the territory of the executing Member State other than by videoconference or other audiovisual transmission (see Art. 10(2)(c) of Directive 2014/41/EU).

applying Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (*OJ*, L 327/27), instead of issuing an execution-EAW, expressly addressed in that examination, both in law[87] and in practice?

d) Did your Member State designate a central authority responsible for transmission of the EAW and all other official correspondence thereto? If so, which authority? Is that authority competent to answer requests for supplementary information (Art. 15(2) of FD 2002/584/JHA) or to forward additional information (Art. 15(3) of FD 2002/584/JHA) without supervision by the issuing judicial authority?

Answer

a)
Who prepares the decision to issue an EAW?

As explained before, the power to issue EAWs is not centralised.

As a rule, the competent public prosecutor who is of the opinion that a EAW should be issued, will request the examining judge of the competent District Court (normally the court to which the public prosecutor is attached) to issue the EAW.

The request to issue an EAW is usually prepared by an assistant (*parketsecretaris*) to the public prosecutor (*officier van justitie*), under the direction of the public prosecutor. The assistant fills in the EAW on the basis of the case-file and draws up a request.

In *execution*-cases, in which the Fugitive Active Search Team (FAST) of the Public Prosecutor's Office has exclusive competence, the assistant to the public prosecutor also draws up a draft decision to issue the EAW. The public prosecutor of FAST does not supervise filling in the EAW and drawing up the request and the draft decision to issu the EAW. He does, however, sign the request to issue an EAW.

In Amsterdam, the Amsterdam Centre for International Legal Assistance (*Internationaal Rechtshulpcentrum* (IRC)) – a regional partnership between the public prosecution service and the police, which acts as a point of contact on matters relating to international legal assistance in criminal matters – advises public prosecutors on requests to issue an EAW.

Which information is provided to the examining judge?

In *prosecution*-cases, the public prosecutor provides:

- the request to issue an EAW;
- the EAW itself;

[87] *I.e.*: does your national law expressly oblige the issuing judicial authority to take into account such a possibility and to expressly mention in its decision that it has done so?

- (sometimes) an *affidavit* (*proces-verbaal*) explaining why the requested person is suspected of having committed the offences mentioned in the EAW;
- (sometimes) a national arrest warrant.

In *execution*-cases, the examining judge is provided with:

- the request to issue an EAW;
- the EAW itself.

The case-file of the criminal case is never handed over to the examining judge. In *execution*-cases, the examining judge is never provided with the final judgment of conviction.

A national arrest warrant is either a decision issued by a public prosecutor or a decision issued by an examining judge or by a District Court or a Court of Appeal (see the answer to question 5bis). According to one examining judge, in about 10% of the cases the public prosecutor provides the examining judge with a warrant of arrest issued by the District Court.

Decision on the request to issue an EAW

In practice, a request to issue an EAW is only denied in very rare cases. Examining judges do not delete anything in the EAW itself nor add anything to the EAW (except, of course, for the examining judge's signature and the date). Only one examining judge mentioned that he had denied a number of requests, because, *e.g.*, the description of the offence did not support the legal qualification given by the public prosecutor or the requested person could not be linked to the offence mentioned in the EAW.

In a small number of cases the examining judge asked the public prosecutor to provide additional information, mostly about the reasons for suspecting the requested person of having committed the offence mentioned in the EAW, or to provide a missing *affidavit*.

After the decision to issue the EAW

Section (i) of the EAW usually refers to the *public prosecutor* – who is not an issuing judicial authority – as a point of contact.

Two examining judges (from different District Courts) remarked that they were never informed of the decision on the execution of an EAW.

Some examining judges have never received a request for supplementary information from the executing judicial authority or a request to give the guarantee referred to in Art. 5(3) of FD 2002/584/JHA, others have.

One Amsterdam public prosecutor remarked that requests by the executing judicial authority for supplementary information were sent to her directly and were answered by her without the knowledge of the examining judge who had issued the EAW. She added that the executing judicial authorities never complained that their requests were not answered by an issuing judicial authority. An assistant to the public prosecutor of FAST answered in the same vein: requests for supplementary information are answered by the public prosecutor without any intervention by and consent of the issuing examining judge.

The public prosecutor of the Amsterdam IRC referred to a case in the district of Noord-Holland in which the public prosecutor received and answered a request for supplementary information without the knowledge of the issuing examining judge. In this respect, the Amsterdam IRC distinguishes between two categories of requests: requests concerning *material* matters, *e.g.*, a request to clarify the description of the offence and requests concerning *practical* matters, *e.g.*, the scheduled date for actual surrender. The answer to requests of the former category must be put before the issuing examining judge for his approval. The Amsterdam IRC advises Amsterdam public prosecutors to act accordingly.

To sum up, it seems probable that

- issuing examining judges are often not informed of requests for supplementary information, of requests for a guarantee of return, and of the decision on the execution of the EAW, and

- such requests sometimes, if not often, are answered by the public prosecutor without any involvement of the issuing examining judge.

b) The Law on Surrender does not require any formalities other than that the EAW must conform to the model contained in Annex 2 and must contain the information referred to in Art. 2(2) of the Law on Surrender.

c)

National judicial decision

In most cases, the national judicial decision at the basis of a prosecution-EAW is an order to arrest the requested person issued by a *public prosecutor*. Neither the Code of Criminal Procedure nor the Law on Surrender requires that the judicial authority checks whether issuing a national arrest warrant would be proportional or that the judicial authority considers alternatives to issuing an arrest warrant.

One public prosecutor answered that she verifies whether there is a reasonable suspicion of having committed an offence, before issuing a national arrest warrant. She could not answer the question regarding the European Supervision Order or the European Investigation order. Transferring the proceedings to another Member State, instead of requesting that an EAW be issued, was considered as a difficult alternative. In the experience of this public prosecutor, the issue of proportionality did not really arise, as all her cases concern serious offences.

An assistant working in the public prosecutor’s office tasked with enforcing final sentences answered that his department did not assess proportionality before requesting that an execution-EAW be issued. The only relevant criterion is the duration of the remaining sentence to be served.

EAW

Examining judges assess whether issuing an EAW would be proportional by verifying whether there are sufficient grounds for suspicion and whether the severity of the offence is

such that issuing an EAW is justified (*i.e*, whether the EAW pertains to a minor offence, such as shoplifting).

The fact that the requested person exercised his right to freedom of movement does not play a role in deciding whether to issue an EAW. Neither does issuing an EIO or applying FD 2008/909/JHA. One examining judge remarked that, presumably, such issues already were addressed by the public prosecutor. The possibility of alerting the person concerned in SIS for the purpose of locating him as an alternative to issuing an EAW was not mentioned by issuing judicial authorities.

d)

The Netherlands did not designate a central authority responsible for transmission of the EAW and all other official correspondence thereto.

C. Your Member State as executing Member State

Explanation
Part 2C concerns the designation of executing judicial authorities by the Member States and the competence of those authorities. According to Art. 6(2) of FD 2002/584/JHA, the executing judicial authority 'shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State'. Pursuant to Art. 6(3), each Member State must 'inform the General Secretariat of the Council of the competent judicial authority under its law'. The term 'executing judicial authority' is an *autonomous* concept of Union law, the meaning and scope of which 'cannot be left to the assessment of each Member State' (compare part 2B; the Court of Justice has not addressed this issue yet).

10.
a) Which authorities did your Member State designate as executing judicial authorities? Did your Member State centralise the competence to execute EAWs?

b) As regards the competent executing judicial authority, does your national legislation differentiate between:

- cases in which the requested person consents to his surrender and cases in which he does not;

- the decision on the execution of an EAW, the decision on consent as referred to in Art. 27(3)(g) and (4) and in Art. 28(2)-(3) of FD 2002/584/JHA and decisions regarding the (postponed or conditional) surrender of the requested person (Art. 23(3)-(4) and Art. 24 of FD 2002/584/JHA)?

c) When deciding on the execution of an EAW, can the executing judicial authorities in your Member State examine whether, in the light of the particular circumstances of each case, it is proportionate to execute that EAW? If so:

- (i) please describe in which way this examination takes place and which factors are taken into consideration. Please give some examples;

- (ii) does the fact that a requested person is a Union citizen who exercised his right to free movement play any role in that examination;

- (iii) is the possibility of issuing a EIO pursuant to Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters (*OJ*, L 130/1)[88], in particular the possibility of issuing an EIO for the hearing of a suspected or accused person, by temporary transfer of a person in custody in the executing Member State to the issuing Member State,[89] by videoconference or other audiovisual transmission,[90] or otherwise,[91] or the possibility of applying Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (*OJ*, L 327/27), instead of issuing an EAW, expressly addressed in that examination, both in law[92] and in practice?

d) If your Member State designated public prosecutors as executing judicial authorities,

- (i) do those public prosecutors meet the autonomous requirements for being executing judicial authorities, and, if so, describe how they meet those requirements;

- (ii) if those public prosecutors meet the autonomous requirements for being executing judicial authorities, can a decision taken by a public prosecutor as executing judicial authority, and, *inter alia*, the proportionality of such a decision, be the subject of court proceedings, in your Member State, which meet in full the requirements inherent in effective judicial protection? If so, please describe that recourse.

e) Did your Member State designate a central authority responsible for reception of the EAW and all other official correspondence thereto? If so, which authority? Is that authority

---

[88] This directive does not apply to Ireland.
[89] See Art. 22(1) of Directive 2014/41/EU and recital (25) of the preamble to that directive. In this regard, it is of note that the execution of such an EIO may be refused when the person concerned does not consent (Art. 22(2)(a) of Directive 2014/41/EU).
[90] See Art. 24(1) of Directive 2014/41/EU and recitals (25) and (26) of the preamble to that directive. In this regard, it is of note that the execution of such an EIO may be refused when the person concerned does not consent (Art. 24(2)(a) of Directive 2014/41/EU).
[91] An EIO can also be issued for hearing an accused or suspected person on the territory of the *executing* Member State other than by videoconference or other audiovisual transmission (see Art. 10(2)(c) of Directive 2014/41/EU).
[92] *I.e.*: does your national law expressly oblige the issuing judicial authority to take into account such a possibility and to expressly mention in its decision that it has done so?

competent to request supplementary information (Art. 15(2) of FD 2002/584/JHA) without supervision by the executing judicial authority?

Answer

a) Pursuant to Art. 6(3) of FD 2002/584/JHA, upon transposition of FD 2002/584/JHA (in 2004) the Netherlands notified the General Secretariat of the Council of the European Union that the executing judicial authorities are:

> '(…) the public prosecutor at the Amsterdam District Public Prosecutor's Office; the examining magistrate, responsible for criminal cases at the Amsterdam District Court, and the Amsterdam District Court'.[93]

The original legislation adopted to transpose FD 2002/584/JHA – which entered into force on 12 May 2004 – gave an important role to the Amsterdam public prosecutor in the execution of EAWs, *e.g.*:

- a. he had the power to summarily dismiss an EAW, if, in his opinion, it is evident that it cannot lead to the surrender of the requested person (Art. 23(1) of the Law on Surrender).
- b. he decided whether a person who was arrested on the basis of an EAW would remain in detention until the EAW-hearing (Art. 21(8) of the Law on Surrender);
- c. he decided on the execution of an EAW when the requested person consented to surrender (Art. 40(1) of the Law on Surrender);
- d. he determined which EAW was to be executed in case of multiple EAWs from different Member States against the same requested person. The District Court of Amsterdam was bound to follow his decision, unless, after a marginal review, it found that he could not have reasonably reached his decision (Art. 26(3) and 28(4) of the Law on Surrender);
- e. he was competent to take decisions concerning the actual surrender of the requested person, such as setting a date for actual surrender (Art. 35(1) of FD 2002/584/JHA), decisions on postponement of surrender (Art. 35(3) and 36(1) of the Law on Surrender) and (together with the Minister of Justice and Security) decisions on temporary surrender (Art. 36(2) and (4) of the Law on Surrender);
- f. he decided on a request for consent to an extension of the offences set out in the EAW in the sense of Art. 27(3)(g) and 27(4) of FD 2002/584/JHA (Art. 14(1)(f) and (3) of the Law on Surrender);
- g. he decided on a request for consent to subsequent surrender in the sense of Art. 28(3) of FD 2002/584/JHA (Art. 14(2)(c) and (4) of the Law on Surrender).

After the *Openbaar Ministerie (Forgery of documents)*[94] judgment, it was clear that the Amsterdam public prosecutor did not then and does not now meet the requirements for being regarded as an executing judicial authority in the sense of Art. 6(2), 27(3)(g) and 27(4) of FD 2002/584/JHA, because in exercising his decision-making power he may receive an instruction in a specific case from the Minister of Justice and Security.

[93] *Council document* 9002/04, 29 April 2004, p. 3.
[94] ECJ, judgment of 28 November 2020, *Openbaar Ministerie (Forgery of documents)*, C-510/19, ECLI:EU:C:2020:953, paragraph 70.

Among other issues, a law to implement FD 2002/584/JHA afresh addressed the issue of the position of the Amsterdam public prosecutor. Some of the powers which FD 2002/584/JHA explicitly confers on an executing judicial authority were taken away from the Amsterdam public prosecutor and were conferred on the District Court of Amsterdam: the powers mentioned above under c, f and g. However, all the others powers mentioned above remained with the Amsterdam public prosecutor. Concerning a decision on continued detention, the legislator was of the opinion that an arrested person has a judicial remedy because, at any time, he can ask the District Court of Amsterdam to release him. Concerning the other powers, the legislator was of the opinion that the exercise of these powers is not capable of prejudicing the liberty of the person concerned. The legislator concluded that all of these powers could be still exercised by the Amsterdam public prosecutor.

In the opinion of the authors of this report, this line of reasoning disregards the explicit wording of FD 2002/584/JHA which confers the powers mentioned above on an executing judicial authority. Moreover, this line of seasoning is based on an interpretation of the Court of Justice's case-law that is demonstrably too narrow. Of course, it is true that the Court of Justice relied, *inter alia*, on the argument that the execution of an EAW is capable of prejudicing the liberty of the person concerned in interpreting the concept 'executing judicial authority' in such a way that it requires the necessary independence of public prosecutors vis-à-vis the executive. However, the Court of Justice does not restrict the requirement of independence to decisions capable of prejudicing liberty. The concept of 'executing judicial authority' covers 'the authorities of a Member State which, without necessarily being judges or courts, participate in the administration of criminal justice in that Member State, acting independently in the exercise of the *responsibilities inherent in the execution of a European arrest warrant* and which exercise their responsibilities under a procedure which complies with the requirements inherent in effective judicial protection'.[95] In the opinion of the authors of this report, the concept 'responsibilities inherent in the execution of an EAW' is broader than decisions capable of prejudicing the liberty of the requested person and includes the powers mentioned above. Finally, some of the powers which remain with the Amsterdam public prosecutor can be said to be capable of prejudicing the liberty of the requested person. *E.g.*, a decision on temporary surrender entails temporarily transferring the requested person against his will to the issuing Member State.[96]

Because the legislator is of the opinion that the Amsterdam can still exercise some powers which FD 2002/584/JHA explicitly confers on executing judicial authorities, the Netherlands did not amend its 2004 notification on executing judicial authorities.

Concerning some of the powers which remain with the Amsterdam public prosecutor, the District Court of Amsterdam managed to give a conforming interpretation to the national provisions at issue. It held that a judgment that surrender is allowed contains an implicit judicial mandate to the Amsterdam public prosecutor to set the date for actual surrender. However, it is not possible to give a conforming interpretation to the provision concerning

[95] ECJ, judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)*, C-510/19, ECLI:EU:C:2020:953, paragraph 56 (emphasis added).
[96] See for a more detailed exposé of the arguments against the legislator's interpretation of *Openbaar Ministerie (Forgery in documents)* Vincent Glerum, 'Van stenen, monniken en kappen: het begrip 'uitvoerende rechterlijke autoriteit', het arrest *Openbaar Ministerie (Valsheid in geschrifte)* en de gevolgen voor de Nederlandse overleveringsprocedure', *SEW* 2021, afl. 6, p. 232-246, in particular p. 243-246.

temporary surrender.[97] Because according to Art. 12 of FD 2002/584/JHA it is up to the executing judicial authority to decide 'whether the requested person should remain in detention', the District Court of Amsterdam now reviews *ex officio* any decision by the public prosecutor to continue an arrested person's detention until the EAW-hearing.[98] Concerning concurrence of EAWs from different Member States, the District Court of Amsterdam no longer marginally reviews the Amsterdam public prosecutor's decision, but assesses independently which EAW must be executed.[99]

As we have seen above, next to the Amsterdam public prosecutor, the Netherlands designated the District Court of Amsterdam – *rechtbank Amsterdam* – and the examining judge – *rechter-commissaris belast met de behandeling van strafzaken* – in the District Court of Amsterdam as executing judicial authorities. Since there are eleven District Courts, the competence to execute EAWs is centralised.

Deciding on the execution of the EAW is the province of the District Court of Amsterdam. If the requested person does not consent to surrender, a panel of three judges will decideon the execution of the EAW, after having held a public hearing. If the requested person consents to surrender, an *unus judex* will decide in so-called 'shortened proceedings' (*verkorte procedure*) after having heard the requested person *in camera*.

> According to Art. 13(1) of FD 2002/584/JHA, if the requested person wishes to consent to surrender that consent must be given 'before the executing judicial authority, in accordance with the domestic law of the executing Member State'. Unless a Member State provides that consent may be revoked, consent cannot be revoked. According to Art. 15(1) of FD 2002/584/JHA, the executing judicial authority decides whether a requested person is to be surrendered and the final decision must be given within a period of 10 days after consent was given (Art. 17(1) of FD 2002/584/JHA).
>
> Since 1 April 2021, the Amsterdam public prosecutor no longer decides on the execution of an EAW where the requested person consents to surrender. This decision is now up to the District Court of Amsterdam (Art. 40(1) of FD 2002/584/JHA). Once given, consent cannot be revoked (Art. 39(2) of the Law on Surrender). Pursuant to the amended provision the requested person can give his consent before *any* District Court but, once the public prosecutor has decided to continue the requested person's detention until the EAW-hearing, *only* before the District Court of Amsterdam (Art. 39(2) of the Law on Surrender). The period of 10 days starts running after consent has been given (Art. 40(1) of the Law on Surrender).
>
> Inasmuch as the national provisions make it possible to give consent to surrender before *another District Court than the District Court of Amsterdam*, they are not in conformity with FD 2002/584/JHA. Consent must be given before the executing judicial authority and the other District Courts are not executing judicial authorities. The obvious solution is *not* to regard consent given before any authority that is not the District Court of Amsterdam as a valid 'consent before the executing judicial authority' in the sense of Art. 13(1) of FD 2002/584/JHA, but to regard it as a mere

[97] District Court of Amsterdam, judgment 11 December 2020, ECLI:NL:RBAMS:2020:6231.
[98] District Court of Amsterdam, judgment of 25 November 2020, ECLI:NL:RBAMS:2020:5778.
[99] District Court of Amsterdam, judgment of 21 September 2021, parketnummer 13/75717-21.

intention of giving consent to surrender. If the requested person still wishes to consent to surrender, he must be brought before the District Court of Amsterdam. Once before the District Court of Amsterdam, he still has the option of not consenting. His 'consent' before the other authority was no consent at all and, therefore, not giving consent before the District Court of Amsterdam could not be regarded as a revocation of consent.

The task of examining judges at the District Court of Amsterdam is limited to deciding whether a requested person who was arrested on the basis of an alert in the Schengen Information System (SIS) will be held in remand (*bewaring*) awaiting the reception of the EAW (Art. 18-19 of the Law on Surrender).

No ordinary legal recourse – appeal or appeal on points of law – lies against a judgment of the District Court of Amsterdam concerning the (non)-execution of an EAW (Art. 29(2) of the Law on Surrender). The Procurator-General at the Supreme Court of the Netherlands may lodge an extraordinary appeal on points of law, if the interests of justice so require (*cassatie in het belang der wet*) (Art. 29(2) of the Law on Surrender). If the Supreme Court quashes the judgment of the District Court in the interests of justice, this does not have any effect on the disposition of the case.[100]

Only in two cases appeal lies from a decision of the District Court of Amsterdam in EAW-matters:

- the public prosecutor can appeal a decision to release the requested person provisionally from detention. The requested person can appeal an decision to deny conditional release from detention, but only once. If the relevant decision was taken by the examining judge, the District Court is competent to hear the appeal; if the decision was taken by the District Court, the Court of Appeal of Amsterdam is competent to hear the appeal (Art. 64(2) of the Law on Surrender in connection with Art. 87(1) of the Code of Criminal Procedure);

- the public prosecutor and the person concerned can appeal against a decision of the District Court on awarding damages for wrongful detention with the Court of Appeal of Amsterdam (Art. 67(2) of the Law on Surrender).

b) As of 1 April 2021, the Law on Surrender no longer distinguishes between:

- cases in which the requested person consents to his surrender and cases in which he does not. In both categories of cases, the District Court of Amsterdam is the competent authority. Prior to 1 April 2021, the Amsterdam public prosecutor decided whether a requested person who consented to surrender would be surrendered.

- the decision on the execution of an EAW, the decision on consent as referred to in Art. 27(3)(g) and (4) and the decision on consent as referred to in Art. 28(2)-(3) of FD 2002/584/JHA. The District Court of Amsterdam is the competent authority for all three

[100] In over 14 years since the entry into force of the Law on Surrender the Prosecutor-General lodged an extraordinary appeal on points of law in 5 EAW-cases. In all these cases the Supreme Court quashed the judgment. In none of these cases did the Supreme Court decide to make a preliminary reference to the ECJ, although all of these cases raised questions which were neither 'acte clair' nor 'acte éclairé'.

categories of decisions. Prior to 1 April 2021, the Amsterdam public prosecutor was the competent authority for the decision on consent as referred to in Art. 27(3)(g) and (4) and the decision on consent as referred to in Art. 28(2)-(3) of FD 2002/584/JHA.[101]

However, the Law on Surrender still confers the competence to decide on postponed or conditional surrender of the requested person (Art. 23(3)-(4) and Art. 24 of FD 2002/584/JHA) on the Amsterdam public prosecutor (postponed surrender, Art. 36(1) of the Law on Surrender) and on the Minister of Justice and Security (conditional surrender, Art. 36(2) of the Law on Surrender).

According to the government, such decisions are not 'capable of prejudicing the liberty of the person concerned'[102] and can, therefore, be left with non-judicial authorities.[103] Nevertheless, FD 2002/584/JHA explicitly confers the power to take these decisions on the executing judicial authority. According to the Court of Justice, that authority must be able to act 'independently in the exercise of the responsibilities inherent in the execution of a European arrest warrant'.[104] The Amsterdam public prosecutor does not meet this condition, because all members of the Public Prosecution Service, in exercising their decision-making power in a specific case, are subject to instructions from the Minister of Justice and Security (Art. 127 Law on the organisation of the courts). Although in practice the Minister of Justice and Security does not use his power to instruct a public prosecutor in an individual case,[105] this does not suffice to preclude the possibility of an instruction.[106] The Minister of Justice and Security is part of the executive and, therefore, cannot ever be regarded as a judicial authority.

c) The Law on Surrender does not contain a provision on assessing the proportionality of a decision to execute the EAW.

According to established case-law of the District Court of Amsterdam, the system of FD 2002/584/JHA, in general, guarantees that issuing and executing an EAW is proportional. After all, that system sets certain conditions for issuing an EAW (Art. 2(1) of FD 2002/584/JHA).However, it cannot be excluded that, 'in exceptional circumstances', the decision to execute an EAW would not be proportional. In such exceptional circumstances, the District Court of Amsterdam will refuse to execute the EAW.

---

[101] The surrendered person has the right to be heard by the executing judicial authority when that authority has to decide on a request for consent as referred to in Art. 27(3)(g) and (4) and 28(2)-(3) of FD 2002/584/JHA. The hearing can take place in the issuing Member State: ECJ, judgment of 26 October 2021, *Openbaar Ministerie (Right to be heard by the executing judicial authority)*, C-428/21 PPU and C-429/21 PPU, ECLI:EU:C:2021:876.
[102] See ECJ, judgment of 24 November 2020, *Openbaar Ministerie (Forgery in documents)*, C-510/19, ECLI:EU:C:2020:953, paragraphs 51 and 62.
[103] *Kamerstukken II* 2020/21, 35535, nr. 7, p. 9.
[104] ECJ, judgment of 24 November 2020, *Openbaar Ministerie (Forgery in documents)*, C-510/19, ECLI:EU:C:2020:953, paragraph 56 (emphasis added).
[105] European Commission, *2020 Rule of Law Report. Country Chapter on the rule of law situation in Netherlands*, SWD(2020) 318 final, p. 4: 'In practice, there have been no cases of specific instructions for decades, as reported by the Dutch authorities'.
[106] Compare ECJ, judgment of 27 May 2019, *OG and PI (Public prosecutor of Lübeck and of Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraphs 78 and 80.

To our knowledge, the District Court of Amsterdam has refused to execute an EAW on account of a lack of proportionality only once.[107] In this case, surrender was sought for the purposes of prosecuting for drugs offences a terminally ill requested person with a life expectancy of only twelve months. One could argue that, in such circumstances, it is possible that *surrender itself* could violate Art. 4 of the Charter, irrespective of the quality of medical care available in the issuing Member State and irrespective of prison conditions in that Member State (see also the answer to questions 49-51).[108]

When deciding on a defence that executing the EAW would be disproportional, the fact that the requested person exercised his right, as a citizen of the Union, to move and reside freely within the territory of the Member States (Art. 21(1) of the TFEU) does not seem to play any role.

The same goes for the possibility of issuing an EIO pursuant to Directive 2014/41/EU and for the possibility of taking over the proceedings. From the perspective of the executing judicial authority, the possibility of taking over the execution of a sentence on the basis of FD 2008/909/JHA is not really a viable alternative to surrender. If the convicted person is a Dutch national or resident, the execution of sentence can be taken over by applying the Dutch transposition of Art. 4(6) of FD 2002/584/JHA.

d) Not applicable. See the answer to question 10(a).

e) No, the Netherlands did not designate a central authority responsible for reception of the EAW and all other official correspondence thereto.

10bis. How does your Member State organise a temporary surrender (Art. 24(2) of FD 2002/584/JHA): what regime, what conditions? Quid with the title of detention (incarceration during the time of the temporary surrender: on the basis of your national title or on the basis of the foreign title (title of detention in the EAW-executing state)? Quid with the allocation of the days of detention during temporary surrender: on your EAW-title, on your national arrest warrant, on your sentence or on the title of the EAW-executing State that proposes the temporary surrender? Quid if the EAW-executing State does not have a title of detention?

Answer

As an introductory terminological remark, it is noted that, although Art. 24(2) of FD 2002/584/JHA itself speaks of 'temporarily' surrendering the person concerned, the rubric of that provision is entitled 'Postponed or *conditional* surrender'.[109] The Dutch transposition of that provision refers to *provisional* surrender (*voorlopige terbeschikkingstelling*) (Art. 36(2) of the Law on Surrender). Using the term 'temporary surrender' creates a risk of conflating it with 'temporary transfer' as mentioned in Art. 18(1)(b) of FD 2002/584/JHA and as transposed in Art. 53 of the Law on Surrender (*tijdelijke terbeschikkingstelling*). Nevertheless, in answering the questions the term 'temporary surrender' will be used on the strict

[107] District Court of Amsterdam, judgment of 1 March 2013, ECLI:NL:RBAMS:2013:BZ3203.
[108] Compare ECJ, judgment of 16 February 2017, *C.K. and others*, C-578/16 PPU, ECLI:EU:C:2017:127, paragraph 73.
[109] Emphasis added.

understanding that it relates exclusively to 'conditional surrender' in the sense of Art. 24(2) of FD 2002/584/JHA.

The wording of the first question could be regarded as pertaining to both the issuing and the executing side, whereas the wording of the second, third and fourth questions seem exclusively to pertain to the issuing side.

To be on the safe side, all of the questions will be answered from the perspective of the Netherlands both as executing Member State and as issuing Member State.

Executing Member State

Pursuant to Art. 36(1) of the Law on Surrender, actual surrender may be postponed:

- as long as a prosecution against the person concerned is ongoing in the Netherlands; or
- if a Dutch judgment of conviction remains to be enforced.

As an alternative to postponement of actual surrender, the Minister of Justice and Security, on the advice of the Public Prosecutor's Office, can order that the person concerned is to be transferred temporarily to the issuing Member State for the purpose of a trial or for the purpose of executing a custodial sentence or detention order in that Member State (Art. 36(2) of the Law on Surrender). The Minister of Justice and Security determines the conditions for temporary surrender (Art. 36(2) of the Law on Surrender).

Those conditions must, at least, include the following:

- in case of an ongoing prosecution in the Netherlands: the condition that the right of the person concerned to be present at the trial in the Netherlands will be respected and that he will undergo a sentence imposed on him in the Netherlands in that Member State (Art. 36(3)(a) of the Law on Surrender).[110]
- in case of a Dutch judgment which remains to be enforced: a guarantee that the person concerned will be returned to the Netherlands to undergo that sentence in the Netherlands (Art. 36(3)(b) of the Law on Surrender).

According to the 2008 evaluation report, in practice conditions set by the Minister of Justice and Security also include the following conditions:[111]

- the issuing Member State must keep the temporarily surrendered person in detention 'insofar as desirable or possible according to the issuing judicial authority'. Obviously, this condition intends to avoid that the return to the Netherlands of the person concerned would be frustrated. Presumably, the authorities of the issuing Member

[110] This legal condition was inspired by ECtHR, judgment of 14 February 2017, *Hokkeling v. the Netherlands*, ECLI:CE:ECHR:2017:0214JUD003074912.
[111] *The practical application of the European arrest warrant and corresponding surrender procedures between Member States: Report on the Netherlands*, Council Document 15370/1/08 REV 1, 2 December 2008, p. 37.

State will meet this condition by enforcing the national judicial decision on which the EAW is based;

- the person concerned wil only stand trial or will only undergo a sentence in respect of offences for which the temporary surrender is permitted (speciality rule);

- the duration of the detention to which the temporarily surrendered person in the issuing Member State is subject between the time of his departure and his (possible) return to the Netherlands is deducted from the sentence imposed in the issuing Member State;

- should the surrendered person escape from detention after the temporary surrender or should he be released, the issuing Member State shall have the primary responsibility for capturing him;

- as soon as the investigation in the issuing Member State no longer requires the presence of the temporarily surrendered person, he will be returned to the Netherlands in order for the prosecution or the execution of the sentence in the Netherlands to be continued, unless decided otherwise by the Netherlands authorities.

If the Minister of Justice and Security orders the temporary surrender of a requested person, the Amsterdam public prosecutor must notify the issuing judicial authority of that decision and must reach an agreement in writing with the issuing judicial authority as to the conditions determined by the Minister of Justice and Security (Art. 36(4) of the Law on Surrender).

If temporary surrender is ordered as an alternative to *enforcing a Dutch judgment convicting the person concerned to a custodial sentence*, time spent in custody in the issuing Member State on the basis of temporary surrender will be deducted from that sentence (Art. 36(5) of the Law on Surrender). Unless the condition concerning deduction of time spent in custody (see above) is not set in such cases, this could mean that time spent in custody in the issuing Member State is deducted *twice* – in the issuing Member State on the basis of the conditions for temporary surrender (see above), and in the Netherlands on the basis of Art. 36(5) of the Law on Surrender.

During the period prior to the execution of temporary surrender, the person concerned can be kept in detention in the Netherlands on the basis of the EAW – in that case, it is the issuing Member State's duty to apply the regime of deduction of Art. 26(1) of FD 2002/584/JHA –, on the basis of a Dutch arrest warrant – in that case, Dutch authorities will deduct the period of detention if a custodial sentence is imposed (Art. 27(1) of the Penal Code) – or on the basis of a Dutch final and enforceable judgement convicting the person concerned to a custodial sentence.

In practice, an ongoing prosecution in the Netherlands may concern offences which cannot give rise to ordering or maintaining the pre-trial detention of the person concerned. This would mean that *upon his return to the Netherlands* the person concerned could not be kept in detention until his actual surrender to the issuing Member State. This is an unsatisfactory state of affairs, especially where the person concerned was already sentenced to a custodial sentence in the issuing Member State. To avoid this problem, in such circumstances the Minister of Justice and Security used to refrain from ordering a temporary transfer. This was

felt as inappropriate in cases in which surrender was sought for serious offences.[112] Since 1 April 2021, the Law on Surrender provides for an explicit basis for detention upon return to the Netherlands: if the person concerned, who was temporarily transferred to the issuing Member State to stand trial and who, at the time of his return to the Netherlands to exercise his right to be present at his trial in the Netherlands, was already convicted to a custodial sentence in the issuing Member State, the Amsterdam public prosecutor may order that the person concerned is taken into custody (*inverzekeringstelling*) for the duration of his stay in the Netherlands (Art. 36(6) of the Law on Surrender).

It is clear that the national provisions concerning temporary transfer by the Netherlands do not conform to Art. 24(2) of FD in at least two respects.

First, an authority that *under no circumstances* can be regarded as an executing judicial authority[113] determines whether and under which conditions the person concerned is to be temporarily surrendered: the Minister of Justice and Security. The reason for conferring the power to order temporary surrender on the Minister of Justice and Security was to avoid that the Amsterdam public prosecutor as executing judicial authority[114] could take a decision that would directly impact on a prosecution conducted by another Dutch public prosecutor.[115]

Second, an authority which *under present conditions* cannot be regarded as an executing judicial authority[116] is tasked with reaching agreement with the issuing judicial authority as to the conditions set by the Minister of Justice and Security: the Amsterdam public prosecutor (see also the answer to question 10a)).

Furthermore, Art. 36(2) of the Law on Surrender includes a *restriction* not contained in Art. 24(2) of FD 2002/584/JHA: apart from temporary transfer for the purposes of executing of a custodial sentence, temporary transfer is only possible for the purposes of *standing trial*. The concept ‘standing trial’ is more narrow than the concept ‘conducting a prosecution’.

Issuing Member State

Pursuant to Art. 47 of the Law on Surrender, the examining judge who issued the EAW has the power to determine the conditions for temporary surrender to the executing Member State by mutual agreement with the executing judicial authority. This provision is the counterpart of Art. 36(2) of the Law on Surrender.

There is no provision concerning the basis for detention upon temporary transfer to the Netherlands. Most likely, the national judicial decision on which the EAW is based will be enforced. This means that if the person concerned is temporarily transferred to the Netherlands to undergo a Dutch custodial sentence, upon arrival in the Netherlands he will be arrested and kept in detention in execution of the final and enforceable judgment of conviction on which the EAW is based. If the person concerned is temporarily transferred to

[112] *Kamerstukken II* 2019/20, 35535, nr. 3 (herdruk), p. 19.
[113] ECJ, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, paragraph 35.
[114] Pursuant to the original legislation adopted to transpose FD 2002/584/JHA, the Amsterdam public prosecutor was an executing judicial authority.
[115] *Kamerstukken II* 2002/03, 29042, nr. 3, p. 27.
[116] ECJ, judgment of 10 November 2016, *Openbaar Ministerie (Forgery in documents)*, C-510/19, ECLI:EU:C:2019:953, paragraph 70.

the Netherlands to stand trial, upon arrival in the Netherlands he will be arrested and kept in detention on the basis of the national arrest warrant on which the EAW is based. (Subject to the conditions laid down in the Code of Criminal Procedure, pre-trial detention may be extended periodically.)

If the person concerned is eventually sentenced to a custodial sentence in the Netherlands, time spent in pre-trial custody in the Netherlands will be deducted from that sentence (Art. 27(1) of the Penal Code). The same holds true for time spent in detention in the *executing Member State* pursuant to a Dutch EAW (Art. 27(1) of the Penal Code).

D. EAW-form

Explanation

All Member States implemented FD 2002/584/JHA and FD 2009/299/JHA.

Art. 2 FD 2009/299/JHA inserts Art. 4a in FD 2002/584/JHA and amends section (d) of the EAW-form.

All issuing judicial authorities are obliged to use the EAW-form as amended by FD 2009/299/JHA (Art. 8(1) FD 2002/584/JHA).

[The official EAW-forms in all official languages of the Member States (with the exception of Irish) are available at: https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=5.]

11. Does the national law of your Member State, as interpreted by the courts of your Member State, oblige the issuing judicial authorities of your Member State to use the amended EAW-form? If not, please attach the document which is used for issuing an EAW.

Answer
Yes. See Art. 2(2) of the Law on Surrender.

E. Language regime

Explanation

According to Art. 8(2) FD 2002/584/JHA the EAW 'must be translated into the official language or one of the official languages of the executing Member State'. However, a Member State may 'state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Communities'.

The Netherlands have made the following declaration: 'In addition to [EAW's] drawn up in Dutch or English, [EAW's] in another official language of the European Union are accepted provided that an English translation is submitted at the same time'.

Issues concerning the language regime

Using the official form
The issuing judicial authorities do not always use the official English EAW-form as a basis for the English translation of the original EAW, but rather provide for an *integral* English translation of the original EAW. In such cases the text of the English translation sometimes deviates from the official English EAW-form;

[The official EAW-forms in all official languages of the Member States (with the exception of Irish) are available at: https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=5.]

Quality of translations
The quality of some English translations is (very) poor.

12. Has your Member State made a declaration as provided for in Art. 8(2) FD 2002/584/JHA? If so,

- what does this declaration entail?
- where was it published? Please provide a copy in English.

Answer

Yes, the Netherlands made a declaration as provided for in Art. 8(2) FD 2002/584/JHA.

This declaration reads as follows:

'Declarations and notifications by the Kingdom of the Netherlands, pursuant to the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States of the European Union.

(…)

Article 8(2) of the Framework Decision

In addition to European arrest warrants drawn up in Dutch or English, European arrest warrants in another official language of the European Union are accepted provided that an English translation is submitted at the same time.

(…)'.[117]

The declaration was not published in the Official Journal, contrary to the requirement of Art. 34(2) of FD 2002/584/JHA. However, it is accessible on the website of the European Judicial Network.

13.

[117] *Council document* 9002/04, 29 April 2004, p. 4.

a) Have the issuing judicial authorities of your Member State had any difficulties in complying with the language requirements of the executing Member State? If so, please describe those difficulties and how they were resolved.

b) If the translation of the EAW deviates from the official EAW-form in the language of the executing Member State – or from the official EAW-form in the designated language –, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

Answer

a) The issuing judicial authorities which answered this question either did not report any difficulties or referred to the Public Prosecution Service which is responsible for translating the EAW.

b) One should distinguish between form and substance.

If a deviation regards form rather than substance, *e.g.*, of section (d) of the EAW

'It is stated if the person took part in judicial investigation after which the decision was adopted:
1. x Yes, the person participated himself in judicial investigation after which the decision was adopted'

instead of

'Indicate if the person appeared in person at the trial resulting in the decision:

1. Yes, the person appeared in person at the trial resulting in the decision',[118]

that deviation should have no consequences. In such cases it is still possible to verify whether the rights of the defence were fully respected.[119]

A deviation with regard to substance is a different matter altogether. If, *e.g.*, section (d) of the EAW mentions:

- 'No, the requested person did not appear in person at the trial during which the judgment was pronounced' instead of 'No, the person did not appear in person at the trial resulting in the decision',[120]

[118] District Court of Amsterdam, judgment of 14 March 2017, ECLI:NL:RBAMS:2017:1694.
[119] In the context of section (d), it was clear that the expression 'judicial investigation' referred to a 'trial': both in point 3.3 and point 3.4 the expression 'the right to a retrial' was rendered as 'the right to reinvestigate the lawsuit'. Furthermore, the person concerned confirmed his presence at the trial.
[120] District Court of Amsterdam, judgment of 26 April 2018, ECLI:NL:RBAMS:2018:2701 (not published).

such a statements could lead to a request for additional information in accordance with Art. 15(2) FD 2002/584/JHA, unless the matter could be clarified by other means (*e.g.* on the basis of a statement by the requested person).[121]

[121] On the basis of the statements of the person concerned, the court established that he was indeed present at the trial resulting in the decision.

Part 3: problems regarding the individual sections of the EAW-form

Explanation

Art. 8(1) of FD 2002/584/JHA lists the information which an EAW must contain. The purpose of that information is 'to provide the minimum official information required to enable the executing judicial authorities to give effect to the European arrest warrant swiftly by adopting their decision on the surrender as a matter of urgency'(ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/17, ECLI:EU:C:2018:27, paragraph 59).

Each section of the EAW-form covers one or more of the requirements set out in Art. 8(1).

The issuing judicial authorities 'are required to complete [the EAW-form contained in the Annex to FD 2002/584/JHA], furnishing the specific information requested' (ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/17, ECLI:EU:C:2018:27, paragraph 57).

Art. 8(1) lays down requirements as to lawfulness 'which must be obeyed if the [EAW] is to be valid' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 64; ECJ, judgment of 6 December 2018, *Piotrowski*, C-551/18 PPU, ECLI:EU:C:2018:991, paragraph 43).

Although the grounds for refusal and guarantees are *exhaustively* listed in Art. 3-5 of FD 2002/584/JHA, a failure to comply with one of those requirements 'must, in principle, result in the executing judicial authority refusing to give effect to that [EAW]' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 64). This is so, because Art. 3-5 are based on the premiss that 'that the [EAW] concerned will satisfy the requirements as to the lawfulness of that warrant laid down in Article 8(1) of the Framework Decision' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 63).

However, before refusing to give effect to the EAW, the executing judicial authority must first apply Art. 15(2) of FD 2002/584/JHA and 'request the judicial authority of the issuing Member State to furnish all necessary supplementary information as a matter of urgency' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 65).

A. Information regarding the identity of the requested person

Explanation

Section (a) of the EAW-form is dedicated to information regarding the identity of the requested person. This sections covers the requirements of Art. 8(1)(a) of FD 2002/584/JHA ("the identity and the nationality of the requested person").

This information enables the executing judicial authority to establish whether the person who is brought before it is actually the person who is sought by the issuing judicial authority.

Information regarding the nationality of the requested person is relevant for applying the ground for refusal of Art. 4(6) of FD 2002/584/JHA and for requesting the guarantee of Art. 5(3) of FD 2002/584/JHA.

Issues regarding section (a)

Relationship between SIS-II-Sirene and the EAW
Issuing judicial authorities do not always enter all relevant data into SIS. Often there is no photo or fingerprints. This causes problems in identifying people with common names without proper documentation (*e.g.* refugees/immigrants) and can lead to repeated arrests of people with the same common name. Other Member States do not always respond to requests for complete information in SIRENE.

14. Have the issuing judicial authorities of your Member State experienced any difficulties with regard to section (a)? If so, please describe those difficulties and how they were resolved.

Answer

The issuing judicial authorities which answered this question did not report any difficulties. A member of the Fugitive Active Search Team (FAST) of the Public Prosecution Service[122] mentioned that, if there is not sufficient evidence to identify the person who was arrested in the executing Member State as the requested person, such as fingerprint- or DNA-evidence, this may lead to a refusal of surrender.

15. Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (a)? If so, please describe those difficulties and how they were resolved.

Answer

In some cases, the requested person contended that section (a) contained errors with regard to his surname or his date of birth. Such errors have no consequences, provided, of course, that it is clear that the person who was arrested on the basis of the EAW is the person who is sought by the issuing judicial authority.[123] The same holds true for requested persons with one or more aliases.

Generally, the exact age of the requested person resulting from his year of birth is not relevant, if he can be held criminally responsible for the acts on which the EAW is based

[122] FAST is a team in which the police and the Public Prosecution Service cooperate in order to track down fugitives who were sentenced to a custodial sentence of which at least 120 days remain to be served, who do not have a known address in the Netherlands or who do have a known address in the Netherlands but were not apprehended within three months after they were flagged in the relevant system: Instruction framework for enforcement, *Stcrt.* 2020, 62551, paragraph 6.2.1 (*Aanwijzing kader voor tenuitvoerlegging*).
[123] See, *e.g.*, District Court of Amsterdam, judgment of 18 January 2018, ECLI:NL:RBAMS:2018:223 (incorrect year of birth); District Court of Amsterdam, judgment of 12 November 2019, ECLI:NL:RBAMS:2019:8577 (incorrect surname). In both cases, the requested person did not contest that he was the person sought by the issuing judicial authority.

under the law of the executing Member State (see Art. 3(3) of FD 2002/584/JHA).[124] The exact age of the requested person is only relevant, when it is not clear whether, owing to his age, he can be held criminally responsible for those act under that law and when the requested person puts forward a defence of mistaken identity.

Information about the requested person's nationality is only relevant, when the executing judicial authority intends to apply Art. 4(6) or Art. 5(3) of FD 2002/584/JHA and when the requested person offers a defence of mistaken identity.

When examining a defence of mistaken identity, the District Court of Amsterdam will have regard to, *e.g.*, fingerprints[125] or to photographs.[126]

The issuing judicial authority is not required to provide a photo of the requested person *motu proprio*.[127] Presumably, the same holds true with regard to fingerprints.

B. Decision on which the EAW is based

Explanation

Section (b) of the EAW-form covers the requirements of Art. 8(1)(c) of FD 2002/584/JHA ('evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2').

Mentioning the existence of an arrest warrant or a judgment signifies that the requested person already had the benefit of judicial protection of procedural safeguards and fundamental rights at the level of the adoption of the *national* judicial decision (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraphs 55-56).

The term 'arrest warrant', as used in Art. 8(1)(c), refers 'to a national arrest warrant that is distinct from the [EAW]' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 58).

The adoption of the EAW 'may occur, depending on the circumstances, shortly after the adoption of the national judicial decision' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 56). Presumably, this means that it is not contrary to FD 2002/584/JHA if the authority competent to issue the EAW is the authority which also rendered the national judicial decision.

[124] District Court of Amsterdam, judgment 4 January 2019, ECLI:NL:RBAMS:2019:72.
[125] District Court of Amsterdam, judgment of 14 March 2017, ECLI:NL:RBAMS:2017:2349 (the defence of mistaken identity was successful: the requested person's fingerprints did not match the fingerprints provided by the issuing judicial authority); District Court of Amsterdam, judgment of 19 February 2020, ECLI:NL:RBAMS:2019:1163 (the defence was unsuccessful: the requested person's fingerprints matched those provided by the issuing judicial authority).
[126] District Court of Amsterdam, judgment of 5 March 2020, ECLI:NL:RBAMS:2020:2036 (the defence was unsuccessful: the court recognised the requested person as the person on the photograph accompanying the EAW).
[127] District Court of Amsterdam, judgment of 5 March 2020, ECLI:NL:RBAMS:2020:2036.

The national decision referred to in Art. 8(1)(c) and section (b) must be a 'judicial decision'. That term 'covers decisions of the Member State authorities that administer criminal justice, but not the police services' (ECJ, judgment of 10 November 2016, *Özçelik*, C-453/16 PPU, ECLI:EU:C:2016:860, paragraph 33). Because the Public Prosecutor's Office 'constitutes a Member State authority responsible for administering criminal justice' (ECJ, judgment of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraph 39), a decision rendered by that authority 'must be regarded as a judicial decision, within the meaning of Article 8(1)(c) of the Framework Decision' (ECJ, judgment of 10 November 2016, *Özçelik*, C-453/16 PPU, ECLI:EU:C:2016:860, paragraph 34).

The enforceability of a national judicial decision is 'decisive in determining the time from which [an EAW] warrant may be issued' (ECJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, paragraph 71).

The information provided in section (b), in combination with the information in section (c), enables the executing judicial authority to determine whether the EAW is issued for the purposes of conducting a criminal prosecution (section (b)(i) in combination with section (c)(i)) or for the purposes of executing a custodial sentence or detention order (section (b)(ii) in combination section (c)(ii)).

If a judgment is not yet enforceable, 'the surrender would serve the specific purpose of enabling a criminal prosecution to be conducted' (ECJ, judgment of 21 October 2010, *B.*, C-306/09, ECLI:EU:C:2010:626, paragraph 56, regarding an *in absentia* judgment).

If a judgment was rendered *in absentia* and the requested person can still apply for a retrial, his position is 'comparable to that of a person who is the subject of [an EAW] for the purposes of prosecution' (ECJ, judgment of 21 October 2010, *B.*, C-306/09, ECLI:EU:C:2010:626, paragraph 57).

According to Advocate-General J. Kokott:

- FD 2002/584/JHA is applicable 'in a situation where the requested person was convicted and sentenced in [a third State, *i.e.* not a Member State of the EU], but by virtue of an international agreement with [that third State] the judgment is recognised in the issuing Member State and executed according to the laws of the issuing State'; but

- the executing judicial authority must end the EAW-proceedings 'if it has substantial grounds to assume that execution of the [foreign] custodial sentence, which the [issuing Member State] has recognised, would lead to a serious breach of fundamental rights' (opinion of 17 September 2020, *Minister for Justice and Equality v JR (Conviction by an EEA third State)*, C-488/19, ECLI:EU:C:2020:738, paragraphs 62-63).

Issues regarding section (b)

Date of issue and issuing authority

The date of issue of the national judicial decision and/or the authority which issued that decision are not always mentioned in section (b).

Distinguishing between prosecution and serving a sentence
An EAW can be issued for the purposes of conducting a criminal prosecution or executing a custodial sentence or for both of those purposes.
If an EAW is issued which does not belong to the latter category (EAWs issued both for conducting an prosecution and for serving a sentence), issuing judicial authorities sometimes complete *both* subsections of section (b) instead of completing only the applicable subsection.
If an EAW is issued for both purposes, issuing judicial authorities do not always clearly distinguish between information pertaining to the prosecution and information pertaining to the sentence, in particular with regard to the offences mentioned in section (e) of the EAW.

Decision to execute a suspended sentence
When the requested person was originally given a suspended sentence and the execution of that sentence was ordered by a subsequent decision, some executing judicial authorities request information about the reasons for deciding to execute the suspended sentence.

16. Have the issuing judicial authorities of your Member State experienced any difficulties with regard to section (b)? If so, please describe those difficulties and how they were resolved.

Answer

The issuing judicial authorities which answered this question did not report any difficulties.

17. Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (b)? If so, please describe those difficulties and how they were resolved.

Answer

Except for problems relating to section (d) of the EAW (see below), no structural problems were encountered. Sometimes, section (b) does not mention the date of the national judicial decision and/or the authority which issued that decision. Unless that defect can be remedied by reading the EAW in conjunction with 'Form A' (concerning an alert in SIS; see also the answer to question 26),[128] the issuing judicial authority will be requested to provide additional information.

[128] See, *e.g.*, District Court of Amsterdam, judgment of 22 August 2019, ECLI:NL:RBAMS:2019:6260; District Court of Amsterdam, judgment of 30 November 2020, ECLI:NL:RBAMS:2020:5330; District Court of Amsterdam, judgment of 25 February 2021, ECLI:NL:RBAMS:2021:1894; District Court of Amsterdam, judgment of 26 March 2021, ECLI:NL:RBAMS:2021:1872.

According to well established case-law, contrary to extradition law[129] Art. 8 of FD 2002/584/JHA does not require the issuing judicial authority to attach a copy of the national judicial decision to the EAW.[130]

The national enforceable judicial decision referred to in Art. 8(1)(c) of FD 2002/584/JHA and section (b) of the EAW is not necessarily the decision referred to in Art. 4a(1) and section (d) of the EAW. This problem was already identified in the previous project.[131]

If an EAW concerns multiple judgments of conviction and the sentences imposed by those judgments are merged into one final sentence after the EAW was issued, the original judgments no longer are 'enforceable' and the EAW cannot be executed.[132] The only solution is to issue a new EAW on the basis of the final judicial decision which merged the individual sentences into a final sentence.

The *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)* judgment makes it clear that the national judicial decision or judgment in the sense of Article 8(1)(c) of FD 2002/584/JHA 'must necessarily come from a court or other judicial authority of a *Member State*'.[133] Therefore, a judgment from a court in a third state cannot, as such, constitute the basis of an EAW.[134] However, an 'act of a court of the issuing State recognising such a judgment and rendering it enforceable as well as subsequent decisions adopted by the judicial authorities of that State with a view to enforcing the judgment recognised' are capable of coming within the ambit of Article 8(1)(c) of FD 2002/584/JHA.[135] In order to meet the requirements of the 'dual level of protection' the law of the issuing Member State must provide, at least at one of those two levels of protection, 'for judicial review to verify that, in the procedure leading to the adoption in the third State of the judgment subsequently recognised in the issuing State, the fundamental rights of the sentenced person and, in particular, the obligations arising from Articles 47 and 48 of the Charter have been complied with'.[136] Prior to *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, the District Court of Amsterdam had already recognised that an EAW could be issued for the execution of a sentence imposed in a third country[137] or in another Member State than the issuing Member State.[138]

---

[129] See, *e.g.*, Art. 12(2)(a) of the European Convention on Extradition.
[130] See, *e.g.*, District Court of Amsterdam, judgment of 8 November 2011, ECLI:NL:RBAMS:2011:7391 (not published).
[131] See Kei Hannah Brodersen, Vincent Glerum & André Klip, The European Arrest Warrant and In Absentia Judgments, Eleven International Publishing: Maastricht 2020, p. 84-85.
[132] District Court of Amsterdam, judgment of 23 May 2019, ECLI:NL:RBAMS:2019:3807.
[133] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, paragraph 43.
[134] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, paragraph 46.
[135] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, paragraph 47.
[136] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, paragraph 57.
[137] District Court of Amsterdam, judgment of 14 February 2017, ECLI:NL:RBAMS:2017:5346 (not published).
[138] District Court of Amsterdam, 5 October 2012, ECLI:NL:RBAMS:2012:BY3806; District Court of Amsterdam, judgment of 19 December 2017, ECLI:NL:RBAMS:2017:9672.

17bis. What is the position of your Member State on the conformity of the EAW and the national arrest warrant: should there be full conformity between the two documents or can they diverge from each other (can you add in the EAW offences that are not included in the national arrest warrant?) ? Do you check on the national arrest warrant or do you ask for a (translated?) copy of the national arrest warrant (in case of doubt of conformity?). (possible issues: Bob-Dogi ruling, rule of speciality, deprivation of liberty, …)

Answer
In 2019, the District Court of Amsterdam ruled that if a national arrest warrant on which a prosecution-EAW is based does not cover all of the offences for which surrender is sought, that EAW does not conform to the requirement of Art. 2(2)(c) of the Law on Surrender, which provision gives effect to Art. 8(1)(c) of FD 2002/584/JHA.[139] In this particular case, the issuing judicial authority had amended the EAW by adding an offence after the requested person was arrested in the Netherlands. In doing so, the issuing judicial authority did not refer to a national arrest warrant covering that offence. That offence was also not covered by the national arrest warrant on which the EAW was based.[140] For those reasons, the court refused surrender for that offence.[141]

This ruling could be said to be in line with the Court of Justice's case-law on the 'dual level of protection'. A decision to issue an EAW is liable to affect the right to liberty of the person concerned.[142] Regarding offences mentioned in the EAW but not covered by the national arrest warrant on which it is based, the executing judicial authority cannot be 'satisfied that the decision to issue a European arrest warrant is based on a national procedure that is subject to review by a court and that the person in respect of whom that national arrest warrant was issued has had the benefit of all safeguards appropriate to the adoption of that type of decision, inter alia those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision 2002/584'.[143]

If, according to the law of the issuing Member State, it is not possible to apply measures restricting personal liberty, such as an arrest or pre-trial detention, concerning one of the offences for which the issuing judicial authority wishes to seek surrender, it is not possible to issue an EAW and to obtain surrender for that offence. However, if the person concerned is surrendered for offences which are covered by a national arrest warrant, the surrendered person may also be prosecuted and sentenced for the offence for which a national arrest warrant could not be issued (Art. 27(3)(c) of FD 2002/584/JHA).

---

[139] District Court of Amsterdam, judgment of 21 May 2019, ECLI:NL:RBAMS:2019:4088.
[140] The judgment does not explain how this was established. Possibly the EAW was accompanied by a copy of the national arrest warrant, as is sometimes the case with EAWs issued by Belgian authorities. In any case, both the legal counsel of the requested person and the public prosecutor agreed that the additional offence was not covered by the national arrest warrant on which the EAW was based.
[141] Interestingly, the court decided to forego a request for additional information (Art. 15(2) of FD 2002/584/JHA) because, after surrender, the issuing judicial authority could submit a request for consent to additional surrender for that offence (Art. 27(3)(g) of FD 2002/584/JHA). It should be pointed out that such a request would have to be accompanied by information about the existence of national arrest warrant (Art. 27(4) of FD 2002/584/JHA). See the answer to question 64bis.
[142] ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 68.
[143] ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 70.

When deciding on the execution of a prosecution-EAW, the District Court of Amsterdam will check whether section (b) of the EAW mentions the existence of an enforceable national arrest warrant issued by a judicial authority. If the EAW mentions the existence of such a national judicial decision, it will be presumed that it covers the offences mentioned in the EAW. If the EAW does not mention the existence of a national judicial decision, the court will apply the procedure described in the *Bob-Dogi* judgment.[144]

According to a well-established line of case-law, an EAW does not need to be accompanied by a copy of the national judicial decision on which it is based.[145] Accordingly, the District Court of Amsterdam is reticent in requesting that the issuing judicial authority provides a copy of the national arrest warrant. Should any serious question arise about the existence or the scope of a national arrest warrant, it will request additional information on those topics rather than request a copy of that arrest warrant.

C. Indications on the length of the sentence

Explanation

Section (c) of the EAW-form refers to the 'sentence which, depending on the case, is liable to be imposed or has actually been imposed in the conviction decision' (ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, paragraph 31). Section (c) covers the requirements of Art. 8(1)(f) of FD 2002/584/JHA ('the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State').

Regarding amendments of the national law of the issuing Member State between the commission of the offence and the date of issue, or execution, of the EAW, only the version of that law of the issuing Member State 'which is applicable to the facts in question' is determinative (ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, paragraph 31).

The information provided in section (c) enables the executing judicial authority to verify compliance with the penalty thresholds of Art. 2(1) and (2) of FD 2002/584/JHA (ECJ, judgment of 6 December 2018, *IK*, C-551/18 PPU, ECLI:EU:C:2018:991, paragraph 51; ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, paragraph 33).

If the EAW is issued for the purposes of executing a sentence, *i.e.* if there is a final judgment, section (c), read in conjunction with Art. 8(1)(f), 'requires the issuing judicial authority to provide only information on the penalty imposed' (opinion of A-G M. Bobek of 26 November 2019, *X (European arrest warrant – Double criminality)*), C-717/18, ECLI:EU:C:2019:1011, paragraph 64). This suggests that in case of an execution-EAW concerning one or more of the offences of Art. 2(2) the standard statement contained in section (e) of the EAW-form ('If applicable, tick one or more of the following offences punishable in the issuing Member State

[144] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-182/15, ECLI:EU:C:2016:385, paragraphs 65-66.
[145] See, *e.g.*, District Court of Amsterdam, judgment of 28 January 2016, ECLI:NL:RBAMS:2016:360.

by a custodial sentence or detention order of a maximum of at least 3 years as defined by the laws of the issuing Member State') suffices.

Issues concerning section (c)

Accessory surrender
FD 2002/584/JHA does not explicitly provide for *accessory surrender* (*i.e.* surrender for an offence or a sentence which does not meet the threshold of Art. 2(1) of FD 2002/584/JHA together with the surrender for one or more offences or sentences which do meet that threshold). However, some Member State allow for issuing and/or executing an EAW for accessory offences/sentences,[146] whereas others do not.

Penalty threshold and multiple offences/sentences
If a *prosecution*-EAW is issued for multiple offences, the issuing judicial authorities of some Member States mention the maximum sentence for each offence separately, whereas the issuing judicial authorities of other Member States mention only one maximum sentence for all offences together. The latter course of action may be the result of national rules concerning concurrence of offences and sentences. According to the legal systems of some Member States, in case of conviction for multiple offences the court must impose a single sentence, the maximum of which is usually 'capped': the maximum sentence is not determined by simply adding up the *maximum* sentences which apply to the offences separately. (In the Netherlands, *e.g.*, the maximum sentence is equal to the heaviest maximum sentence applicable to the offences plus one third of that maximum sentence.)
If an *execution*-EAW is issued for multiple sentences, must *each* of those sentences meet the four months requirement *separately*? Or is it allowed to surrender for the execution of those sentences if they *add up* to at least four months?

Partial refusal of execution-EAWs: 'aggregate sentences'
Situations in which a single sentence was imposed for two or more offences (a so-called 'aggregate sentence'),[147] but in which surrender for one of those offences cannot be allowed (*e.g.*, when that offence is not offence under the law of the executing Member State (Art. 2(4) jo. Art. 4(1) of FD 2002/584/JHA) or when that offence is time-barred according to the law of the executing Member State (Art. 4(4) of FD 2002/584/JHA), are problematic. Should surrender:

- be allowed for the execution of the sentence without any restriction;
- be allowed only for those offences which do meet the necessary requirements and, if so, is it necessary to know which part of the sentence relates to those offences (*i.e.* whether that part of the sentence is for four months);
- be refused surrender altogether?

---

[146] For the purposes of this project:
- an 'accessory offence' is an offence which does not meet the threshold of Art. 2(1) of FD 2002/584/JHA and for which surrender is sought together with one or more sentence and/or one or more offences which do meet that threshold; and
- an 'accessory sentence' is a sentence which does not meet the threshold of Art. 2(1) of FD 2002/584/JHA and for which surrender is sought together with one or more sentences and/or one or more offences which do meet that threshold.

[147] An 'aggregate sentence', therefore, is the antonym of an 'individual sentence'. An 'individual sentence' is a sentence imposed for each offence separately.

Partial refusal of execution-EAWs: 'cumulative sentences'
In some Member States, two or more individual final sentences imposed on the same person may be replaced with a cumulative sentence in separate proceedings. In cumulative sentence proceedings, the court is bound by the individual judgments. The cumulative sentence cannot exceed and is usually less than the sum total of the individual sentences.
If an offence for which an individual sentence was imposed which is later replaced by a cumulative sentence does not meet the conditions for surrender, problems similar to those concerning aggregate sentences arise.

Penalty threshold for execution-EAWs: 'gross' or 'net'?
Does the four months requirement refer to the sentence as it was imposed or to that part of the imposed sentence which still remains to be executed (*e.g.* after deduction of time already served or of periods of remand)? In other words, does the requirement refer to the 'gross' sentence or the 'net' sentence?

Remaining sentence to be served
The remaining sentence to be served is not always mentioned.

18. Does the national law of your Member State allow for issuing and/or executing an EAW with regard to accessory offences/sentences?

Answer

Executing an EAW
In 2021, Parliament passed a bill to transpose FD 2002/584/JHA anew (see the answer to question 4) which included a proposal to introduce the possibility of accessory surrender. The act entered into force in 1 April 2021.[148] From that date on, Art. 7(4) of the Law on Surrender allows for *granting* accessory surrender for offences which carry a maximum sentence of *deprivation* of liberty of less than twelve months in the issuing Member State and/or for sentences of less than four months. Offences carrying only a financial penalty and or only a penalty of *restriction* of freedom are not covered by that provision and will, therefore, lead to a partial refusal to execute the EAW.[149] The executing judicial authority, the District Court of Amsterdam, decides whether accessory surrender will be granted.

Issuing an EAW
Probably as a result of an omission, the possibility of *issuing* an EAW with regard to such *accessory* offences/sentences is still excluded. Art. 2(1) of the Law on Surrender still dictates that an EAW 'can *only* be issued 'for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for a sentence of at least four months'.[150]

---

[148] Prior to that date, accessory surrender was not possible. See, *e.g.*, District Court of Amsterdam, judgment of 6 December 2019, ECLI:NL:RBAMS:2019:9818.
[149] District Court of Amsterdam, 25 May 2021, ECLI:NL:RBAMS:2021:2665.
[150] Emphasis added.

19. Does the national law of your Member State, as interpreted by the courts of your Member State, allow or require mentioning a single maximum sentence when a *prosecution*-EAW is issued for two or more offences?

Answer

As a rule, the District Court of Amsterdam requires mentioning a maximum sentence for each separate offence. Consequently, if a prosecution-EAW is issued for two or more separate offences, but only mentions a single maximum sentence in section (c), the court will request supplemental information on the applicable maximum sentences.[151]

Of course, if a prosecution-EAW is issued for two or more separate offences which are covered by one and the same legal provision, the court will assume that a single maximum sentence mentioned in section (c) applies to all offences.[152]

20. Concerning an *execution*-EAW for separate imposed sentences, does the national law of your Member State, as interpreted by the courts of your Member State, allow or require 'adding up' those sentences in order to cross the threshold of Art. 2(1) of FD 2002/584/JHA when deciding on issuing or executing that EAW?

Answer

Executing side
According to established case-law of the District Court of Amsterdam, separate imposed sentences may be added up to cross the threshold of Art. 2(1) of FD 2002/584/JHA.[153] The wording of that provision does not exclude issuing an EAW for the purpose of executing *two or more separate* sentences – imposed either by a single judgment or by separate judgments – if the *combined* duration of those separate sentences amounts to at least four months. Such an interpretation is in accordance with FD 2002/584/JHA's aim of facilitating judicial cooperation.

However, it is not permitted to add up *separate EAWs* to cross the threshold. *Each* execution-EAW must *in and of itself* meet the condition that it is issued for a sentence or sentences of at least four months.[154]

Issuing side
As an experiment, FAST (a unit of the Public Prosecution Service office tasked with tracking down fugitive sentenced persons) issued two execution-EAWs, both concerning two or more sentences, none of which amounted, in itself, to four months. The *total* amount for *each* EAW, however, did amount to at least four months. In both cases, an executing judicial authority from Belgium refused to execute the EAW. Apparently, these Belgian judicial authorities do not share the opinion that adding separate sentences to reach the threshold of Art. 2(1) of FD 2002/584/JHA is permissible.

---

[151] District Court of Amsterdam, judgment of 22 June 2017, ECLI:NL:RBAMS:2017:4748; District Court of Amsterdam, judgment of 3 September 2020, ECLI:NL:RBAMS:2020:4333; District Court of Amsterdam, judgment of 4 November 2020, ECLI:NL:RBAMS:2020:5487.
[152] District Court of Amsterdam, judgment of 3 September 2020, ECLI:NL:RBAMS:2020:4333.
[153] See, *e.g.*, District Court of Amsterdam, judgment of 19 October 2007, ECLI:NL:RBAMS:2007:BC9797
[154] District Court of Amsterdam, judgment 11 July 2014, ECLI:NL:RBAMS:2014:5231.

21. Regarding the requirement of a sentence of at least four months, does the national law of your Member State, as interpreted by the courts of your Member State, refer to the duration of the sentence as it was imposed or to the duration of that part of the sentence which remains to be enforced?

Answer

Executing side
Art. 2(1) of FD 2002/584/JHA was transposed as Art. 2(1) of the Law on Surrender. According to established case-law of the District Court of Amsterdam, the requirement of a custodial sentence or detention order of at least four months contained in Art. 2(1) of FD 2002/584/JHA refers to the duration of the sentence *as it was imposed*, not to the duration of that part of the custodial sentence or detention order which remains to be served.[155] The European Commission is of the same opinion.[156]

Of course, some part of the custodial sentence or detention order must remain to be served,[157] otherwise the judicial decision which the EAW is based on could not be said to be 'enforceable' (see Art. 8(1)(b) of FD 2002/584/JHA).

In theory, it is possible to order surrender in cases in which the remaining sentence is less than four months. In practice, such cases seldom occur. Particularly given the issuing Member State's duty to deduct periods of EAW-based detention in the executing Member State 'from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed' (Art. 26(1) of FD 2002/584/JHA; see also the next paragraph), surrender for the execution of a remainder of a sentence of less than four months would raise serious issues of proportionality. It cannot be excluded that, in such circumstances, surrender – which is a limitation of the person concerned right to liberty (Art. 6 of the Charter) and of his right to respect for his private life (Art. 7 of the Charter) – would not meet the conditions of Art. 52(1) of the Charter.[158]

[155] See, *e.g.*, District Court of Amsterdam, judgment of 19 October 2007, ECLI:NL:RBAMS:2007:BC9797; District Court of Amsterdam, judgment of 12 April 2018, ECLI:NL:RBAMS:2018:2350; District Court of Amsterdam, judgment of 23 October 2018, ECLI:NL:RBAMS:2018:7624; District Court of Amsterdam, judgment of 30 October 2018, ECLI:NL:RBAMS:2018:8974 (not published); District Court of Amsterdam, judgment of 2 May 2019, ECLI:NL:RBAMS:2019:3326.
[156] *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C 335/12.
[157] District Court of Amsterdam, judgment of 30 November 2018, ECLI:NL:RBAMS:2018:8970.
[158] In one case, the EAW pertained to a custodial sentence of 10 years of which 7 months minus 105 days (which, in total, is less than 4 months) remained to be served. Surrender was ordered: District Court of Amsterdam, judgment of 2 May 2019, ECLI:NL:RBAMS:2019:3328. However, in that case the EAW *also* pertained to a prosecution in the issuing Member State. Although the court did not (explicitly) consider the proportionality issue, one could argue that, because the person concerned would have to be surrendered anyway (for the purpose of conducting a prosecution), also surrendering him for the remaining sentence of less than 4 months was not disproportional.
In another case, the EAW pertained to a sentence of 6 months of which six months minus 1 day remained to be served: District Court of Amsterdam, judgment of 22 February 2019, ECLI:NL:RBAMS:2019:1377. The defence argued that, when the person concerned was eventually surrendered, after deduction of periods of detention pursuant to Art. 26(1) of FD 2002/584/JHA there would remain less than 4 months of the sentence to be served in the issuing Member State. According to the defence, the requirement of Art. 2(1) of the Law on Surrender concerns the duration of the remaining sentence to be served in the issuing Member State (after deduction pursuant to Art. 26(1) of FD 2002/584/JHA. The court ordered surrender, noting that this requirement

If, during surrender proceedings, the duration of the requested person's detention on the basis of the EAW becomes equal to the duration of that part of the custodial sentence or detention order which remains to be served, he will not be surrendered. After all, according to Art. 26(1) of FD 2002/584/JHA the issuing Member State must 'deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed'.[159]

Issuing side
Those issuing judicial authorities which answered this question were of the opinion that the requirement of a sentence of at least four months refers to the duration of the sentence as it was imposed, not to the duration of the remainder of the sentence to be served.

However, in practice as a rule FAST (the Fugitive Active Search Team of the Public Prosecutor's Office) will only request the examining judge to issue an execution-EAW if at least 120 days of the sentence remain to be served.[160]

22. If an 'aggregate sentence' or a 'cumulative sentence' was imposed for multiple offences and one of those offences does not meet the requirements for surrender, does the law of your Member State allow or require the executing judicial authority to surrender without any restriction, to surrender for only those offences which meet the necessary requirements and, if so, is it necessary to know which part of the sentence relates to those offences (*i.e.* whether that part of the sentence is for four months) or to refuse surrender altogether?

Answer

Executing side
According to established case-law of the District Court of Amsterdam, if an 'aggregate' or 'cumulative' sentence is imposed for two or more offences, the fact that one of those offences does not meet the necessary requirements for surrender will not prohibit surrender of the requested person. In such circumstances, the District Court will refuse surrender with regard to that offence and allow surrender for the other offence(s). Under the rule of speciality, after surrender it is up to the authorities of the issuing Member State to *limit* the execution of the sentence imposed to that part of the sentence which corresponds to the offence(s) for which surrender was allowed.[161] The principle of mutual trust requires that the District Court does

---

only pertains to the duration of the sentence as it was imposed. The defence did not raise the issue of proportionality. Given that at the moment of the decision on surrender, the person concerned was already held in custody on the basis of the EAW for a period of more than 60 days, a proportionality issue could have been raised. However, because the person concerned was a national of the issuing Member State with no fixed abode in the Netherlands and was convicted in the issuing Member State of, *inter alia*, committing acts of violence, on balance surrendering him does not seem to be a disproportional limitation of his fundamental rights.

[159] See, *e.g.*, District Court of Amsterdam, judgment of 11 February 2021, parketnummer 13/751600-20 (not published); District Court of Amsterdam, judgment of 15 June 2021, parketnummer 13/751017-20 (not published). In both cases, the issuing judicial authority withdrew the EAW, after the Dutch authorities had notified it that the requested person had effectively served the remainder of his sentence while in detention during the surrender proceedings.

[160] Interview with a member of FAST, 27 November 2020. See also Pro Facto, *Eindrapport Aanpak van de voorraad openstaande vrijheidsstraffen*, Groningen 2020, p. 70-71.

[161] See, *e.g.*, District Court of Amsterdam, judgment of 19 October 2007, ECLI:NL:RBAMS:2007:BC9797.

not inquire whether and, if so, to what extent the authorities of the issuing Member State will limit the execution of the 'aggregate' sentence, unless it has sufficient reasons to doubt whether those authorities will comply with the speciality rule.[162]

Issuing side
There is no provision in Dutch law to disaggregate a final aggregate sentence following a partial refusal to execute a Dutch EAW issued for the purpose of executing an 'aggregate' sentence. In other words: the Netherlands cannot 'split' an aggregate sentence. According to a member of FAST – a unit of the Public Prosecution Service office tasked with tracking down fugitive sentenced persons –, this could lead executing judicial authorities to refuse the execution of a Dutch execution-EAW altogether, where one of the offences for which the 'aggregate' sentence was imposed does not meet the requirements for surrender.

23. Have the issuing judicial authorities of your Member State experienced any difficulties with regard to section (c)? If so, please describe those difficulties and how they were resolved.

Answer
Those issuing judicial authorities which answered this question did not report any difficulties. A member of FAST - see the answer to question 22 – reported difficulties with separate sentences of less than four months (see the answer to question 20).

24. Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (c)? If so, please describe those difficulties and how they were resolved.

Answer

No structural problems were encountered.

Issues with regard to maximum sentences for each separate offence, separate sentences of less than four months and 'aggregate' sentences were resolved by the District Court (see the answers to questions 19, 20 and 22).

If section (c) of the EAW does not mention the applicable maximum sentence, if the case-file contains 'Form A' (concerning an alert in SIS) and if that form mentions the applicable sentence, the District Court will read the EAW in combination with 'Form A'.[163]

D. Appearance in person at the trial resulting in the decision

[162] See District Court of Amsterdam, interlocutory judgment of 6 May 2014, ECLI:NL:RBAMS:2014:4455 and District Court of Amsterdam, judgment of 28 October 2014, ECLI:NL:RBAMS:2014:9873. In this case, the issuing judicial authority originally stated that it was 'legally impossible' to change the duration of the 'aggregate' sentence in case of a partial refusal of surrender. After further enquiries, it turned out that the legal system of the issuing Member State did provide for a possibility 'to amend the prior decision so that the penalty shall be executed only as to the offences for which the extradition was granted'.
[163] District Court of Amsterdam, judgment 26 March 2020, ECLI:NL:RBAMS:2020:2010.

Many of the problems identified in the *InAbsentiEAW*-project still are a live issue in Dutch executing practice.[164] However, one of those problems is now solved.

Originally, the Netherlands had transposed Art. 4a(1) of FD 2002/584/JHA as a ground for *mandatory* refusal (Art. 12 of the Law on Surrender). The mandatory character of that provision caused a high number of refusals.[165]

On 1 April 2021, the Act to transpose FD 2002/584/JHA anew entered into force. The objective of this Act is to bring the Law on Surrender into line with the Court of Justice's case-law on, *inter alia*, Art. 4a by turning Art. 12 of the Law on Surrender into a ground for *optional* refusal.

Under the amended provision, the District Court of Amsterdam will check:

- 1. whether the requested person appeared in person at the trial resulting in the decision. If not,

- 2. whether any of the situations described in Art. 12(a)-(d) applies. If not,

- 3. whether there are other circumstances that enable it to ensure that the surrender of the requested person does not entail a breach of his rights of defence.

In the context of the third question, the court will try to establish whether:

- the requested person waived his right to attend the trial of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner and/or

- the requested person displayed a manifest lack of diligence, notably where it transpires that he sought to avoid service of the information addressed to him,[166] that he sought to avoid any contact with the legal counsel appointed by the courts of the issuing Member State,[167] or that he brought an appeal against the decisions at first instance.[168]

If the District Court of Amsterdam cannot establish that the surrender of the requested person does not entail a breach of his rights of defence, it will apply the ground for optional refusal and will refuse to execute the EAW.

[164] See, *e.g.*, District Court of Amsterdam, judgment of 28 May 2021, ECLI:NL:RBAMS:2021:2876: section (d) was not filled in; when requested to provide supplementary information, the issuing judicial authority replied that the requested person appeared in person at the trial resulting in the decision.
[165] *Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2018*, SWD(2020) 127 final: out of a total of 155 refusals in 2018 (p. 16), 65 refusals ware based on Art. 12 (p. 19).
[166] ECJ, judgment 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, paragraph 51.
[167] ECJ, judgment of 17 December 2020, *Generalstaatsanwaltschaft Hamburg*, C-416/20 PPU, ECLI:EU:C:2020:1032, paragraph 52.
[168] ECJ, judgment of 17 December 2020, *Generalstaatsanwaltschaft Hamburg*, C-416/20 PPU, ECLI:EU:C:2020:1032, paragraph 53.

In the period of 1 April 2021 – 26 May 2021, the District Court of Amsterdam rendered judgment in twenty-six cases in which it devoted attention to the applicability of Art. 12 on the Law on Surrender.[169] In sixteen of those cases, either the requested person had appeared in person at the trial resulting in the decision or one of the situations referred to in sections a-d of that provision applied. In the remaining eight cases, the requested person had not appeared in person and none of those situations applied. In four of those eight cases, the court decided *not* to refuse the execution of the EAW.[170] The common thread of the court's ruling in those four cases is that the information provided by the issuing judicial authority showed that the requested person was – sufficiently – aware the proceedings and of the charges against him and, in two of these cases, that he was aware of the consequences of not receiving official mail at the address provided by him. In three of the other four cases,[171] the information provided by the issuing judicial authority did not allow for the conclusion that the requested person was – sufficiently – aware of the proceedings and the charges against him and, consequently, could not carry the conclusion that the requested person had waived his right to attend or has displayed a manifest lack of diligence.[172]

E. Offences

Explanation
Section (e) is intended 'to provide details of the offence for the purposes of applying Article 2' (opinion of A-G M. Bobek of 26 November 2019, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2019:1011, paragraph 59). Section (e) covers the information referred to in Art. 8(1)(d)-(e) of FD 2002/584/JHA ('the nature and legal classification of the offence, particularly in respect of Article 2' and 'a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person'). Besides providing a basis for checking whether the conditions of Art. 2 are met, the information required by section (e) also serves the purposes of:
- informing the requested person of the offence(s) for which surrender is sought (see Art. 6 of the Charter in conjunction with Art. 5(2) of the ECHR);

[169] Source: e-archive of the District Court of Amsterdam, accessed on 26 May 2021.
[170] District Court of Amsterdam, judgment of 15 April 2021, ECLI:NL:RBAMS:2021:1813; District Court of Amsterdam, judgment of 15 April 2021, ECLI:NL:RBAMS:2021:1803; District Court of Amsterdam, judgment of 22 April 2021, ECLI:NL:RBAMS:2021:2321 (not published); District Court of Amsterdam, judgment of 12 May 2021, ECLI:NL:RBAMS:2021:2407 (not published).
[171] District Court of Amsterdam, judgment of 15 April 2021, ECLI:NL:RBAMS:2021:1818; District Court of Amsterdam, judgment of 22 April 2021, ECLI:NL:RBAMS:2021:2353; District Court of Amsterdam, judgment of 29 April 2021, ECLI:NL:RBAMS:2021:2325.
[172] In the remaining case - District Court of Amsterdam, judgment of 21 April 2021, ECLI:NL:RBAMS:2021:1969 - the court considerably narrowed its criterion: it could not establish whether the requested person was aware of *the next scheduled trial date*. Perhaps this ruling was influenced by the fact that the issuing judicial authority had already provided information which turned out to be incorrect, *viz.* that requested person was summoned in person to that scheduled trial date. That fact may have tainted other information which, otherwise, might have allowed for the conclusion that the requested person was – sufficiently – aware of the proceedings and of the charges against him.

- enabling the executing judicial authority to check whether there are grounds for refusal (*e.g. ne bis in idem* (Art. 3(2)), double criminality (Art. 4(1)), prescription (Art. 4(4));

- (together with the decision to execute the EAW) enabling the authorities of the issuing Member State to comply with the speciality rule (Art. 27 and 28 of FD 2002/584/JHA) and enabling the surrendered person to monitor compliance with that rule.

The structure of section (e) leaves something to be desired. Section (e) requires a description of the offences at two different places: at the top of section (e) and under point II. As point II clearly refers to non-listed offences, the implication seems to be that listed offences should be described at the top of section (e) and non-listed offences under point II.

The EAW-form seems to differentiate its requirements as to the description of the offence(s): regarding a non-listed offence a 'full' description is required (point II of section (e)).

With regard to the listed offences of Art. 2(2) of FD 2002/584/JHA, in conjunction with section (e)(I), it should be remembered that 'the actual definition of those offences and the penalties applicable are those which follow from the law of 'the issuing Member State'', as is apparent from the wording of Art. 2(2). After all, FD 2002/584/JHA 'does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract'. Consequently, the vagueness of some of the listed offences does not support the conclusion that Art. 2(2) infringes the principle of legality of criminal offences and penalties (ECJ, judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, ECLI:EU:C:2007:261, paragraphs 51-54). Concerning the role of the executing judicial authority in checking compliance with Art. 2(2), if any, according to A-G M. Bobek the FD 'relies on a system of self-declaration, where only a minimum and prima facie review by the executing judicial authority is provided for' (opinion of 26 November 2019, *X (European arrest warrant – Double criminality),* C-717/18, ECLI:EU:C:2019:1011, paragraph 70).[173]

Some grounds for refusal refer to the 'act' or the 'acts' on which the EAW is based. See, *e.g.*, Art. 3(2) ('the same acts'), Art. 4(1) ('the act'), Art. 4(2) ('the same act') and Art. 4(4) ('the acts'). Section (e) identifies the 'act(s)' on which the EAW is based.

Conceivably, the way in which the executing judicial authorities assess whether:

- there was a final judgment for 'the same acts' (Art. 3(2));

- 'the act' constitutes an offence under the law of the executing Member State (Art. 4(1));

- the requested person is being prosecuted in the executed Member State for 'the same act' (Art. 4(2)); and

[173] A recent preliminary reference questions whether the executing judicial authority has any discretion in this regard: C-120/20 (*LU*), with regard to Art. 5(1) of FD Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties (*OJ*, L 76/16).

- whether the prosecution of the punishment for 'the acts' is statute-barred under the law of the executing Member State (Art. 4(4)),

influences the decision whether the information about 'the act(s)', provided in section (e), is sufficient to decide on the execution of the EAW.

The Court of Justice has held that the concept of 'the same acts' both in Art. 54 CISA and in Art. 3(2) of FD 2002/584/JHA refers 'only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected' (ECJ, judgment of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683, paragraphs 39-40).

In the context of FD 2008/909/JHA the Court of Justice has held that assessing double criminality entails verifying whether 'the factual elements underlying the offence (…), would also, per se, be subject to a criminal sanction in the territory of the executing State if they were present in that State' (ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4, paragraph 38).

Issues concerning section (e)

Meaning of the term "offence"
Neither FD 2002/584/JHA nor the EAW-form contains a definition of the term "offence".

Incomplete description of the offence
The description of the offence (whether listed or non-listed) does not always mention the time, place and/or the degree of participation of the requested person in the offence.

Description of the investigation instead of description of the offence
In prosecution-cases, section (e) regularly describes the investigation of the offence, detailing *why* the requested person is suspected of having committed an offence instead of simply describing *which offence* he is suspected of having committed.

Detailing the number of offences (and numbering them separately)
In case of multiple offences, the number of offences is not always given and the offences are not always presented and numbered separately.

Divergence between number of offences described and the applicable legal classifications
In case of multiple offences, the offences described in section (e) are not always clearly linked to the applicable legal classifications. The number of offences described does not always correspond to the number of legal classifications mentioned.

Vague designations of listed offences
Some of the designated listed offences are so vague that it is hard to determine what is covered by that designation and to distinguish one listed offence from the other (*e.g.* 'fraud' and 'swindling').

Divergent designations of listed offences

The order of listed offences sometimes deviates from the official order in FD 2002/584/JHA. Designations of listed offences are sometimes used which deviate from the official designations in FD 2002/584/JHA.

Non-listed offence(s) not described under point II
Non-listed offences are not always described under point II of section (e).

Offences described both as listed and as non-listed
Offences are sometimes described both as listed and as non-listed, meaning that one of the categories of point I is ticked regarding a particular offence, while at the same time that offence is described under point II.

25. Have the issuing judicial authorities of your Member State experienced any difficulties with regard to section (e)? If so, please describe those difficulties and how they were resolved.

Answer

Although this question - obviously - refers to difficulties in dealing with the executing judicial authorities, the issuing judicial authorities thought that it referred to difficulties with the Dutch public prosecutor when requesting the issuing of an EAW. Consequently, it was not possible to determine whether there are difficulties with regard to section (e) of the EAW.

26. Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (e)? If so, please describe those difficulties and how they were resolved.

Answer

The District Court of Amsterdam has had to deal with most of the issues mentioned in the explanation.

Not all of those issues have consequences. Some of the issues may be caused by divergent opinions on the meaning of the term ‘offence’.

In determining whether the description of the offence is in conformity with Art. 8(1)(e) of FD 2002/584/JHA, the District Court of Amsterdam will examine whether that description is such that the requested person can inform himself of the offences for which his surrender is sought (compare Art. 5(2) of the ECHR) and that the court can decide on the execution of the EAW. Moreover, the description must be such that, if the requested person is surrendered, compliance with the rule of speciality is guaranteed (which means, in essence, that the description must not be (too) vague). In its decisions, the District Court of Amsterdam distinguishes between prosecution- and execution-cases. In prosecution-cases the description of the offence is allowed to be less precise than in execution-cases, because in the former

cases the criminal investigation into the offences has not yet been finally concluded.[174] This is in line with the case-law of the Supreme Court in extradition-cases.[175]

If the description of the offence is not complete, *e.g.* because the time, place and/or the degree of participation of the requested person in the offence are missing, the court will request supplementary information. If the EAW-file contains 'Form A' (relating to an alert in SIS), the court will read the description of the offence in section (e) of the EAW in combination with the content of 'Form A' and/or the national arrest warrant (where available), thus, if possible, remedying the defect in that description.[176]

If the EAW describes the investigation leading up to the issuing of the EAW, instead of only describing the offence, this is inconvenient – because it is redundant and can elicit arguments about whether there are sufficient grounds to suspect the requested person of having committed the offence – but it does not have any consequence, provided that the description of the offence, in itself, conforms to Art. 8(1)(e) of FD 2002/584/JHA.

The offences described in section (e) of the EAW must be covered by the national judicial decision referred to in section (b) of the EAW. Adding an offence by e-mail not covered by the national arrest warrant on which the EAW is based, will lead to a refusal for that offence.[177]

If an EAW is issued for multiple offences, but does not specify the number of offences and does not present and number them separately, again this is (highly) inconvenient, but it does not have any consequences, provided that the description of the offences conforms to Art. 8(1)(e) of FD 2002/584/JHA.

Divergence between the number of offences described and the number of applicable legal classifications mentioned in section (e), again is an irritant. When the number of applicable legal classifications does not correspond to the number of offences described, as a rule some offences appear to be covered by more than one legal classification.[178]

As regards listed offences, the District Court of Amsterdam applies a marginal check: when there is a manifest discrepancy between the description of the offence and the listed offence which was ticked by the issuing judicial authority, the court will treat the offence as a non-listed offence and verify whether it constitutes an offence under Dutch law. Of course, if the

---

[174] See, *e.g.*, District Court of Amsterdam, judgment 16 September 2020, ECLI:NL:RBAMS:2020:4644; District Court of Amsterdam, judgment of 8 October 2020, ECLI:NL:RBAMS:2020:5320; District Court of Amsterdam, judgment of 21 October 2020, ECLI:NL:RBAMS:20205331; District Court of Amsterdam, judgment of 24 December 2020, ECLI:NL:RBAMS:2020:6777; District Court of Amsterdam, judgment of 23 March 2021, ECLI:NL:RBAMS:2021:1411.

[175] See, *e.g.*, Supreme Court, judgment of 22 July 1986, *NJ* 1987/300.

[176] See, *e.g.*, District Court of Amsterdam, judgment of 11 December 2012, ECLI:NL:RBAMS:2012:BZ0832 (the place where the offence was committed); District Court of Amsterdam ,judgment of 22 August 2019, ECLI:NL:RBAMS:2019:6228 (time and place of the offence); District Court of Amsterdam, judgment of 8 October 2020, ECLI:NL:RBAMS:2020:5320 (time of the offence); District Court of Amsterdam, judgment of 20 October 2020, ECLI:NL:RBAMS:2020:5051 (degree of participation: 'perpetrator').

[177] District Court of Amsterdam, judgment of 21 May 2019, ECLI:NL:RBAMS:2019:4088.

[178] See, *e.g.*, District Court of Amsterdam, judgment of 28 February 2017, ECLI:NL:RBAMS:2017:1285: the EAW mentioned five offences, but pertained to two robberies; four of those five offences referred to one of those robberies, which had four victims.

listed offence does not carry a maximum sentence of at least three years in the issuing Member State, the District Court of Amsterdam will treat it as a non-listed offence as well (see also the answer to question 27a). According to the District Court of Amsterdam the maximum sentence in case of an inchoate offence (an attempt to commit a certain offence (the predicate offence; *gronddelict*)) is the maximum sentence for the predicate offence.[179] It seems that this ruling is incorrect. After all, the maximum sentence mentioned in Art. 2(2) and Art. 8(1)(c) of FD 2002/584/JHA and in section (c) of the EAW is the sentence which 'is liable to be imposed'.[180]

The District Court of Amsterdam will not treat an offence as a listed offence, when that offence is not an 'official' listed offence as mentioned in FD 2002/584/JHA and Annex 1 to the Law on Surrender.[181] However, sometimes 'non-official' designations seem to be caused by a faulty translation: *e.g.* 'extorsion by force with use of a gun or threat of using a gun' instead of 'racketeering and extortion'. In such cases, against the background of the description of the offence, the court can establish that the issuing judicial authority intended to tick the box of an official listed offence.[182] A deviation in the official order of the listed offences is inconvenient and can lead to confusion but, in itself, has no consequences.[183]

When a non-listed offence is not described under point II of section (e) nor anywhere else in the EAW, the District Court of Amsterdam will request a description of that offence. When an offence is described both as listed and as non-listed, as a rule the court will regard it as a listed offence (but see the answer to question 27a).

27. How do the executing judicial authorities of your Member State assess whether:

a) the requested person is the subject of a final judgment in respect of the same acts on which the EAW is based;

b) the acts on which the EAW is based constitute an offence under the law of the executing Member State? Does such an assessment take place:

- *ex tunc* – *i.e.* according to law at the time the acts were committed –;

- according to the law at the time of issuing the EAW; or

- *ex nunc* – *i.e.* according to law at the time of the decision on the execution of the EAW –?

---

[179] District Court of Amsterdam, judgment of 30 December 2020, ECLI:NL:RBAMS:2020:6953.
[180] ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, paragraph 31.
[181] District Court of Amsterdam, judgment of 12 May 2020, ECLI:NL:RBAMS:2020:2582. In this case, the issuing judicial authority seemed to have extended the scope of the listed offence 'trafficking in human beings' ('mensenhandel') by adding another offence ('trafficking in human beings/smuggling human beings'; 'mensenhandel/mensensmokkel').
[182] District Court of Amsterdam, judgment of 31 October 2014, ECLI:NL:RBAMS:2014:7915; District Court of Amsterdam, judgment of 3 November 2015, ECLI:NL:RBAMS:2015:8538.
[183] District Court of Amsterdam, judgment of 31 October 2014, ECLI:NL:RBAMS:2014:7915.

ImprovEAW RESEARCH PROJECT

Have the executing judicial authorities of your Member State actually refused to execute an EAW, because the acts on which the EAW was based did not constitute an offence under the law of your Member State? If so, please give some examples;

c) the act for which the requested person is being prosecuted in the executing Member State are the same acts on which the EAW is based;

d) the prosecution or punishment of the acts on which the EAW is based is statute-barred according to the law of the executing Member State? Does such an assessment take place:

- *ex tunc* – *i.e.* according to law at the time the acts were committed –;
- according to the law at the time of issuing the EAW; or
- *ex nunc* – *i.e.* according to law at the time of the decision on the execution of the EAW –?

Answer

a) In assessing whether the requested person is the subject of a final judgment in respect of the same acts on which the EAW is based, the District Court of Amsterdam applies the ECJ's case-law. The court will compare the description of the offence in the EAW - *i.e.* the acts described in section (e) - with the description of the offence in the final judgment – *i.e.* the acts described in that judgment - in order to determine whether they form 'a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected'.[184]

b) In assessing whether the acts on which the EAW is based constitute an offence under Dutch law, the District Court of Amsterdam applies the *Grundza* judgment of the ECJ[185] *mutatis mutandis* to EAW-matters.[186] The court will verify whether the factual elements underlying the offence, as mentioned in the EAW, would also, *per se*, be subject to a criminal penalty in the Netherlands if they were present there.[187] It is not required that the interest protected by the applicable legal provision of the executing Member State is identical to the interest protected by the legal provisions of the issuing Member State.[188]

This assessment is *ex nunc*: the law as its stands at the time of the decision on the execution of the EAW is determinative.[189] If the acts constitute an offence under Dutch law at that moment, the ground for refusal of Art. 7(1) of the Law on Surrender – which transposes Art.

---

[184] ECJ, judgment of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683, paragraphs 39-40.
[185] ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4.
[186] See, e.g., District Court of Amsterdam, judgment of 17 January 2017, ECLI:NL:RBAMS:2017:312; District Court of Amsterdam, judgment of 8 February 2018, ECLI:NL:RBAMS:2018:655; District Court of Amsterdam, judgment of 8 November 2019, ECLI:NL:RBAMS:2019:8351; District Court of Amsterdam, judgment of 17 September 2020, ECLI:NL:RBAMS:2020:6087.
[187] Compare ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4, paragraph 47.
[188] District Court of Amsterdam, judgment of 17 September 2020, ECLI:NL:RBAMS:2020:6087.
[189] District Court of Amsterdam, judgment of 22 December 2016, ECLI:NL:RBAMS:2016:8717; District Court of Amsterdam, judgment of 21 August 2018, ECLI:NL:RBAMS:2018:6367 (not published); District Court of Amsterdam, judgment of 26 March 2019, ECLI:NL:RBAMS:2019:3162.

4(1) of FD 2002/584/JHA – is not applicable, even where the acts did not constitute an offence at the time they were committed or at the time the EAW was issued (or received). This is in keeping with the case-law of the Supreme Court in *extradition*-cases[190] and does not violate the *nulla poena* principle of Art. 7 of the ECHR[191] and of Art. 49(1) of the Charter.[192] Of course, in *criminal cases*, the *nulla poena* principle will apply, which is also guaranteed by Art. 16 of the Constitution (*Grondwet*) and Art. 1(1) of the Criminal Code (*Wetboek van Strafrecht*).

Applying the prohibition of retroactivity inherent in the *nulla poena* principle to the ground for refusal of Art. 4(1) – which would result in an assessment *ex tunc* – would *broaden* its scope of application. After all, when the prohibition of retroactivity applies, the ground for refusal is applicable to conduct which was not an offence in the executing Member State at the time of commission; when the prohibition of retroactivity does not apply, the ground for refusal is only applicable to conduct which is not an offence in the executing Member State at the time of the decision on the execution of the EAW (*ex nunc*). Broadening the scope would (potentially)[193] have a *negative impact* on surrender.

Some examples of decisions to refuse to execute an EAW, because the acts mentioned in the EAW do not constitute an offence under Dutch law:

- escaping from prison;[194]
- non-compliance with a ‘precautionary measure’ (house arrest);[195]
- facilitating prostitution;[196]
- committing an act concerning drugs the substance of which was not established;[197]
- illegally entering or residing in a Member State as an alien;[198]
- offering and supplying synthetic drugs not covered by Dutch anti-drugs legislation;[199]
- failing to pay maintenance for a child, thus exposing the child to the inability to satisfy his basic needs, where the perpetrator did not (intentionally) expose the child to a concrete risk for its life or health;[200]
- threatening someone with assault;[201]

---

[190] See, *e.g.*, Supreme Court, judgment of 16 January 1973, ECLI:NL:HR:1973:AB4979, *NJ* 1973/281; Supreme Court, judgment of 8 July 2003, ECLI:NL:HR:2003:AE5288; Supreme Court, judgment of 18 November 2003, ECLI:NL:HR:2003:AH8601.
[191] See European Commission of Human Rights, decision of 6 July 1976, *X. v. the Netherlands*, ECLI:CE:ECHR:1976:0706DEC000751276; European Commission of Human Rights, decision of 6 March 1991, *Polley v. Belgium*, ECLI:CE:ECHR:1991:0306DEC001219286; European Commission of Human Rights, decision of 18 January 1996, *Bakhtiar v. Switzerland*, ECLI:CE:ECHR:1996:0118DEC002729295; ECtHR, decision of 7 October 2008, *Monedero Angora v. Spain*, ECLI:CE:ECHR:2008:1007DEC004113805.
[192] According to the Court of Justice, it is up to the authorities of the *issuing* Member State to respect the *nulla poena* principle: ECJ, judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, ECLI:EU:C:2007:261, paragraph 53.
[193] Art. 4(1) of FD 2002/584/JHA contains a ground for *optional* refusal.
[194] District Court of Amsterdam, judgment of 9 March 2017, ECLI:NL:RBAMS:2017:1739.
[195] District Court of Amsterdam, judgment of 26 October 2017, ECLI:NL:RBAMS:2017:7853.
[196] District Court of Amsterdam, judgment of 23 January 2018, ECLI:NL:RBAMS:2018:446.
[197] District Court of Amsterdam, judgment of 1 November 2018, ECLI:NL:RBAMS:2018:8959.
[198] District Court of Amsterdam, judgment of 18 April 2019, ECLI:NL:RBAMS:2019:3169.
[199] District Court of Amsterdam, judgment of 20 August 2019, ECLI:NL:RBAMS:2019:6196.
[200] District Court of Amsterdam, judgment of 8 November 2019, ECLI:NL:RBAMS:2019:8351.
[201] District Court of Amsterdam, judgment of 17 March 2020, ECLI:NL:RBAMS:2020:2063. Under Dutch law only threatening a person with *aggravated* assault is an offence (Art. 285(1) of the Penal Code).

- escaping from police custody;[202]
- giving false testimony, when it is not established that the person giving testimony was under oath;[203]
- entering a port area without threats or violence, when it is not established that entry in that area was publicly forbidden.[204]

Since 1 April 2021, the national provision which transposes Art. 4(1) of FD 2002/584/JHA (Art. 7(1)(a)(2°) of the Law on Surrender) contains an *optional* ground for refusal. Under this new provision the District Court of Amsterdam is no longer required to refuse to execute an EAW with respect to acts which do not constitute an offence under Dutch law. One of the relevant factors for abstaining from refusing to execute the EAW is the existence or absence of a real connection of the offence with the legal order of the Netherlands.[205] Another important factor is whether the requested person would have to be surrendered anyway for other offences mentioned in the EAW[206] or on the basis of another EAW.

c) In assessing whether the acts for which the requested person is being prosecuted in the executing Member State are the same acts on which the EAW is based, the District Court of Amsterdam applies the ECJ's case-law on *ne bis in idem* by analogy.[207] See the answer to question a).

Since 1 April 2021, the national provision which transposes Art. 4(2) of FD 2002/584/JHA (Art. 9(1)(a) of the Law on Surrender) contains a ground for *optional* refusal. Under this new provision the District Court of Amsterdam is no longer required to refuse to execute the EAW with respect to acts for which the requested person is being prosecuted in the Netherlands. The Minister of Justice and Security has the power to order that such a prosecution be halted with a view of making surrender possible in which case the executing judicial authority cannot apply the ground for refusal (Art. 9(3) of the Law on Surrender) – which power he already had before 1 April 2021 –, but even in the absence of such a ministerial order (*stakingsbeslissing*) the District Court of Amsterdam is no longer required to refuse to execute an EAW concerning acts for which the requested person is being prosecuted in the Netherlands. Although the role of a non-judicial authority in the decision making process is still problematic, at least where the Minister for Justice and Security decides to carry out that role it is in favour of surrender.

d)

Statute-bar according to the law of the issuing Member State

Statute-barred prosecution or punishment according to the law of *issuing* Member State does not constitute a ground for refusal (see Art. 4(4) of FD 2002/584/JHA, which only refers to statute-barred prosecution or punishment according to the law of the *executing* Member

[202] District Court of Amsterdam, judgment of 3 September 2020, ECLI:NL:RBAMS:2020:4331.
[203] District Court of Amsterdam, judgment of 15 June 2021, ECLI:NL:RBAMS:2021:3317.
[204] District Court of Amsterdam, judgment of 29 June 2021, parketnummer 13/751420-21 (not published).
[205] District Court of Amsterdam, judgment of 15 April 2021, ECLI:NL:RBAMS:2021:1803: the requested person and the victim both had the nationality of the issuing Member State and the offence was committed in that Member State: the court abstained from refusal.
[206] District Court of Amsterdam, judgment of 29 April 2021, ECLI:NL:RBAMS:2021:2323 (not published).
[207] See, *e.g.*, District Court of Amsterdam, judgment of 18 September 2009, ECLI:NL:RBAMS:2009:BK2284.

State). Consequently, pursuant to the principle of mutual trust there is a presumption that the issuing judicial authority will not issue an EAW where prosecution or punishment of a penalty in the issuing Member State is no longer possible.

However, it cannot be excluded that prosecution or punishment in the issuing Member State becomes statute-barred *after* the EAW was issued but before the executing judicial authority decides on the execution of that EAW, *e.g.* in cases in which there is a long delay between issuing the EAW and arresting the requested person or between the arrest of the requested person and the decision on the execution of the EAW.

At least two such cases occurred in the Netherlands. In one case, an EAW for the prosecution of four offences was issued in 2010 but the requested person was not found and arrested until 2021. Section (f) of the EAW mentioned that the right to prosecute one of the offences would expire in 2017. The District Court ruled that a statute-bar under the law of the issuing Member State does not constitute a ground for refusal and ordered surrender for all of the offences.[208] In another case, an EAW for prosecution of five offences was issued in 2010, the requested person was arrested in 2018 but the decision on the execution of the EAW was only taken in 2021. Section (f) of the EAW indicated that the right to prosecute for one of the offences would expire in 2012. The court observed that the right to prosecute according to *Dutch* law had not expired for any of the offences, did not comment on expiry of the right to prosecute according to the law of the *issuing* Member State, and ordered surrender for all of the offences.[209]

Of course, the court was perfectly correct in ruling that a statute-bar under the law of the issuing Member State does not constitute a ground for refusal. However, the indication in the EAW that the right to prosecute would expire at a certain date where the decision on the execution of that EAW is taken after that date raises another issue. The mention of the existence of an 'enforceable' national judicial decision in the sense of Art. 8(1)(c) of FD 2002/584/JHA in section (b) of the EAW confirms the presumption that prosecution or punishment was not statute-barred according to the law of the *issuing* Member State *at the time of issuing the EAW*.[210] If, *afterwards*, the right to prosecute or to punish expires, the national judicial decision on which the EAW is based cannot be said to be 'enforceable' in the sense of Art. 8(1)(c) of FD 2002/584/JHA any longer.[211] An EAW which is not based on an enforceable national judicial decision is not a valid EAW.[212]

Although the court's reasoning was rather laconic, in both particular cases its decision to order surrender seems justified. After all, in both cases the EAW and the national arrest warrant also pertained to *other offences* for which the requested person could be prosecuted and for which he would have to be surrendered anyway. After surrender, it was open to him to

[208] District Court of Amsterdam, judgment of 13 July 2021, parketnummer 13/751897-14.
[209] District Court of Amsterdam, judgment of 9 July 2021, ECLI:NL:RBAMS:2021:3658.
[210] Vincent Glerum, *De weigeringsgronden bij uitlevering en overlevering. Een vergelijking en kritische evaluatie in het licht van het beginsel van wederzijdse erkenning* (PhD thesis Amsterdam VU), Nijmegen: Wolf Legal Publishers 2013, p. 600-601.
[211] In the same vein, with regard to an amnesty in the issuing Member State, advocate general J. Kokott, opinion of 17 June 2021, *AB and Others (Revocation of an amnesty)*, ECLI:EU:C:2021:498, paragraph 33.
[212] ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2015:385, paragraph 64; ECJ, judgment of 13 January 2021, *MM*, C-414/20 PPU, ECLI:EU:C:2021:56.

argue before the authorities of the issuing Member State that the right to prosecute for one of the offences had expired.

Statute-bar according to the law of the executing Member State

In assessing whether the prosecution or the enforcement of a sentence for acts on which the EAW is based is statute-barred according to the law of the executing Member State, the District Court of Amsterdam will first have to determine whether those acts constitute an offence under Dutch law and, if so, which offence (see the answer to question b).

Under Dutch law, some, very serious, offences are not statute-barred. With regard to other offences Dutch law distinguishes between prosecution-cases and execution-cases.

In *prosecution*-cases, the applicable period of limitation is dependent on the maximum sentence for the offence at issue (Art. 70 of the Penal Code). Any 'act of prosecution' will interrupt the period of limitation, after which a new period of limitation will start to run (Art. 72(1) of the Penal Code). With regard to crimes (*misdrijven*), however, the right to prosecute will expire if a period has elapsed equal to twice the applicable limitation period starting on the day on which the original period of limitation started to run (Art. 72(2) of the Penal Code). When deciding whether a period of limitation was interrupted, the District Court of Amsterdam will also have regard to 'acts of prosecution' by authorities of the issuing Member State which, if they were committed by Dutch authorities, would have the effect of interrupting the period of limitation, *e.g.*, subpoenaing the defendant, issuing an arrest warrant,[213] holding a trial hearing,[214] rendering a judgment, and/or issuing an EAW.[215]

In *execution*-cases, the applicable period of limitation exceeds the period of limitation for prosecution-cases with one third (Art. 6:1:22 of the Code of Criminal Procedure). The period of limitation starts running the day after the judgment becomes enforceable (Art. 6:1:23(1) of the Code Criminal Procedure). As a general rule, a judgment is not enforceable, as long as there is an ordinary legal remedy which may be exercised against it and, if said remedy is exercised, until said remedy is withdrawn or a decision has been given thereon (Art. 6:1:13(1) of the Code of Criminal Procedure).[216]

In *execution*-cases, the District Court of Amsterdam will *only* assess whether the right to execute a sentence has expired and not also whether the right to prosecute had expired in the period before the judgment became enforceable.[217] In doing so, the court does not follow the

---

[213] District Court of Amsterdam, judgment of 29 April 2010, ECLI:NL:RBAMS:2010:6364.
[214] District Court of Amsterdam, judgment of 6 June 2019, ECLI:NL:RBAMS:2019:4704.
[215] District Court of Amsterdam, judgment of 30 July 2019, ECLI:NL:RBAMS:2019:5609; District Court of Amsterdam, judgement of 9 July 2021, ECLI:NL:RBAMS:2021:3658.
[216] If a judgment is not enforceable yet because the requested person may still exercise the legal remedy of opposition, the court will examine whether the right *to prosecute* has expired: District Court of Amsterdam, judgment of 2 June 2021, parketnummer 13/751855-19.
[217] See, *e.g.*, District Court of Amsterdam, judgment of 7 May 2021, ECLI:NL:RBAMS:2021:2467: implicit; the EAW was issued for the purposes of prosecution and of execution of four sentences. With regard to the prosecution-part of the EAW, the court assessed whether the right to prosecute had expired, with regard to the execution-part whether the right to execute the sentences had expired.

Supreme Court's extradition case-law concerning Art. 10 of the European Convention on Extradition.[218]

If, in an *execution*-case, an aggregate or a cumulative sentence was imposed for multiple offences which carry different maximum sentences, the applicable period of limitation is determined on the basis the most severe maximum sentence.[219] In this respect, the District Court of Amsterdam follows the Supreme Court's case-law in extradition-matters.[220]

The assessment whether the applicable period of limitation has expired is *ex nunc*, *i.e.* according to the law at the time of the decision on the execution of the EAW,[221] even where the right to prosecute or to execute the sentence would have been expired according to the law at the time the acts were committed or at the time the EAW was issued (or received). This is in keeping with the Supreme Court's case-law on *extradition*.[222]

> In *criminal cases* the assessment is also *ex nunc*, but once the right to prosecute the sentence had expired according to the law at the time the acts were committed the prosecution is statute-barred.[223] This is in line with EU law. Under EU law, in criminal cases rules concerning time limitations may apply retroactively. Thus, an extension of a time limitation may be applied retroactively to an offence which has never become statute-barred. This is so, because such rules are not covered by the *nulla poena* principle of Art. 49(1) of the Charter.[224]

The ground for refusal *only* applies where 'the acts fall within the jurisdiction of [the issuing Member State] under its own criminal law' (Art. 4(4) of FD 2002/584/JHA). Whereas that provision uses the present tense – which could be interpreted as an indication that the assessment whether the condition of jurisdiction is met is *ex nunc* –, Art. 9(1)(f) of the Law on Surrender uses the past tense: 'Surrender may be refused for an offence for which: (…) f. jurisdiction could have been exercised under Dutch law (…)' ('Overlevering kan worden geweigerd voor een feit ten aanzien waarvan: (...) f. naar Nederlands recht rechtsmacht kon worden uitgeoefend (...)') – which could be interpreted as an indication that the assessment whether the condition is met is *ex tunc*.

In the opinion of the Dutch legislator the prohibition of retroactivity inherent in the *nulla poena* principle, *as a rule*, applies to provisions conferring jurisdiction, thus not excluding the possibility of retroactive application.[225] The Supreme Court of the Netherlands has also not

---

[218] Supreme Court, judgment of 26 June 1984, *NJ* 1985/57. See also Supreme Court, judgment of 3 March 1987, *NJ* 1988/1003.
[219] District Court of Amsterdam, judgment of 5 March 2021, ECLI:NL:RBAMS:2021:1111 (not published).
[220] Supreme Court, judgment of 28 June 1983, *NJ* 1984/79; Supreme Court, judgment of 29 October 1991, ECLI:NL:HR:1991:ZC8881, *NJ* 1992/268.
[221] District Court of Amsterdam, judgment of 13 February 2008, ECLI:NL:RBAMS:2008:BF8822; District Court of Amsterdam, judgment of 29 April 2010, ECLI:NL:RBAMS:2010:BM6364.
[222] See, *e.g.*, Supreme Court, judgment of 1 July 1977, ECLI:NL:HR:1977:AB6982, *NJ* 1977/601; Supreme Court, judgment of 11 November 2008, ECLI:NL:HR:2008:BC9546; Supreme Court, judgment of 9 February 2021, ECLI:NL:HR:2021:201.
[223] See, *e.g.*, Supreme Court, judgment of 29 January 2010, ECLI:NL:HR:2010:BK1998.
[224] ECJ, judgment of 8 September 2015, *Taricco and Others*, C-105/14, ECLI:EU:C:2015:555, paragraphs 56-57; ECJ, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, ECLI:EU:C:2017:936, paragraph 42.
[225] See R. van Elst, 'Rechtsmacht', in: E. van Sliedregt & R. van Elst (Eds), *Handboek internationaal strafrecht. Internationaal en Europees Strafrecht vanuit Nederlands perspectief*, Deventer: Wolters Kluwer 2015, p. 82.

completely ruled out the possibility of retroactive application of jurisdictional provisions in criminal cases.[226]

In the context of the application of Art. 9(1)(f) of the Law on Surrender, the District Court of Amsterdam held that the Netherlands must have had jurisdiction at the time of the commission of the offence (*ex tunc*), unless the provision concerning jurisdiction has explicit retroactive effect (*ex nunc*).

These judgments were rendered before 1 July 2014, when jurisdiction over offences committed abroad by Dutch nationals was extended over offences committed abroad by Dutch *residents*. As a result, in cases in which the ground for refusal applies, the condition of jurisdiction is usually met because the requested person is either a national or a resident of the Netherlands at the time of the decision on the execution of the EAW. Pursuant to Art. 7(1) of the Penal Code, the Netherlands has jurisdiction to prosecute a Dutch national who, while he is abroad, commits a crime (*misdrijf*) under Dutch law, provided that, at the time of commission, it is also an offence under the law of the *locus delicti*. The same applies to a foreigner who *acquires* Dutch nationality *after commission of the offence* and to a foreigner who permanently resides in the Netherlands (Article 7(3) of the Penal Code).[227]

Whatever the status of jurisdictional provisions under the *nulla poena* principle may be, in contrast to the ground for refusal of Art. 4(1) of FD applying the *nulla poena* principle to jurisdiction *as a condition for a refusal* on the basis of Art. 4(4) of FD 2002/584/JHA *restricts* the scope of that ground for refusal and, therefore, *facilitates* surrender.

Since 1 April 2021, the national provision which transposes Art. 4(4) of FD 2002/584/JHA (Art. 9(1)(f) of the Law on Surrender) contains a ground for *optional* refusal. Under this new provision the District Court of Amsterdam is no longer required to refuse to execute the EAW with respect to acts for which the prosecution or the execution of a sentence is statute-barred according to Dutch law. A relevant factor for not refusing to execute the EAW is a connection between the offence and the legal order of the Netherlands.[228]

27a. Regarding listed offences,

- (a) have the issuing judicial authorities of your Member State had any difficulties in deciding whether a certain offence constitutes a listed offence? If so, please describe those difficulties and how they were resolved;

- (b) do the executing judicial authorities of your Member State assess whether the issuing judicial authority correctly ticked the box of a listed offence? If so,

    - (i) please describe how they assess that;

---

[226] Supreme Court of the Netherlands, judgment of 21 October 2008, ECLI:NL:HR:2008:BD6568, paragraph 6.2.

[227] Art. 7(3) applies retroactively to offences committed before the entry into force of that provision (1 July 2014): Art. VI(1) of the Law of 27 November 2013, *Stb*. 2013, 484.

[228] See, *a contrario*, District Court of Amsterdam, judgment of 7 May 2021, ECLI:NL:RBAMS:2021:2467: the court refused to execute the EAW for four sentences, taking into consideration, *inter alia*, that the offences carried a minor penalty under Dutch law, that the requested person had built a life for himself in the Netherlands and that he had not tried to hide from the authorities of the issuing Member State.

- (ii) are there instances in which the executing judicial authorities actually found that a listed offence was not applicable; if so, which listed offence(s) and did those listed offence(s) constitute an offence under the law of your Member State?

Answer

a) The issuing judicial authorities did not report any difficulties.

b)

(i) Yes, the District Court of Amsterdam checks whether a listed offence designated by the issuing judicial authority is actually applicable. However, that review is not a full review. In principle, it is up to the issuing judicial authority to assess – on the basis of the law of the issuing Member State –[229] whether an offence is a listed offence. Only if there is a *manifest* discrepancy between the description of the offence – *i.e.* the description of the acts which constitute the offence under the law of the issuing Member State – and the designated listed offence (see the answer to sub question (ii)) or if the designated listed offence does not carry a maximum sentence of at least three years,[230] the District Court of Amsterdam will disregard the designation as a listed offence and will then verify double criminality.
A recent judgment of the Court of Justice confirms that the designation of an offence as a listed offence takes place on the basis of the law of the issuing Member State and, consequently, that the executing judicial authority is bound, in principle, by that designation.[231]

(ii) Yes. Some examples:
- 'illicit trafficking in narcotic drugs and psychotropic substances': buying small amounts of drugs for personal use, an offence under Dutch law;[232]
- 'illicit trafficking in narcotic drugs and psychotropic substances': being under the influence of marihuana, not an offence under Dutch law;[233]
- 'illegal trafficking in weapons, munitions and explosives' and 'kidnapping, illegal restraint and hostage-taking': receiving stolen goods (a car stereo), an offence under Dutch law ;[234]
- 'computer-related crime': stealing bankcards and using them, both offences under Dutch law;[235]

[229] See, *e.g.*, District Court of Amsterdam, judgment of 20 August 2021, ECLI:NL:RBAMS:2021:4361; District Court of Amsterdam, judgment of 9 September 2021, ECLI:NL:RBAMS:2021:5547.
[230] See, *e.g.*, District Court of Amsterdam, judgment of 15 May 2018, ECLI:NL:RBAMS:2018:3277; District Court of Amsterdam, judgment of 12 February 2019, ECLI:NL:RBAMS:2019:9908 (not published); District Court of Amsterdam, judgment of 29 October 2019, ECLI:NL:RBAMS:2019:808.
[231] ECJ, judgment of 6 October 2021, *LU (Recouvrement d'amendes de circulation routière)*, C-136/20, ECLI:EU:C:2021:804, paragraphs 41-42.
[232] District Court of Amsterdam, judgment of 5 February 2021, ECLI:NL:RBAMS:2021:433.
[233] District Court of Amsterdam, judgment 13 October 2020, ECLI:NL:RBAMS:2020:4969.
[234] District Court of Amsterdam, judgment of 13 September 2018, ECLI:NL:RBAMS:2018:6673 (not published). In this case, there were more offences and the issuing judicial authority gathered all of them under the cover of the listed offence.
[235] District Court of Amsterdam, judgment of 22 January 2021, ECLI:NL:RBAMS:2021:419.

- ‘kidnapping, illegal restraint and hostage-taking’: extortion and theft of licence plates, both offences under Dutch law;[236]
- ‘organised or armed robbery’: driving a motor vehicle without a driver’s licence, an offence under Dutch law.[237]

F. Other circumstances relevant to the case (optional information)

Explanation

Section (f) covers the information indicated in by Art. 8(1)(g) (‘if possible, other consequences of the offence’). By way of example, section (f) refers to ‘remarks on extraterritoriality, interruption of periods of time limitation and other consequences of the offence’.

As is clear from the wording of Art. 8(1)(g) and the heading of section (f), the issuing judicial authority is *not* required to provide such information.

Extraterritoriality (Art. 4(7)(b) of FD 2002/584/JHA)

According to Advocate-General J. Kokott:

- the ‘spirit and purpose’ of Art. 4(7)(b) is ‘to enable the executing judicial authority, when executing the European arrest warrant, to take into consideration key decisions of the requested Member State on the scope of its own criminal jurisdiction’ (opinion of 17 September 2020, *Minister for Justice and Equality v JR (Conviction by an EEA third State)*, C-488/19, ECLI:EU:C:2020:738, paragraph 70);
- that ground for refusal ‘applies only if the offence was committed *entirely* outside the requesting State, whereas it is not sufficient if only part of it took place there’ (opinion of 17 September 2020, *Minister for Justice and Equality v JR (Conviction by an EEA third State)*, C-488/19, ECLI:EU:C:2020:738, paragraph 78);
- that ground for refusal ‘applies not only to the enforcement of a prison sentence (…), but also to criminal prosecution’ (opinion of 17 September 2020, *Minister for Justice and Equality v JR (Conviction by an EEA third State)*, C-488/19, ECLI:EU:C:2020:738, paragraph 79);
- ‘when determining the criminal offence committed, focus has to be on the actual act. The specific circumstances which are inextricably linked together are decisive’ (opinion of 17 September 2020, *Minister for Justice and Equality v JR (Conviction by an EEA third State)*, C-488/19, ECLI:EU:C:2020:738, paragraph 82).

[236] District Court of Amsterdam, judgment 15 May 2019, ECLI:NL:RBAMS:2019:3546. In this case, there were more offences and the issuing judicial authority gathered all of them under the cover of the listed offence.
[237] District Court of Amsterdam, judgment of 27 November 2018, ECLI:NL:RBAMS:2018:8700. In this case, there were more offences and the issuing judicial authority gathered all of them under the cover of the listed offence.

Interruption of periods of time limitation

Time limitations according to the law of the *issuing* Member State do not constitute a ground for refusal (cf. Art. 4(4) of FD 2002/584/JHA). The existence of an *enforceable* national judicial decision (section (b)) implies that the prosecution or execution is not statute-barred according to the law of the *issuing* Member State. If the offence was committed or if the judgment was rendered a long time ago, to pre-empt requests for supplementary information (Art. 15(2) of FD 2002/584/JHA) it may be advisable to mention that the period of time limitation was interrupted.

Issues concerning section (f)

Extraterritoriality
Section (f) is only seldom completed. For the executing judicial authorities of Member States which transposed the optional ground for refusal concerning Art. 4(7)(b) of FD 2002/584/JHA, it would be helpful if the EAW contained a statement whether the offence(s) was/were committed wholly outside of the territory of the issuing Member State and, if so, which form of extraterritorial jurisdiction is claimed.

28. What kind of information do the issuing judicial authorities of your Member State usually provide in section (f)?

Answer

Judging from the answers to this question, most issuing judicial authorities usually do not provide optional information. Concerning execution-EAWs, however, section (f) is used to convey the message that the right to enforce the sentence is not statute-barred.

29. What kind of information do the executing judicial authorities of your Member State usually encounter in section (f)? What kind of information would they like to see in section (f)?

Answer

Usually, section (f) contains information about the period of limitation applicable in the issuing Member State and information about the proceedings in the issuing Member State (in addition to information provided in section (d)).

Additional information can be both a blessing and a curse. Additional information about the proceedings in the issuing Member State can be very useful, *e.g.*, when Art. 4a of FD is applicable. Such information could indicate that, even though none of the exceptions of Art. 4a(1)(a-d) applies, surrender would not constitute a breach of the requested person's rights of defence. However, unsolicited additional information can also be a curse, because such

information can elicit unfruitful discussion about irrelevant subjects. It can lead the requested person to raise arguments which cannot lead to a refusal of surrender.[238]

29a. Did the issuing and/or executing judicial authorities of your Member State encounter any problems regarding the exercise of extraterritorial jurisdiction in the sense of Art. 4(7)(b) of FD 2002/584/JHA? If so, please describe those problems and how they were resolved.

Answer

Executing side
No. The information contained in the EAW is usually sufficient to determine whether that ground for refusal is applicable (*i.e.* whether the offence was committed outside of the territory of the issuing Member State and, if so, whether the Netherlands could exercise extraterritorial jurisdiction in an analogous case).

In one case, a Belgian EAW mentioned that the offence was committed in Bocholt, however without mentioning in which country the offence was committed, thus leaving open the possibility that the offence was committed in Germany, which also has a town called Bocholt. The District Court of Amsterdam read the EAW in combination with 'Form A', which mentioned that the offence was committed in Bocholt, Belgium, and ruled that the ground for refusal of Art. 4(7)(b) of FD 2002/584/JHA did not apply.[239]

If, according to the information provided by the issuing judicial authority – either in the EAW or following a request for supplementary information –, the offence was committed outside the territory of the issuing Member State, the District Court of Amsterdam will apply a hypothetical analogous test to determine whether 'the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory'. In this test, the Netherlands take the place of the issuing Member State. Those aspects of the case which, from the viewpoint of the *issuing* Member State, have an exclusively 'national' character – such as the fact that the requested person is a national of that Member State –, are 'converted' into their *Dutch* equivalents.[240] An example: if Slovakia seeks surrender of a *Slovakian* national who has committed offences *in the Czech Republic*, the District Court of Amsterdam will examine whether the Netherlands would have jurisdiction to prosecute a *Dutch* national for those offences when committed *outside the Netherlands*.[241]

> Incidentally, establishing whether the Netherlands would have extraterritorial jurisdiction in a hypothetical analogous case requires establishing whether a listed offence is an offence under Dutch law. Jurisdiction presupposes an offence (and in

---

[238] See, *e.g.*, District Court of Amsterdam, judgment of 19 August 2021, ECLI:NL:RBAMS:2021:4487. Section (f) mentioned that the 'enforcement proceedings' had been suspended at one time. On the basis of this, the defence argued that the judgment of conviction was no longer enforceable. However, section (b)1 of the EAW referred to the judgment as an 'enforceable' judgment. Moreover, section (f) explained that the 'enforcement proceedings' had only been suspended in order to organise an (international) search for the person concerned, who had not reported to prison to undergo his sentence. Therefore, mentioning a suspension of the 'enforcement proceedings' did not in any way negate the enforceable character of the judgment.
[239] District Court of Amsterdam, judgment of 12 May 2020, ECLI:NL:RBAMS:2020:2582.
[240] See, *e.g.*, Nico Keijzer, 'Locus Delicti Exceptions', in: Nico Keijzer & Elies van Sliedregt (Eds.), *The European Arrest Warrant in Practice*, The Hague: TMC Asser Press, p. 97-98.
[241] See District Court of Amsterdam, judgment of 27 July 2011, ECLI:NL:RBAMS:2011:BR3440. See also District Court of Amsterdam, judgment of 6 August 2019, ECLI:NL:RBAMS:2019:5853.

some cases even a crime (*misdrijf*)). If the acts described in the EAW do not constitute an offence, Dutch law does not allow for a prosecution for those acts anyway.

Where the requested person is a Dutch national – and, thus, from the perspective of the issuing Member State a *foreigner* – the question arises whether this aspect of the case should also be 'converted'. In other words: should the executing judicial authority examine whether the Netherlands would have jurisdiction to prosecute a foreigner when the offence was committed outside the Netherlands? Or should it examine whether the Netherlands would have jurisdiction to prosecute a Dutch national when the offence was committed outside the Netherlands?

The first approach – hypothetically converting Dutch nationality into a foreign nationality – equates to establishing whether the executing Member State could exercise extraterritorial jurisdiction on a *similar* basis as the issuing Member State. The second approach equates to establishing whether the executing Member State could exercise extraterritorial jurisdiction on *any* basis.

In this respect it is important to note that the wording of Art. 4(7)(b) of FD 2002/584/JHA does not explicitly require, as a condition for refusal, that 'the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory' *on a similar basis as the law of the issuing Member State*. Moreover, the objective of that provision is 'to ensure that the judicial authority of the executing State is not obliged to grant a European arrest warrant (…) for an offence prosecuted under an international criminal jurisdiction that is broader than that recognised by the law of that State'.[242] One could argue that if the executing Member State would have extraterritorial jurisdiction to prosecute the offence, albeit on the basis of a *different* principle of extraterritorial jurisdiction than the issuing Member State, the jurisdiction exercised by the issuing Member State is not broader than that recognised by the executing Member State. At any rate, as an exception to the rule the ground for refusal of Art. 4(7)(b) of FD 2002/584/JHA must be interpreted strictly.[243] Requiring that the executing Member State could prosecute on the basis of a similar principle of extraterritorial jurisdiction would give the ground for refusal a broader scope than requiring that the executing Member State could prosecute on the basis of any principle of extraterritorial jurisdiction and, therefore, could lead to more refusals.

In a case concerning a German EAW against a Dutch national who had committed offences outside Germany the defence argued that the District Court of Amsterdam should examine whether the Netherlands would have jurisdiction to prosecute a foreign national for the offences when committed outside the Netherlands. However, the court did not decide this issue because the Netherlands would have had extraterritorial jurisdiction anyway irrespective of the nationality of the requested person.[244] Another case concerned a Belgian EAW issued against a Dutch national for an offence committed in Germany. In this case, the court did not convert the nationality of the requested person and examined whether the Netherlands would have jurisdiction to prosecute a Dutch national for the offence if committed outside the

[242] ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, paragraph 68.
[243] See, *e.g.*, ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, paragraph 39.
[244] District Court of Amsterdam, judgment of 11 September 2009, ECLI:NL:RBAMS:2009:BK9181.

Netherlands.[245] It answered this question in the affirmative. According to Art. 7(1) and (3) of the Criminal Code, the Netherlands can exercise extraterritorial jurisdiction over acts committed by a national or by a resident of the Netherlands which constitute a *crime* (*misdrijf*) under Dutch law and which also constitute an offence under the *lex loci delicti*.[246]

In most cases in which the requested person invoked the Dutch transposition of Art. 4(7)(b) of FD 2002/584/JHA – Art. 13(1)(b) of the Law on Surrender – that provision was held not to be applicable because the offence was at least partially committed in the territory of the issuing Member State.

Even if the offence is committed wholly outside the issuing Member State, cases in which the Netherlands would not have jurisdiction are rare. Two of such cases concerned drugs offences committed on the high seas on board of a Sierra Leonian ship by Syrian nationals.[247] However, in such cases a refusal of surrender is not automatic. Since 1 April 2021, Art. 13(1)(b) of the Law on Surrender contains a ground for optional refusal.

Issuing side
No.

G. The seizure and handing over of property

Explanation

Section (g) relates to Art. 29 of FD 2002/584/JHA. According to Art. 29(1), the executing judicial authority must in accordance with national law, either on its own initiative or at the request of the issuing judicial authority, seize and hand over two categories of property:

- property which may be required as evidence, and
- property which has been acquired by the requested person as a result of the offence.

Section (g) of the EAW-form affords the issuing judicial authority to indicate a request for seizure and handing over of property.

Issues concerning section (g)

Divergent language version of Art. 29(1) and section (g)
Regarding category (b) (‘property which has been acquired by the requested person as a result of the offence’) the Dutch language version of FD 2002/584/JHA contains a restriction which is not in the English, German and French language versions. The Dutch language version

[245] District Court of Amsterdam, judgment of 24 December 2020, ECLI:NL:RBAMS:2020:6777.
[246] In the same vein District Court of Amsterdam 27 October 2021, parketnummer 13/751888-21.
[247] District Court of Amsterdam, judgment of 14 November 2014, ECLI:NL:RBAMS:2014:9846; District Court of Amsterdam, judgment of 10 May 2016, ECLI:NL:RBAMS:2016:2765.

restricts category (b) to property acquired as a result of the offence *which is in the possession of the requested person* ('zich in het bezit van de gezochte persoon bevinden'). The Dutch transposition of Art. 29 generally restricts the possibility of seizing and handing over property to property *found in the possession of the requested person* ('aangetroffen in het bezit van de opgeëiste persoon'). This term is to be understood as 'on his person or carrying with him', thereby excluding the possibility of seizing and handing over property which requires a search in a place of residence or in a place of business.

30. Does the national law of your Member State, as interpreted by the courts of your Member State, contain restrictions similar to the restriction contained in Dutch law (see the explanation) or other restrictions? If so, describe the restriction(s).

Answer

As mentioned in the explanation, the Dutch language version of FD 2002/584/JHA contains a restriction regarding category (b) of Art. 29(1) to property acquired as a result of the offence *which is in the possession of the requested person* ('*zich in het bezit van de gezochte persoon bevinden*').

The Dutch transposition of Art. 29 (Art. 49 (1) of the Law on Surrender) restricts the possibility of seizing and handing over *of both categories* to property *found in the possession of the requested person* ('*aangetroffen in het bezit van de opgeëiste persoon*'). This term is to be understood as 'on his person or carrying with him', thereby excluding the possibility of seizing and handing over property which requires a search in a place of residence or in a place of business.

Property seized during a search in a place of residence or a place of business in the execution of a *European Investigation Order* issued by an authority of the issuing Member State will not be handed over by the District Court of Amsterdam in the context of surrender proceedings, because such a search is not possible on the basis of a *European arrest warrant*.[248]

31. Have the issuing judicial authorities of your Member State experienced any difficulties when requesting the seizure and handing over of property pursuant to section (g)? If so, please describe those difficulties and how they were resolved.

Answer

No.

32. Have the executing judicial authorities of your Member State experienced any difficulties when confronted with a request for seizure and handing over of property pursuant to section (g)? If so, please describe those difficulties and how they were resolved.

Answer

[248] District Court of Amsterdam, judgment of 22 February 2021, parketnummer 13/752111-20 (not yet published).

As explained in the answer to question 30, Art. 49(1) of the Law on Surrender does not allow for search and seizure of premises and, consequently, does not allow for handing over any property found during such a search.

H. Guarantees concerning life sentences

Explanation

Section (h) covers the guarantees of Art. 5(2) of FD 2002/584/JHA upon which the execution of an EAW may be made dependent, when the EAW concerns an offence which carries a life sentence in the issuing Member State (prosecution-EAW) or when the EAW concerns a life sentence which was imposed in that Member State (execution-EAW).

Issues concerning section (h)

Not clear when applicable and, if so, which guarantee

Because section (g) uses indents instead of boxes, it is not always clear if the issuing judicial authority intended to declare this section applicable and, if so, which of the guarantees. (Compare *Handbook on how to issue and execute a European arrest warrant*, C(2017) 6389 final, p. 108).

Art. 5(2) and section (h) do not fully reflect the case-law of the ECtHR
To be compatible with Article 3 of the ECHR – which corresponds to Art. 4 of the Charter –, a life sentence must be reducible *de jure* and *de facto*, meaning that there must be both a prospect of release for the prisoner and a possibility of review, both of which must exist from the moment of imposition of the sentence (see, *e.g.*, ECtHR, judgment of 26 April 2016 [GC], *Murray v. the Netherlands*, ECLI:CE:ECHR:2016:0426JUD001051110, § 99). This line of case-law also applies to extradition (see, *e.g.*, ECtHR, judgment of 4 September 2014, *Trabelsi v. Belgium*, ECLI:CE:ECHR:2014:0904JUD000014010, § 131) and to surrender.

The imposition of a life sentence already is incompatible with Art. 3 of the ECHR where at the moment of imposition of that life sentence national law 'does not provide any mechanism or possibility for review of a whole life sentence'(ECtHR, judgment of 9 July 2013 [GC], *Vinter v. the United Kingdom*, ECLI:CE:ECHR:2013:0709JUD006606909, § 122).

The right to a review of a person sentenced to a life sentence 'entails an actual assessment of the relevant information whether his or her continued imprisonment is justified on legitimate penological grounds (…), and the review must also be surrounded by sufficient procedural guarantees (…). To the extent necessary for the prisoner to know what he or she must do to be considered for release and under what conditions, it may be required that reasons be provided (…)' (see, *e.g.*, ECtHR, judgment of 23 May 2017, *Matiošaitis v. Lithuania*, ECLI:CE:ECHR:2017:0523JUD002266213, § 174)

A person sentenced to a life sentence must have access to that review mechanism no later than 25 years after the imposition of the life sentence (see, *e.g.*, ECtHR, judgment of 26 April 2016 [GC], *Murray v. the Netherlands*, ECLI:CE:ECHR:2016:0426JUD001051110, § 99).

It is clear that the wording of Art. 5(2) of FD 2002/584/JHA and of section (h) does not fully reflect this case-law, *e.g.*, the conditions concerning the mechanism of review, which is not surprising because the adoption of the EAW predates this case-law. In the experience of Dutch issuing judicial authorities, section (h) often leads to requests for clarification by the executing judicial authority (the fact that the Dutch language version of Art. 5(2) and section (h) differs from other language versions (see below) could explain this).

Divergent language versions
In some language versions of FD 2002/584/JHA, the review of the life sentence must be possible *at least* after 20 years (ES ('al meno'); NL ('ten minste')), instead of 'at the latest after 20 years'.

33. Have the issuing judicial authorities of your Member State experienced any difficulties when applying section (h)? If so, please describe those difficulties and how they were resolved.

Answer

Most issuing judicial authorities answered this question in the negative. FAST mentioned one EAW concerning a life sentence. That EAW detailed the possibilities of reducing a life sentence under Dutch law.

According to the Supreme Court of the Netherlands, a Dutch life sentence is *de jure* and *de facto* reducible. Therefore, again according to the Supreme Court, the imposition of such a sentence does not violate Art. 3 of the ECHR.[249]

34. Have the executing judicial authorities of your Member State experienced any difficulties when confronted with EAW's in which section (h) was applicable? If so, please describe those difficulties and how they were resolved.

Answer

The Law on Surrender does not make the execution of an EAW dependent on the guarantee mentioned in Art. 5(2) of FD 2002/584/JHA when the offence is punishable by a custodial life sentence or a life-time detention order in the issuing Member State.

However, if there is a real risk of the imposition (or the execution) of an *irreducible* life sentence in the issuing Member State, Art. 3 of the ECHR and Art. 4 of the Charter of fundamental rights of the European Union would prohibit exposing the requested person to that risk. In establishing such a risk, the District Court of Amsterdam applies the two step-test of the judgment in *Aranyosi and Căldăraru*.[250]

[249] Supreme Court, judgment of 19 December 2017, ECLI:NL:HR:2017:3185.
[250] District Court of Amsterdam, judgment of 26 November 2018, ECLI:NL:RBAMS:2018:5808; District Court of Amsterdam, judgment of 25 June 2020, ECLI:NL:RBAMS:2020:3146.

A sufficiently recent judgment of the ECtHR, establishing a violation of Art. 3 ECHR by the issuing Member State with regard to the imposition of a life sentence, is enough to establish an *in abstracto* real risk. Following the *T.P. and A.T. v. Hungary* judgment,[251] the District Court of Amsterdam requested supplementary information about the possibilities of reducing a life sentence under Hungarian law. The Hungarian answer excluded the imposition of a life sentence.[252] Following the *Dardanskis and Others v. Lithuania* case, in which the ECtHR ruled that 'the life sentence commutation procedure and its requirements, as very recently adopted by the Lithuanian authorities in order to rectify the situation which the Court had criticised in the *Matiošaitis and Other*s judgment (cited above), constitute an adequate and sufficient remedy for the applicants' complaint under Article 3 of the Convention',[253] the District Court of Amsterdam ruled that there was no *in abstracto* real risk of the imposition of an irreducible life sentence.[254]

If the issuing judicial authority guarantees the execution of a possible custodial (life) sentence in the Netherlands (Art. 5(3) of FD 2002/584/JHA), there is no problem under Art. 3 of the ECHR or Art. 4 of the Charter, because under Dutch law a life sentence is *de jure* and *de facto* reducible (see the answer to question 33).[255]

I. Information about the issuing judicial authority and the Central Authority, signature

Explanation

Section (i) partly covers the information required by Art. 8(1)(b) of FD 2002/584/JHA ('the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority'). The information in this part of section (i) enables the executing judicial authority to identify the issuing judicial authority, and to contact it, if need be.

Further, section (i) requires contact information about the Central Authority of the issuing Member State, if that Member State designated such an authority, thus enabling the executing judicial authority to contact the Central Authority, if need be.

Lastly, section (i) requires information about (the 'representative' of) the issuing judicial authority, and a signature by or on behalf of (the 'representative' of) the issuing judicial authority.

Issues concerning section (i)

Distinction between the authority and its representative

[251] ECtHR, judgment of 4 October 2016, *T.P. and A.T. v. Hungary*, ECLI:CE:ECHR:2016:1004JUD003787114. See also ECtHR, judgment of 17 June 2021, *Sándor Varga and others v. Hungary*, ECLI:CE:ECHR:2021:0617JUD003973415; ECtHR, judgment of 28 October 2021, *Bancsók and Lázló Magyar (No. 2) v. Hungary*, ECLI:CE:ECHR:2021:1028JUD005237415.
[252] District Court of Amsterdam, judgment 4 January 2019, ECLI:NL:RBAMS:2019:68.
[253] ECtHR, decision of 18 June 2019, *Dardanskis and Others v. Lithuania*, ECLI:CE:ECHR:2019:0618DEC007445213, § 31.
[254] District Court of Amsterdam, judgment 28 January 2021, ECLI:NL:RBAMS:2021:231.
[255] District Court of Amsterdam, judgment of 10 June 2020, ECLI:NL:RBAMS:2020:3013.

Sometimes, under 'official name' the name and surname of the issuing judge or public prosecutor are given, whereas the term 'official name' – obviously – refers to the official name of the *authority* to which the issuing judge or public prosecutor belongs, *e.g.* the Court of X or the Public Prosecutor's Office in X. The name and surname of the issuing judge or public prosecutor should be mentioned under 'Name of its representative'.

Representative not a judge or a public prosecutor?
German EAWs are sometimes issued by a representative of the issuing Local Court (*Amtsgericht*) whose 'title/grade' is that of 'Direktor', which could be translated as 'manager', thus raising the question whether the representative of the issuing judicial authority is actually a judge.

35. Have the issuing judicial authorities of your Member State experienced any problems regarding section (i)? If so, please describe those difficulties and how they were resolved.

Answer

No.

36. Have the executing judicial authorities of your Member State experienced any problems regarding section (i)? If so, please describe those difficulties and how they were resolved.

Answer

Yes. Sometimes, German prosecution-EAWs are issued by a functionary called the 'Direktor des Amtsgerichts' (manager of the Local Court). It turns out that, under German law, a 'Direktor' must always be a judge at the 'Amtsgericht'.[256]

Confusingly, sometimes in German prosecution-EAWs the 'Staatsanwalt' (public prosecutor) is mentioned as the representative of the 'Amtsgericht'; this does not have any consequences, if it is clear that the EAW was issued and signed by a judge.[257]

Sometimes, defence counsel try to depict 'substitute' or 'deputy' public prosecutor as mere administrative assistants to the public prosecutor who, therefore, cannot issue an EAW. According to the District Court of Amsterdam, one should distinguish between the issuing judicial authority and its representative. If the issuing judicial authority is the 'Parket van de Procureur des Konings Antwerpen – Afdeling Turnhout' (Office of the public prosecutor

[256] District Court of Amsterdam, judgment of 22 May 2020, ECLI:NL:RBAMS:2020:2672; District Court of Amsterdam, judgment of 11 June 2020, ECLI:NL:RBAMS:2020:2969.
[257] District Court of Amsterdam, judgment of 4 November 2020, ECLI:NL:RBAMS:2020:5487: section (i) referred to the 'Amtsgericht' as issuing judicial authority and the EAW was signed by the 'Richterin am Amtsgericht Dr. Werwie'. See also District Court of Amsterdam, judgment of 28 May 2021, ECLI:NL:RBAMS:2021:2876: section (b) of a German EAW referred to an enforceable judgment of conviction rendered by a 'Landesgericht' (District Court) and to a 'Vollstreckungshaftbefehl' (arrest warrant for the purpose of executing a sentence) issued by a public prosecutor; section (i) referred to the public prosecutor as the issuing judicial authority, however the EAW was signed by the members of a three judge panel of the 'Landesgericht'; the District Court of Amsterdam held that the EAW was issued by the 'Landesgericht', which is an issuing judicial authority, for the purposes of executing a sentence.

Antwerp – department Turnhout) and if the EAW is signed by its representative, the 'Substituut-Procureur des Konings', there is no doubt that such a substitute public prosecutor is, indeed, a public prosecutor.[258] It should be pointed out that the public prosecution service is an hierarchical organisation in which the function of public prosecutor is carried out by functionaries holding different ranks, ranging from 'public prosecutor in training' to 'prosecutor-general'.[259]

[258] District Court of Amsterdam, judgment of 21 October 2020, ECLI:NL:RBAMS:2020:5328.
[259] See, *e.g.*, for the Netherlands: Art. 135 and 136 of the Law on the organisation of the judiciary (*Wet op de rechterlijke organisatie*).

Part 4: problems not directly related to the EAW-form

Explanation

Part 4 concerns problems not directly related to the EAW-form. A common feature of the subjects dealt with in this part of the questionnaire is that they concern or are linked to providing information (either to decide on the execution of an EAW or on the issuing of an EAW or as a basis for measures after surrender).

These subjects are:

- supplementary/additional information necessary or useful for the decision on the execution of the EAW (Art. 15(2)-(3) of FD 2002/584/JHA);
- the time limits for deciding on the execution of the EAW (Art. 17 of FD 2002/584/JHA);
- the guarantee of return (Art. 5(3) of FD 2002/584/JHA);
- information about detention conditions and deficiencies in the judicial system in the issuing Member State;
- surrender to and from Iceland or Norway;
- (analogous) application of the *Petruhhin* judgment; and
- the speciality rule.

A. Supplementary/additional information (Art. 15(2)-(3))

Explanation

Part. 4A concerns information not included in the EAW but necessary or useful for deciding on the execution of that EAW. Art. 15(2) of FD 2002/584/JHA concerns providing supplementary information ('in particular with respect to Articles 3 to 5 and Article 8') at the request of the executing judicial authority, whereas Art. 15(3) of FD 2002/584/JHA concerns forwarding 'additional useful information' by the issuing judicial authority *proprio motu*. When requesting supplementary information, the executing judicial authority 'may' fix a time limit for the receipt of that information, given the need to observe the time limits for deciding on the EAW set out in Art. 17 of FD 2002/584/JHA.

Art. 15(2) affords the executing judicial authority the 'option' to request that the necessary supplementary information be furnished as a matter of urgency, if it finds 'that the information disclosed by the issuing Member State is insufficient to enable [it] to adopt a decision on surrender'. However, 'recourse may be had to that option only as a last resort in

exceptional cases in which the executing judicial authority considers that it does not have the official evidence necessary to adopt a decision on surrender as a matter of urgency' (ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/16, ECLI:EU:C:2018:27, paragraphs 60-61).

In some situations, the 'option' is actually an *obligation* to request supplementary information (before deciding to refuse to execute the EAW):

- when examining whether the EAW meets the requirements of lawfulness set out in Art. 8(1) (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 65;
- when examining whether the requirements of Art. 4a(1)(a)-(d) of FD 2002/584/JHA are met (ECJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paragraphs 101-103);
- when examining whether there is a real risk for the requested person of a violation of Art. 4 of the Charter or of a violation of the essence of the right to a fair trial as guaranteed by Art. 47(2) of the Charter (ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paragraph 95; ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586, paragraph 77).

The issuing judicial authority is obliged to provide the requested information (ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paragraph 97, with regard to information about detention conditions). That obligation derives from the duty of sincere cooperation (Art. 4(3) TEU), which 'informs' the 'dialogue' between the issuing and judicial authorities when applying Art. 15(2)-(3) (ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Detention conditions in Hungary)*, C-220/18, ECLI:EU:C:2018:589, paragraph 104).

Issues concerning Art. 15(2)-(3)

Information provided by another authority
Sometimes, requests for supplementary information pursuant to Art. 15(2) of FD 2002/584/JHA are answered by an authority other than the issuing judicial authority. Equally, sometimes such requests are answered by the Central Authority of the issuing Member State, without it being clear who actually provided the answer: the Central Authority itself, the issuing judicial authority or yet another authority.
A recent preliminary reference questions whether, if the EAW was issued by a judicial authority and supplementary information is provided by another authority (in this case a member of the Public Prosecutor's Office) which substantially supplements, or possibly changes the content of the EAW, that other authority should also meet the requirements of Art. 6(1) of FD 2002/584/JHA for being an 'issuing judicial authority' (*Generálna prokuratura Slovenskej republiky*, C-78/20).

Irrelevant information/standard questionnaires

Sometimes executing authorities ask additional specific questions or even submit a standard list of questions with regard to information that is not relevant. Sometimes issuing judicial authorities submit irrelevant information.

37. Did your Member State confer the competence to provide supplementary information – either at the request of the executing judicial authority or on its own initiative (see Art. 15(2)-(3) of FD 2002/584/JHA) – on another authority than the issuing judicial authority? If so, which authority?

Answer

No. The power to provide supplementary information – either at the request of the executing judicial authority or on its own initiative – is conferred on the examining judge who issued the EAW (Art. 47 of the Law on Surrender).

However, it should be pointed out that requests for supplementary information are usually sent to the competent prosecutor (section (i) of a Dutch EAW usually states that one should address the public prosecutor with requests for supplementary information *et cetera*). In our response to question 9a) we concluded that it seems probable that requests concerning an EAW issued by an examining judge in another District Court than the District Court of Amsterdam are sometimes answered by the public prosecutor – who is not an issuing judicial authority – without the knowledge and approval of the examining judge.

38. When the (issuing judicial) authorities of your Member State are asked to provide supplementary information, what kind of information are they usually asked for?[260]

Answer

In prosecution-cases, the guarantee mentioned in Art. 5(3) of FD 2002//584/JHA. In execution-cases (Hungary and UK):

- information about the proceedings resulting in the judicial decision which finally sentenced the requested person:
- whether an aggregate sentence can be disaggregated if one of the offences is not an offence under the law of the executing Member State.

39. When the (issuing judicial) authorities of your Member State provide supplementary information *proprio motu*, what kind of information do they usually provide?

Answer

In execution-cases:

[260] With regard to requests for supplementary information concerning *in absentia* decisions you could refer to the *InAbsentiEAW* project, unless there are developments which justify expressly dealing with such requests in this project.

- information about the proceedings resulting in the judicial decision which finally sentenced the requested person (Hungary);
- explaining that escaping from prison is not an offence under Dutch law (UK).

40. What kind of supplementary information do the executing judicial authorities of your Member State usually ask for?

Answer

Apart from the guarantee mentioned in Art. 5(3) of FD 2002/584/JHA, usually requests for supplementary information relate to:

- the authority which issued the national arrest warrant;
- the description of the offence (*e.g.* the role of the requested person);
- the applicable maximum sentence for each separate offence;
- the proceedings resulting in an *in absentia* decision (Art. 4a);
- life sentences (art. 5(2); see the answer to question 34);
- detention conditions in the issuing Member State (see the answers to questions 48-51);
- independence of the judiciary of the issuing Member State (see the answers to questions 52-55).

41. When requesting supplementary information, do the executing judicial authorities of your Member State fix any time limit for the receipt of that information?

Answer

Yes. Usually, requests refer to the date for the (next) hearing by the District Court of Amsterdam and stress that the information should be sent before that date.

In principle, when setting the date for a hearing by the District Court the time limits of Art. 17 of FD 2002/584/JHA are taken into account. If it is necessary to adjourn the proceedings, *e.g.*, in order to request supplementary information, in principle the hearing will be adjourned to a *specific* date, taking into account the time limits.

41a. Have the issuing judicial authorities of your Member State experienced receiving irrelevant questions and requests for irrelevant information? If so, please specify what questions and information.

Answer

Not in prosecution-cases.

It is reported that in execution-cases Hungarian authorities request information about the proceedings in the Netherlands which is already mentioned in the EAW and that the authorities of the UK asked a lot of questions by way of a standard questionnaire.

41b. Have the executing judicial authorities of your Member State experienced receiving irrelevant information? If so, please specify what information.

Answer

In prosecution-cases, Belgian and French EAWs regularly contain information about the investigation into the offence, explaining why the authorities of the issuing Member State came to suspect the requested person of having committed the offence. Such information is irrelevant, because it is not up to the executing judicial authority to assess whether there is a reasonable suspicion against the requested person (but see the answer to question 7). Execution-EAWs from Poland and Romania sometimes contain information about proceedings resulting in a decision to revoke suspension of the execution of a custodial sentence. Such proceedings are irrelevant, because the resultant decisions leave unchanged the sentences with regard to both their nature and level.[261]

B. Time limits (Art. 17)

Explanation

Part 4B concerns observance of the time limits of Art. 17(3) and (4) of FD 2002/584/JHA in cases in which the information in the EAW-form is insufficient to decide on the execution of the EAW.

The final decision on the execution of the EAW must, in principle, be taken with the time limits of Art. 17(3) and (4) FD 2002/584/JHA (ECJ, judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, ECLI:EU:C:2015:474, paragraph 32), *i.e.* within 60 or 90 days.

When 'in exceptional circumstances' the executing judicial authority cannot observe the time limit of 90 days, its Member State must inform Eurojust thereof and give reasons for the delay (Art. 17(6) of FD 2002/584/JHA).

Such exceptional circumstances may occur when

- the executing judicial authority assesses whether there is a real risk that the requested person will, if surrendered to the issuing judicial authority, suffer inhuman or degrading treatment, within the meaning of Article 4 of the Charter, or a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 of the Charter or

- proceedings are stayed pending a decision of the Court of Justice in response to a request for a preliminary ruling made by an executing judicial authority, on the basis of Article 267 TFEU (ECJ, judgment of 12 February 2019, *TC*, C-492/18 PPU, ECLI:EU:C:2019:108, paragraph 43).

42.

[261] ECJ, judgment 22 December 2017, *Ardic*, C-571/17 PPU, ECLI:EU:C:2017:1026, paragraph 82.

a) Have the executing judicial authorities of your Member State had any cases in which the time limits of 60 and/or 90 days could not be observed, because the information contained in the EAW was insufficient to decide on the execution of the EAW? If so, please state the decision taken by the executing judicial authority.

b) Is recent statistical data available concerning compliance with the time limits by the authorities of your Member State?

c) Pursuant to Art. 17(7) of FD 2002/584/JHA, does your Member State inform Eurojust when it cannot observe the time limits and does your Member State give the reasons for the delay?

Answer

a)

Time limits
On 1 April 2021, the provisions concerning the time limits were amended. According to the amended provisions, extending the time limit of 90 days is possible only 'in exceptional circumstances' in three *exhaustively listed* situations:

- the District Court of Amsterdam is awaiting a judgment by the Court of Justice of the European Union in response to a preliminary reference – either by the District Court itself or by another judicial authority – which is relevant to the case at hand. In such cases, the court may extend the time limit each time with a maximum period of 30 days until the Court of Justice has given its judgment and the District Court renders judgment (Art. 22(4) of the Law on Surrender);
- the District Court of Amsterdam is in the process of assessing whether an *in abstracto* real risk of a violation of the Charter exists. In such cases, the court may extend the time limit each time with a maximum period of 30 days until the District Court renders judgment (Art. 22(5) of the Law on Surrender);
- the District Court of Amsterdam decided to postpone its decision on the execution of the EAW on account of an *in concreto* real risk of a violation of the Charter.[262] In such cases, the court may extend the time limit each time with a maximum period of 60 days until the District Court renders judgment (Art. 22(6) of the Law on Surrender).

These situations correspond to those identified by the Court of Justice in its *TC* judgment.[263] However, the Court of Justice did not rule that 'exceptional circumstances' are *limited* to those identified in the *TC* judgment.

In cases not concerning those exhaustively listed situations, the District Court of Amsterdam cannot extend the time limit of 90 days and, consequently, cannot request supplementary information needed to take a decision on the execution of the EAW.

If the time limit of 90 days cannot be extended, the District Court is forced to take a decision on the execution of the EAW at the latest on the 90th day of the time limit.

[262] Cf. *Aranyosi and Căldăraru*, paragraph 98.
[263] *TC*, paragraph 43.

Normally, the District Court will not rule *ex tempore*, *i.e.* it will not give an oral ruling directly after having concluded the hearing but will render a written judgment, at the latest on the fourteenth day after the hearing (Art. 28(1) of the Law on Surrender). Although the possibility of an *ex tempore* ruling is not excluded (Art. 30(1) of the Law on Surrender *juncto* Art. 345(1) of the Code of Criminal Procedure), it is not conducive to the quality of decision making. Therefore, rendering a written judgment at a later date is to be preferred. However, since the entry into force of the new rules on time limits there has been a sharp rise in the number of cases in which the court had to give an *ex tempore* ruling because the time limits could not be extended any further.

In some cases, the District Court of Amsterdam could not extend the time limit because none of the exhaustively listed situations was applicable and, consequently, had to render a decision on the execution of an EAW, *even though it did not have all the information necessary for such a decision*. This could lead to refusals which could have been avoided if extension of the time limit of 90 days were permitted.[264]

Because the new rules prohibit extending the time limit of 90 days in cases not covered by the new rules, the District Court of Amsterdam is, in effect, precluded from making preliminary references to the Court of Justice in those cases, unless the preliminary reference was made before the period of 90 days expired.

In practice, the decision on whether or not to refer questions to the Court of Justice can depend on obtaining supplementary information provided by the issuing judicial authority. In some cases - particularly in cases concerning the application of Art. 4a of FD 2002/584/JHAs but also in cases concerning, *e.g.*, the application of the *ne bis in idem* grounds for refusal - repeated requests for supplementary information are needed just to establish the facts. Thus, just trying to establish the facts before being able to decide on a preliminary reference already can 'consume' most, if not all, of the time limit of 90 days.

The preliminary reference in case C-665/20 (*X (European arrest warrant – Ne bis in idem)*)[265] affords an example.[266] This case predates the entry into force of the new rules on time limits. In this case, the requested person invoked the ground for optional refusal of Art. 4(5) of FD 2002/584/JHA, which at that time had been transposed as a ground for mandatory refusal: allegedly he had been finally convicted for the same acts in Iran, had served part of the sentence and had received an executive pardon for the remainder of the sentence. This

[264] See, *e.g.*, District Court of Amsterdam, judgment of 22 April 2021, ECLI:NL:RBAMS:2021:2321. Although it was not possible to establish before the expiry of the non-extendable time limit of 90 days whether the requested person met *all* of the conditions to be considered as a 'resident' in the sense of Art. 4(6) of FD 2002/584/JHA, the court decided to give him the benefit of the doubt, refused his surrender on the basis of Art. 6a of the Law on Surrender and ordered that the foreign sentence be executed in the Netherlands. See also District Court of Amsterdam, judgment of 7 September 2021, ECLI:NL:RBAMS:2021:5308 (not published). After repeated requests for supplementary information concerning *in absentia* judgments, the District Court still could not establish whether the requested person's rights of defence had been respected with respect to one of two *in absentia* judgments. The time limits would expire shortly and could not be extended any further. The court dismissed the public prosecutor's application for a continuance and refused surrender with regard to one of the two judgments.
[265] ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339.
[266] District Court of Amsterdam, interlocutory judgment of 7 December 2020, ECLI:NL:RBAMS:2020:6229.

defence raised a number of questions of Union law. However, in order to establish the facts the court had to request information from the issuing judicial authority and, *via* the Dutch Ministry of Foreign Affairs, from the Iranian authorities. Once the court had finally established the facts and had decided to refer questions to the Court of Justice on the interpretation of Art. 4(5) of FD 2002/584/JHA, the time limit of 90 days had already expired.

It seems doubtful that the new restrictive rules are in accordance with Union law.

Decision on detention
The new rules on time limits that entered into force on 1 April 2021 link the decision to extend the time limit on the basis of Art. 22(4)-(6) of FD 2002/584/JHA to a decision on extending the detention of the requested person. Pursuant to Art. 27(3) of the Law on Surrender, at least on the occasion of each extension on the basis of Art. 22(4)-(6) of the Law of Surrender the District Court of Amsterdam must take a decision on the extension of the detention of the requested person *ex officio*.

The court can take both decision *in camera* (Art. 31(1) of the Law on Surrender in combination with Art. 21-25 of the Code of Criminal Procedure).

If Art. 22(4)-(6) of FD 2002/584/JHA does not allow extending the time limit, equally the detention of the requested person cannot be extended.

b) The most recent information concerns 2019. In 2019, the District Court of Amsterdam took a final decision on the execution of an EAW in 645 cases.

Period between the arrest of the requested person and the final decision on the execution of the EAW:

- less than 60 days: 17,4%;
- between 60 and 90 days: 51,6%;
- between 91 and 150 days: 11,7%;
- more than 150 days: 19,3%.[267]

c) Before 1 April 2021, the Netherlands had not transposed Art. 17(7) of FD 2002/584/JHA.[268] In practice, Eurojust was not - always - informed of cases in which it was not possible to observe the time limit of 90 days.[269]

Since 1 April 2021, the Amsterdam public prosecutor has the duty to inform Eurojust and the issuing judicial authority of each extension of the time limit of 90 days (Art. 22(7) of the Law on Surrender).

[267] Source: public prosecutor's office Amsterdam.
[268] 'Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. (…)'.
[269] *E.g.*, Eurojust reported no notification under Art. 17(7) by the Netherlands in the years 2007-2013 (*Notifications to Eurojust of breaches of time limits in the execution of European Arrest Warrants (Article 17(7) (first sentence) of FD on EAW)*, 26 May 2014), whereas the official figures collected by the Amsterdam public prosecution office clearly show (many) instances of non-compliance with the time limit of 90 days in each of those years.

C. Guarantee of return (Art. 5(3))

Explanation

Part 4C concerns the guarantee of return.

The system of FD 2002/584/JHA, as evidenced, *inter alia,* by Art. 5(3) of FD 2002/584/JHA, 'makes it possible for the Member States to allow the competent judicial authorities, in specific situations, to decide that a sentence must be executed on the territory of the executing Member State' (ECJ, judgment of 21 October 2010, *B.*, C-306/09, ECLI:EU:C:2010:626, paragraph 51).

That provision refers to a guarantee, to be given by the issuing Member State, that a national or resident of the executing Member State who is the subject of a prosecution-EAW, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order to be imposed on him in the issuing Member State.

The object of that provision is to increase 'the chances of social reintegration of the national or resident of the executing Member State by allowing him to serve, in its territory, the custodial sentence or detention order which, after his surrender, under [an EAW], would be imposed in the issuing Member State' (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 48).

Art. 5(3) does not require that the guarantee be given by the issuing judicial authority. Compare Art. 27(4) and Art. 28(3) of FD 2002/584/JHA which state that the issuing *Member State* must give the guarantees provided for in Art. 5(3) for the situations mentioned in that provision and ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 41: '(…) a guarantee to be given by the issuing Member State in particular cases (…)'.

If the executing judicial authority so requests, the issuing Member State *must* provide the guarantee. Compare, again, Art. 27(4) and Art. 28(3) and *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 41.

The return of the surrendered person should occur as soon as possible after the sentence in the issuing Member States has become final (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 58).

However, if the surrendered person 'is required to be present in that Member State by reason of other procedural steps forming part of the criminal proceedings relating to the offence underlying the [EAW], such as the determination of a penalty or an additional measure' the issuing judicial authority must balance 'the objective of facilitating the social rehabilitation of the person concerned' against 'both the effectiveness of the criminal prosecution for the purpose of ensuring a complete and effective punishment of the offence underlying the [EAW] and the safeguarding of the procedural rights of the person concerned' (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 56). The issuing judicial authority must, therefore, 'assess whether concrete grounds relating to the safeguarding of the rights of defence of the person concerned or the proper administration of justice make his presence essential in the issuing

Member State, after the sentencing decision has become final and until such time as a final decision has been taken on any other procedural steps coming within the scope of the criminal proceedings relating to the offence underlying the [EAW]' (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 59). It must 'take into account, for the purposes of the balancing exercise that it is required to carry out, the possibility of applying cooperation and mutual assistance mechanisms provided for in the criminal field under EU law' (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 61).

Once the sentenced person is returned, 'an adaptation of the sentence by the executing Member State outside of the situations contemplated under Article 8 of [FD 2008/909/JHA] cannot be accepted' (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 66).

43. According to the national law of your Member State, as interpreted by the courts of your Member State, is the decision to subject surrender to the condition that the issuing Member State give a guarantee of return *dependent* on whether the requested person expressly states that he wishes to undergo any sentence in the executing Member State? If so, does your national law distinguish between nationals and residents of your Member State in this regard?

Answer
Before 1 April 2021, the Netherlands had transposed all grounds for refusal mentioned in Art. 4 and Art. 4a of FD 2002/584/JHA and the guarantee mentioned in Art. 5(3) of FD 2002/584/JHA as grounds for mandatory refusal and as a mandatory guarantee.

All those grounds for refusal were turned into grounds for optional refusal when the Law on Surrender was amended on 1 April 2021. That Act did not amend the transposition of Art. 5(3) – *viz.* Art. 6(1) of the Law on Surrender – which was previously considered as having a *mandatory* character, irrespective of whether the person concerned wanted to serve a custodial sentence in the Netherlands. Due to a fluke of legal history, the actual wording of Art. 6(1) of the Law on Surrender – both before and after 1 April 2021 – allows for an interpretation that the guarantee referred to in Art. 5(3) of FD 2002/584/JHA is not a *conditio sine qua non* for surrendering an Dutch national (or a Dutch resident), in other words is an *option*. After 1 April 2021, the District Court of Amsterdam adopted this interpretation.[270] According to this interpretation, the District Court of Amsterdam is not bound to make the surrender of a Dutch national – or of a resident of the Netherlands (Art. 6(9) of the Law on Surrender – conditional on a guarantee of return. This enables it to pay due regard to the aim of social re-integration in the particular circumstances of each case. The District Court of Amsterdam could abstain from requesting a guarantee of return, *e.g.*, if the requested person explicitly states that he does not want to serve in the Netherlands any sentence passed against him in the issuing Member State.

44. Which authority of your Member State is competent to give the guarantee of return?

Answer

[270] District Court of Amsterdam, judgment of 7 May 2021, ECLI:NL:RBAMS:2021:2467. (Unfortunately, this judgment erroneously states that Art. 6(1) of FD 2002/584/JHA was amended on 1 April 2021).

Art. 5(3) of FD 2002/584/JHA does not specify which authority of the issuing Member State should give the guarantee. The rubric of that provision is entitled 'Guarantees to be given by the issuing Member State in particular cases'. Art. 27(4) and Art. 28(3)(d) of FD 2002/584/JHA both explicitly state: 'For the situations referred to in Article 5, the issuing Member State must give the guarantees provided for therein'. Finally, the Court of Justice refers to the guarantee provided for in Art. 5(3) of FD 2002/584/JHA 'as a guarantee to be given by the issuing Member State in particular cases'.[271] One can, therefore, conclude that FD 2002/584/JHA does not require that the guarantee of return is given by the issuing judicial authority.

A Member State may have good reasons for entrusting the task to provide the guarantee of return to an authority other than the issuing judicial authority. The return of the surrendered person to the executing Member State to undergo his sentence in that Member State is related to the execution of sentences. In some Member States, judicial authorities may not be competent to deal with the enforcement of sentences.

The Dutch legislator, however, chose to confer the power to give the guarantee of return on the issuing judicial authority (Art. 45(1)(a) of the Law on Surrender), *i.e.* each examining judge (Art. 44 of the Law on Surrender). Such a guarantee is binding on all persons and all authorities charged with a public task in the Netherlands (Art. 48 of the Law on Surrender).

45.
a) Do the issuing judicial authorities of your Member State use a uniform text for the guarantee of return? If so, what text?

b) Does a guarantee of return given by the competent authority of your Member State refer to 'other procedural steps forming part of the criminal proceedings relating to the offence underlying the [EAW], such as the determination of a penalty or an additional measure'?

c) Does the national law of your Member State, as interpreted by the courts of your Member State:

- (i) either require the consent of the surrendered person with his return to the executing Member State in order to undergo his sentence there, or, at least, allow him to express his views on a such a return;

- (ii) prohibits the return to the executing Member State to undergo the sentence there, if the answer to question (i) is in the affirmative and the surrendered person withholds consent to a return or is opposed to a return;

- (iii) differentiate between nationals of the executing Member State and residents of that Member State in this regard?

[271] ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return to the executing Member State)*, C-314/18, ECLI:NL:RBAMS:2021:191, paragraph 41.

d) When is the surrendered person returned to the executing Member State to undergo his sentence there? Which authority of your Member State determines when the surrendered person is to be returned and according to which procedure?

Answer

a) According to one of the issuing judicial authorities who answered this question, the examining judges of the District Court of Amsterdam use the following standard text:

Het Kabinet van de Rechter-Commissaris te /// verleent hierbij de garantie dat de (Nationaliteit) onderdaan (///) in het geval van een onherroepelijke veroordeling tot een vrijheidsbenemende straf of maatregel, deze persoon naar (Land) zal worden overgebracht teneinde deze straf of maatregel aldaar te ondergaan.

[The Office of the Investigating Judge at /// hereby gives the guarantee that the (nationality) national (///), if he is sentenced to a custodial sentence or detention order by final judgment, will be returned to (Member State) to serve his custodial sentence or detention order there.]

It could not be established whether the examining judges of all District Courts use the same text. Furthermore, it is not certain that with regard to EAWs issued by examining judges of other District Courts, the guarantee is even given by the examining judge.

b) Not to our knowledge. See the answer to question 45(a). The Amsterdam public prosecutor confirmed that the standard text *used in Amsterdam* does not refer to such procedural steps.[272]

c)
(i)
Both Art. 6(1) of the Law on Surrender – concerning the executing side – and Art. 45 of the Law on Surrender – concerning the issuing side – deviate from Art. 5(3) of FD 2002/584/JHA. Whereas Art. 5(3) of FD 2002/584/JHA refers to the guarantee that the person concerned '*is* returned' to the executing Member State, both national provisions refer to guarantee that the person concerned '*may* serve the sentence' in the executing Member State.

According to the Court of Justice, Art. 5(3) of FD 2002/584/JHA is one of the provisions of that framework decision which 'allows (…) the competent authorities of Member States to decide that a sentence imposed in the issuing Member State *must be* enforced in the territory of the executing Member State'.[273] In another framework decision, FD 2008/909/JHA, the guarantee of Art. 5(3) of FD 2002/584/JHA is described as 'the condition that the person *has to be* returned to serve the sentence in the Member State concerned' (Art. 25 of FD 2008/909/JHA).[274]

The wording of Art. 5(3) of FD 2002/584/JHA and the Court of Justice's case-law raise the question whether the surrendered person must be returned to the executing Member State

[272] Interview with a public prosecutor and an assistant to the public prosecutor, 25 May 2021.
[273] ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return to the executing State)*, C-314/18, ECLI:EU:C:2020:191, paragraph 41 (emphasis added).
[274] Emphasis added.

irrespective of his wishes or of his consent to return. In this respect, FD 2008/909/JHA is relevant.

According to Art. 25 of FD 2008/909/JHA, the provisions of that FD shall apply, *mutatis mutandis* 'to the extent they are compatible with provisions under [FD 2002/584/JHA]' to enforcement of sentences in cases where 'acting under Article 5(3) of that Framework Decision, [a Member State] has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned'.

Pursuant to Art. 6(1) of FD 2008/909/JHA the consent of the sentenced person is needed in order to initiate proceedings concerning mutual recognition of a custodial sentence. However, Art. 6(2) of FD 2008/909/JHA sums up three cases in which the consent of the sentenced person is *not* required. Are these provisions compatible with Art. 5(3) of FD 2002/584/JHA, which seems to require unreservedly that the sentenced person is returned to serve his sentence in the executing Member State?

One could argue that Art. 6(1) and (2) of FD 2008/909/JHA is *not* compatible with Art. 5(3) of FD 2002/584/JHA and, therefore, is not applicable when complying with a guarantee of return. In this line of reasoning, the guarantee of return is a guarantee of return *irrespective of whether the surrendered person consents to his return*. It is the executing judicial authority which determines whether, in the interest of enhancing the chances of social re-integration, a sentence imposed in the issuing Member State must be enforced in the territory of the executing Member State. Once that authority has decided to make surrender conditional on a guarantee of return, the actual return to the executing Member State cannot depend on consent by the person concerned.

Evidently, the Dutch legislator is of the opinion that Art. 6(1) and (2) of FD 2008/909/JHA is compatible with FD 2002/584/JHA, because the provisions of the law adopted to transpose FD 2008/909/JHA do not distinguish between cases in which FD 2008/909/JHA is directly applicable and cases in which that framework decision is applicable *mutatis mutandis* on the basis of Art. 25 of FD 2008/909/JHA. The entire regime of FD 2008/909/JHA, as transposed by the Law on mutual recognition and enforcement of custodial sentences or measures involving deprivation of liberty and probation measures, is applicable to mutual recognition of a custodial sentence in cases where the District Court of Amsterdam made surrender of a Dutch national – or of a resident of the Netherlands – conditional on a guarantee of return. Therefore, in cases in which none of the exceptions to the rule that consent of the sentenced person is required – *e.g.* when the surrendered person is a Dutch national who does not have a fixed abode in the Netherlands – his consent for transfer to the Netherlands is required (Art 2:3 letter c in combination with Art. 2:5 of the Law on mutual recognition and enforcement of custodial sentences or measures involving deprivation of liberty and probation measures).

According to an official of the responsible department of the Ministry of Justice and Security, even where consent of the surrendered person is not required, in practice the Netherlands will not execute a transfer to the Netherlands when the person concerned does not want to serve his sentence there.[275]

[275] Interview with, *inter alios*, a civil servant of the Ministry of Justice and Security, 16 February 2021.

(ii) See the previous answer: if consent of the surrendered person is required, no transfer to the executing Member State will be effected if the person concerned withholds consent.

(iii) Both the provisions of FD 2008/909/JHA and of the Law on mutual recognition and enforcement of custodial sentences or measures involving deprivation of liberty and probation measures distinguish between nationals and residents of the executing Member State. *E.g.*, if the sentenced person is a national of the executing Member State who lives in that Member State, his consent is not required (Art. 6(2)(a) of FD 2008/909/JHA), whereas if the sentenced person is a resident of the executing Member State his consent is required (art. 6(1) of FD 2008/909/JHA, unless Art. 6(2) or (c) of FD 2008/909/JHA applies).

d)

When is the surrendered person returned to the executing Member State?

In principle, the return of the surrendered person should occur 'as soon as possible after [the] sentencing decision has become final'.[276] Therefore, in principle the competent authority of the issuing Member State should initiate transfer proceedings under FD 2008/909/JHA as soon as possible after the sentencing decision has become final.

However, when the sentencing decision is final but the surrendered person is required to be present in the issuing Member State 'by reason of other procedural steps forming part of the criminal proceedings relating to the offence underlying the European arrest warrant, such as the determination of a penalty or an additional measure', the issuing judicial authority must balance - in each individual case - 'the objective of facilitating the social rehabilitation of the person concerned, pursued by Article 5(3) of Framework Decision 2002/584' against 'the effectiveness of the criminal prosecution for the purpose of ensuring a complete and effective punishment of the offence underlying the [EAW] and the safeguarding of the procedural rights of the person concerned'.[277]

The Amsterdam public prosecutor was of the opinion that is up to the surrendered person to invoke the guarantee in the issuing Member State, if he wants to return to the executing Member State.[278] The Netherlands will not execute a return to the executing Member State against the will of the person concerned, even if his consent is not required under the legislation adopted to transpe FD 2008/909/JHA (see the answer to question c) (i and ii)).

Which authority determines whether the surrendered person is to be returned and according to which procedure?
In *SF (European arrest warrant – guarantee of return to the issuing Member State)* the Court of Justice held that is it for the *issuing judicial authority* to perform the balancing exercise discussed above, when the sentencing decision is final but the surrendered person is required to be present in the issuing Member State by reason of other procedural steps forming part of the criminal proceedings relating to the offence underlying the EAW.[279] In other words, it is

[276] ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return to the executing Member State)*, C-314/18, ECLI:EU:C:2020:191, paragraph 54.
[277] *SF (European arrest warrant – Guarantee of return to the executing Member State)*, paragraph 56.
[278] Interview with a public prosecutor and an assistant to the public prosecutor, 25 May 2021.
[279] *SF (European arrest warrant – Guarantee of return to the executing Member State)*, paragraph 59.

for the issuing judicial authority to decide whether or not to postpone the return of the requested person pending a definitive decision on those other procedural steps. Assigning that task to a *judicial* authority is logical, since the balancing exercise requires assessing whether 'concrete grounds relating to the safeguarding of the rights of defence of the person concerned or the proper administration of justice make his presence essential in the issuing Member State',[280] which, by its nature, is a judicial assessment.

Under Dutch law, the examining judge who issued the EAW is the issuing judicial authority and, therefore, the competent authority to determine when the surrendered person is to be returned to the executing Member State.

In practice, however, examining judges who issued EAW never seem to be apprised of the decision of the executing judicial authority and, therefore, do not seem to be aware of the requested person's surrender to the Netherlands, let alone of an eventual final conviction of the surrendered person and/or of other procedural steps forming part of the criminal proceedings relating to the offence underlying the EAW.

Both IOS (*Afdeling Internationale Overdracht Strafvonnissen*, the department of the Ministry of Justice and Security responsible for transfer of the execution of Dutch sentences) and the Amsterdam public prosecutor presume that the decision on the transfer of a surrendered person to the executing Member State pursuant to a guarantee of return is taken by the public prosecution service (and then effected by the Ministry of Justice and Security), although in light of the *SF (European arrest warrant – Guarantee of return to the executing Member State)* judgment the Amsterdam public prosecutor recognises that the examining judge should probably take the decision.

As explained above, the Amsterdam public prosecutor is of the opinion that it is up to the surrendered person to invoke the guarantee of return.

46. Have the (issuing judicial) authorities of your Member State experienced any difficulties when they provided a guarantee of return? If so, please describe those difficulties and how they were resolved.

Answer

One examining judge and one public prosecutor had no experiences at all with the guarantee of return. Two examining judges reported that they had given guarantees of return.

47. Have the executing judicial authorities of your Member State experienced any difficulties with a guarantee of return? If so, please describe those difficulties and how they were resolved.

Answer

In most cases, the EAW does not contain the guarantee. As a result, in each case involving a Dutch national or a Dutch resident the Amsterdam public prosecutor's office, either at the

[280] *SF (European arrest warrant – Guarantee of return to the executing Member State)*, paragraph 59.

request of the District Court of Amsterdam or *proprio motu*, has to ask for a separate guarantee.

It would be helpful if the issuing judicial authority, *proprio motu*, were to indicate in the EAW itself, *e.g.*, in section (f), that the competent authority of the issuing Member State guarantees the return of a national or a resident of the executing Member State insofar as the executing judicial authority will make surrender conditional on that guarantee.[281]

Issuing authority

In some Member States the guarantee is not given by the issuing judicial authority, but by a *public prosecutor*[282] or by or on behalf of a *government minister*.[283] This is not a problem, as Art. 5(3) of FD 2002/584/JHA does not require that the issuing judicial authority gives the guarantee.[284] On the contrary, the rubric of that provisions is entitled 'Guarantees to be given by the issuing Member State in particular cases'. And both Art. 27(4) and Art. 28(3)(d) of FD 2002/584/JHA explicitly state: 'For the situations referred to in Article 5, the issuing Member State must give the guarantees provided for therein'. Finally, the Court of Justice refers to the guarantee provided for in Art. 5(3) of FD 2002/584/JHA 'as a guarantee to be given by the issuing Member State in particular cases'.[285]

In an Norwegian case, the guarantee was given by a *police officer*. The requested person disputed that the police officer was competent to issue the guarantee. That contention was rejected, because:
- the police officer had stated that he was acting on behalf of the public prosecutor;
- he had confirmed that that guarantee was still valid, after having spoken with the public prosecutor;
- he was mentioned in the Arrest Warrant as a contact; and
- both the Arrest Warrant, which was issued by the public prosecutor, and 'Form A' already contained a (short version of the) guarantee ('The suspect will be returned to his home country for serving the legal sentence').
In those circumstances, the District Court of Amsterdam had no reason to doubt that the issuing public prosecutor had mandated the police officer to issue the guarantee of return.[286]

Content and form of the guarantee

In accordance with Art. 5(3) of FD 2002/5874/JHA, the guarantee usually states that the person concerned 'will be returned' to the executing Member State without referring to consent of the requested person. Such guarantees are valid according to the District Court of

---

[281] See also *Handbook on how to issue and execute a European arrest warrant*, *OJ* 2017, C 335, p. 21.
[282] See, *e.g.*, District Court of Amsterdam, judgment of 30 July 2020, ECLI:NL:RBAMS:2020:3571; District Court of Amsterdam, judgment of 21 October 2020, ECLI:NL:RBAMS:2020:5329.
[283] See, *e.g.*, District Court of Amsterdam, judgment of 8 October 2020, ECLI:NL:RBAMS:2020:5320 (*Ministero della Giustizia*); District Court of Amsterdam, judgment of 4 November 2020, ECLI:NL:RBAMS:2020:5378 (*Secretary of State*); District Court of Amsterdam, judgment of 19 February 2021, ECLI:NL:RBAMS:2021:704 (not published) (*Director General in Rome*).
[284] District Court of Amsterdam, judgment of 3 November 2020, ECLI:NL:RBAMS:2020:5361.
[285] ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return to the executing Member State)*, C-314/18, ECLI:NL:RBAMS:2021:191, paragraph 41.
[286] District Court of Amsterdam, judgment of 16 March 2021, parketnummer 13/751026-20 (not published).

Amsterdam: FD 2008/909/JHA and the Dutch legislation adopted to transpose that framework decision determine whether consent of the surrendered person is required or not.[287]

A guarantee which explicitly stipulates that the person concerned expresses 'his will not to serve his sentence in France and to benefit from the return guarantee' as a precondition for a return to the Netherlands is not problematic in the opinion of the District Court of Amsterdam. Both FD 2008/909/JHA and the Dutch legislation adopted to transpose it, in principle, require consent of the person concerned.[288]

At this point it is appropriate to point out that this case-law relies heavily on the correctness of the transposition of FD 2008/909/JHA. As we saw earlier, there is a case to be made that actual return to the executing Member State on the basis of a guarantee of return cannot be dependent on consent by the person concerned (see the answer to question 45c) (i)).

In a German case, the guarantee referred to the Council of Europe Convention on the transfer of sentenced persons as the legal basis for return to the Netherlands. The District Court of Amsterdam held that this did not affect the validity of the guarantee, because both Germany and the Netherlands had, at that time, already transposed FD 2008/909/JHA (which replaces that convention).[289]

In a Spanish case, the issuing judicial authority did not provide a translation of the guarantee. Because the EAW in that case also suffered from other serious defects, the District Court of Amsterdam refused to execute it.[290] In another Spanish case, the document containing the decision to give the guarantee mentioned that the decision was not final and could be appealed. The public prosecutor contended that the decision was final because the time limit for filing an appeal had already expired, without, however, identifying the factual grounds on which he based that contention. The District Court decided to inquire whether the decision was final.[291] It turned out that the period for filing an appeal had expired and that no appeal was filed; the District Court of Amsterdam ruled that the guarantee was valid.[292]

Even a monosyllabic guarantee ('Yes') can be a valid guarantee, when read in combination with the request to provide the guarantee as referred to in Art. 5(3) of FD 2002/584/JHA.[293]

In Poland, apparently the legislation adopted to transpose FD 2002/584/JHA does not provide for giving a separate guarantee by Polish authorities, but rather dictates that Polish authorities will comply with a *condition set by the executing judicial authority* in this regard. If, in response to a request for the guarantee of Art. 5(3) of FD 2002/584/JHA, the issuing judicial authority refers to Art. 607j of the Polish Code of Criminal Procedure and states that Polish authorities will comply with the condition set by the District Court, it will consider such a

[287] District Court of Amsterdam, judgment of 2 September 2020, ECLI:NL:RBAMS:2020:4647.
[288] District Court of Amsterdam, judgment of 28 May 2021, ECLI:NL:RBAMS:2021:2877.
[289] District Court of Amsterdam, judgment of 21 July 2020, ECLI:NL:RBAMS:2020:3571.
[290] District Court of Amsterdam, judgment of 22 June 2017, ECLI:NL:RBAMS:2017:4748.
[291] District Court of Amsterdam, judgment of 11 March 2021, parketnummer 13/752171-20 (not published).
[292] District Court of Amsterdam, judgment of 26 March 2021, ECLI:NL:RBAMS:2021:1872.
[293] District Court of Amsterdam, judgment of 17 December 2020, ECLI:NL:RBAMS:2020:7234 (not published).

statement as a sufficient guarantee.[294]As the court held in another case, by requesting the guarantee of Art. 5(3) of FD 2002/584/JHA it must be regarded as having set a condition within the meaning of the relevant Polish legislation.[295]

Sometimes, Polish issuing judicial authorities only refer to legislation adopted to transpose FD 2008/909/JHA instead of referring to the provision adopted to transpose Art. 5(3) of FD 2002/584/JHA, *i.e.* Art. 607j of the Polish Code of Criminal Procedure, and make a return to the Netherlands dependent on a finding by a Polish court that enforcing the sentence in the Netherlands would 'better achieve the educational and preventive objectives of the sentence'.[296] The District Court of Amsterdam will not regard such a statement as the unconditional guarantee provided for in Art. 5(3) of FD 2002/584/JHA and Art. 6(1) of the Law on Surrender.[297]

Transmission of the guarantee
Providing the guarantee via e-mail is accepted.[298]

D. Detention conditions/deficiencies in the system of justice

Explanation

Part 4D concerns information about detention conditions in the issuing Member State and deficiencies in the judicial system of the issuing Member State.

Detention conditions
In the *Aranyosi and Căldăraru* judgment, the Court of Justice devised a two-step test for assessing a real risk of a breach of Art. 4 of the Charter by reason of inhuman or degrading detention conditions in the issuing Member State.

The first step of the test aims at establishing whether detainees in the issuing Member State in general run a real risk of being subjected to inhuman or degrading detention conditions on account of 'deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention'. In doing so, the executing judicial authority must, initially, 'rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State'.

[294] See, *e.g.*, District Court of Amsterdam, judgment of 17 January 2014, ECLI:NL:RBAMS:2014:1303; District Court of Amsterdam, judgment of 19 November 2019, ECLI:NL:RBAMS:2019:9098; District Court of Amsterdam, judgment of 12 May 2020, ECLI:NL:RBAMS:2020:2582 (not published).
[295] District Court of Amsterdam, judgment of 29 June 2021, ECLI:NL:RBAMS:2021:3325.
[296] See, *e.g.*, the following guarantee: '*In response to the letter of April 21, 2021, the District Court in Gdansk would like to confirm, that in case of a possible conviction of the surrender [the requested person] to imprisonment, he or the relevant Dutch authorities will have the right to request the Polish court to execute this punishment in the Netherlands. According to article 611 t of the Polish Code of Criminal Procedure, the court will accept the request and will submit an appropriate request to the Dutch authorities, if it deems, that the executing of the judgment in the Netherlands will allow to better achieve the educational and preventive objectives of the sentence'*.
[297] See, *e.g.*, District Court of Amsterdam, interlocutory judgment of 21 May 2021, parketnummer 13/752176-18 (not yet published).
[298] District Court of Amsterdam, judgment of 5 February 2021, ECLI:NL:RBAMS:2021:432.

If the executing judicial authority finds that 'there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member', it must then take the second step of the test and assess, specifically and precisely, 'whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State'.

To that end, the executing judicial authority must engage in a dialogue with the issuing judicial authority and request pursuant to Art. 15(2) of FD 2002/584/JHA 'supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State'. The issuing judicial authority is obliged to carry out such a request, if need be, with assistance of the central authority (Art. 7 of FD 2002/584/JHA) of its Member State.

If that assessment results in a funding of a real risk for the requested person if surrendered, the executing judicial authority must postpone the execution of the EAW 'until it obtains the supplementary information that allows it to discount the existence of such a risk', but 'if the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end' (ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 & C-659/15 PPU, ECLI:EU:C:2016:198, paragraphs 88-104).

Deficiencies in the system of justice
In the *Minister for Justice and Equality (Deficiencies in the system of justice)* judgment, the Court of Justice essentially adapted the two-step *Aranyosi and Căldăraru* test and turned it into a test for assessing a real risk of a breach of the right to an independent tribunal, a right which belongs to the essence of the right to a fair trial as guaranteed by Art. 47(2) of the Charter.

Accordingly, the executing judicial authority must 'assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State (…), whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached'.

A finding of the existence of such a risk, necessitates a further assessment, *viz.* whether there are substantial grounds to believe that the requested person will be exposed to that risk if surrendered.

That further assessment consists of two distinct steps. First, the executing judicial authority must, in particular, 'examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State's courts, (…) are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject'. Second, if it finds that those deficiencies are indeed 'liable to affect those courts', it must also 'assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the [EAW]'.

Furthermore, the executing judicial authority engage in a dialogue with the issuing judicial authority and 'must, pursuant to Article 15(2) of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk'. As with requests about detention conditions, the issuing judicial authority is obliged to carry out such a request, if need be, with assistance of the central authority (Art. 7 of FD 2002/584/JHA) of its Member State.

If the executing judicial authority cannot 'discount the existence of a real risk that the individual concerned will suffer in the issuing Member State a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial', it must 'refrain from giving effect' to the EAW (ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, ECLI:EU:C:2018:586, paragraphs 60-61 and 68-78).

Issues

Issuing judicial authority not competent
Sometimes, when the issuing judicial authority is not competent under national law to provide information and/or a guarantee, it will content itself with reporting this to the executing judicial authority instead of referring the matter to the competent national authority of engaging the services of its national central authority.

Detention conditions
48. Have the executing judicial authorities of your Member State had any cases in which they established that detainees in general would run a real risk of being subjected to inhuman or degrading detention conditions in the issuing Member State on account of systemic or generalised deficiencies, deficiencies which may affect certain groups of people, or deficiencies which may affect certain places of detention (the first step of the *Aranyosi and Căldăraru* test)? If so:

- with respect to which Member State(s);
- on the basis of which sources;
- did the executing judicial authorities use the database of the Fundamental Rights Agency[299] in stablishing that risk;
- what role, if any, did (measures to combat) COVID-19 play in establishing that risk?

Answer

Yes, the District Court of Amsterdam has had cases in which it established that detainees in general would run a real risk of being subjected to inhuman or degrading detention conditions in the issuing Member State on account of systemic or generalized deficiencies, deficiencies

[299] The 'Criminal Detention Database 2015-2019': https://fra.europa.eu/en/databases/criminal-detention/criminal-detention.

which may affect certain groups of people, or deficiencies which may affect certain places of detention.

This was established with respect to the following Member States.

- Belgium (with regard to places of detention in which the inmates have to sleep on the floor of the cell)
- Bulgaria
- France (with regard to three specific places of detention)
- Greece (with regard to one specific place of detention)
- Hungary (except for two specific places of detention)
- Italy (with regard to 16 specific places of detention)
- Lithuania (with regard to three specific places of detention and with regard to psychiatric patients)
- Sweden (with regard to persons who are suicidal and psychiatric patients when detained in custody on remand)
- Poland (with regard to persons involved in a witness protection program in Germany)
- Portugal (with regard to three specific places of detention)
- Romania
- United Kingdom (with regard to three specific places of detention)

This was established, *inter alia*, on the basis of one or more of the following sources.

- European committee for the prevention of torture (CPT):
  - public statements
  - reports
- Judgments of the European Court of Human Rights
- Reports of NGO's:
  - Associazione Antigone (Italy/2019)[300]
- Information from the Minister of Justice of the issuing State (this information was mentioned in relation to the establishment of a real risk) (UK)[301]
- Report from the Ombudsman of the issuing Member State (Portugal)[302]
- HM Chief Inspector of Prisons of the issuing Member State: annual report and other documents (UK)[303]
- Information from the Prosecution office of another Member State than the issuing and executing Member State[304]
- Information of the Police of another Member State than the issuing and executing Member State[305]
- N.B. Other sources were taken into account (often provided by the requested person), but these were not used by the District Court of Amsterdam as a basis for establishing a real risk.
  - Human rights reports of the US State Department (Croatia).[306]

---

[300] District Court of Amsterdam, judgment of 24 December 2019, ECLI:NL:RBAMS:2019:10053.
[301] District Court of Amsterdam, judgment of 29 March 2019, ECLI:NL:RBAMS:2019:2381.
[302] District Court of Amsterdam, judgment of 22 August 2016, ECLI:NL:RBAMS:2016:6316.
[303] District Court of Amsterdam, judgment of 29 March 2019, ECLI:NL:RBAMS:2019:2381.
[304] District Court of Amsterdam, judgment of 17 December 2017, ECLI:NL:RBAMS:2017:8014.
[305] District Court of Amsterdam, judgment of 17 December 2017, ECLI:NL:RBAMS:2017:8014.
[306] District Court of Amsterdam, judgment of 22 May 2018, ECLI:NL:RBAMS:2018:3539.

- Observatoire International des Prisons (France)[307]
- European Prison Observatory (Latvia)[308]
- Latvia Human Rights Report (Latvia)[309]
- Media coverage
- Answers from the Minister of Justice of the issuing Member State to questions from Parliament (Belgium)
- UN Committee against Torture (CAT) (Sweden)[310]

In its decisions, the District Court of Amsterdam did not refer to the database of the Fundamental Rights Agency in establishing a real risk, although that database was used in preparing some cases.

The COVID-19 pandemic was often used by the requested person to argue that the EAW should not be executed or that the requested person should not be actually transferred after the decision of the Court to execute the EAW. However, there are no cases in which the execution of the EAW was refused and no cases in which the requested person was not eventually actually transferred to the issuing Member State. There were cases in which after the decision of the Court to execute the EAW, the actual transfer was delayed/postponed due the pandemic.

49. Having established a real risk as referred to in the previous question:

- what kind of information did the executing judicial authorities of your Member State request from the issuing judicial authorities in order to assess whether the requested person would run such a risk if surrendered (the second step of the *Aranyosi and Căldăraru* test);

- did the executing judicial authorities of your Member State actually conclude that a requested person would run such a real risk, if surrendered;

- if so, was such a real risk excluded within a reasonable delay? If not, what was the decision taken by the executing judicial authorities of your Member State? If a (judicial) authority of the issuing Member State gave a guarantee that the detention conditions would comply with Art. 4 of the Charter, did the executing judicial authorities of your Member State rely on that guarantee? If not, why not?

Answer

The District Court of Amsterdam requested the following information, *inter alia*, from the issuing judicial authorities in the context of step 2 of the *Aranyosi and Căldăraru* test (with regard to both prosecution- and execution-EAW's since in both cases the requested person will be detained after surrender).

- Information about detention conditions such as:

[307] District Court of Amsterdam, judgment of 31 January 2019, ECLI:NL:RBAMS:2019:655 and District Court of Amsterdam, judgment of 14 May 2019, ECLI:NL:RBAMS:2019:3673.
[308] District Court of Amsterdam, judgment of 13 September 2019, ECLI:NL:RBAMS:2016:6014 and District Court of Amsterdam, judgment of 2 August 2018, ECLI:NL:RBAMS:2016:4857.
[309] District Court of Amsterdam, judgment of 2 August 2018, ECLI:NL:RBAMS:2016:4857.
[310] District Court of Amsterdam, judgment of 26 January 2017, ECLI:NL:RBAMS:2017:440.

    - square meters of living space;
    - duration of the detention;
    - duration of stay inside and outside the prison cell;
    - state of the sanitation facilities;
    - recreational and educational and work facilities;
- Information in which prison the requested person will be detained after his/her surrender.
- Information about the duration of the stay in a specific prison.

Yes, the District Court of Amsterdam establish in a number of cases that the requested person would run a real risk. From 1 January 2016 to 1 September 2019, the District Court of Amsterdam established an *in abstracto* real risk in 94 cases concerning Bulgaria, France, Hungary, Portugal, Romania and the United Kingdom. In 56 of these decisions, the Court surrendered the requested person without establishing an *in concreto* real risk (concerning Bulgaria, France, Hungary, Portugal and Romania). Statistics with regard to the period after 1 September 2019 are not available yet.[311]

In some cases such a real risk was excluded within a reasonable time. From 1 January 2016 to 1 September 2019, the District Court of Amsterdam established an *in concreto* real risk in 38 cases, which led the court to postpone the procedure in order to ask for more information and/or guarantees of the executing Member State. Of the 38 cases in which an *in concreto* risk was established, the Court allowed the execution of the EAW in eight cases on the basis of additional information and/or guarantees (concerning Bulgaria, France, Portugal and the United Kingdom). Statistics with regard to the period after 1 September 2019 are not available yet.[312]

In cases in which such a real risk was not excluded within a reasonable time, the Court decided to bring the procedure to an end, *i.e.* to declare the request of the prosecutor to process the EAW inadmissible. From 1 January 2016 to 1 September 2019, the Court declared the request of the prosecutor inadmissible in 30 decisions (concerning Bulgaria, Portugal and Romania). Of these decisions, 26 were based on an EAW from Romania. Statistics with regard to the period after 1 September 2019 are not available yet.[313]

It is interesting to compare these statistics with the figures compiled by the Council of the European Union concerning the years 2017 and 2018.[314] Of 27 Member States which responded to questions about poor detention conditions as a reason to refuse to execute an EAW (question 1) and as a reason to postpone the decision on the execution of an EAW (question 2), 18 Member States reported no cases of refusal/postponement by their judicial authorities at all. The other 9 Member States replied as follows:
- Belgium:
    - 2017: none
    - 2018: three refusals, one postponement (which eventually led to surrender)
- Denmark:
    - No refusals

[311] Source: D. Gigengack master thesis
[312] Ibid.
[313] Ibid.
[314] *Council document* 8850/19, 2 May 2019.

    - About 30 cases of postponement
- Germany:
    - No clear statistics on detention conditions, but in 2017 in 40 cases surrender was refused on the basis of Art. 1(3) of FD 2002/584/JHA
- Ireland:
    - Refusals: one case in 2017
    - Postponement: two cases in 2017, nine cases in 2018
- Italy:
    - Refusal: four cases in 2017, none in 2018
    - Postponement: none in 2017 and 2018.
- Luxembourg:
    - Non refusals/postponement
- Malta:
    - Refusal: one case in 2017
    - Postponement: no cases in 2017-2018
- Sweden:
    - Refusal: 8 cases in 2017, one in 2018
    - Postponement: none in 2017 and 2018.

Apparently, the executing judicial authorities of two thirds of the Member States either were not confronted with (defences based on) poor detention conditions in the issuing Member State or did not establish an *in concreto* real risk of inhuman or degrading detention conditions in the issuing Member State.[315]

With regard to guarantees given when applying step 2 of the test the following approaches of the District Court can be identified.

- In some cases the District Court did not rely on a mere guarantee that the detention conditions would comply with Art. 4 of the Charter and/or did not rely on general information, because the guarantee/information was not deemed to be sufficiently concrete to base the assessment in step 2 on. Relying just on such a guarantee and such information was considered not be in line with the *Aranyosi and Căldăraru* test which requires a specific and precise assessment in step 2 given the establishment of a real risk in step 1.
- In some cases the District Court did rely on a guarantee that contained information that was deemed to be sufficiently concrete to base the assessment in step 2 on.
- In some cases the District Court did rely on a guarantee that a requested person would not be detained in a facility with conditions that do not comply with Art. 4 of the Charter
- In some cases the District Court did rely on a guarantee that a requested person would be detained (most likely) in a facility with regard to which no *in abstracto* real risk was established when applying step 1.
- Some of the guarantees were given with regard to a specific requested person. Others were given with regard to unspecified requested persons who are in the same situation (*e.g.* the guarantee that all requested persons would (not) be detained in a specific facility).

---

[315] This raises the question whether those executing judicial authorities are aware of the *Aranyosi* case-law or whether those executing judicial authorities are confronted with EAWs from Member States which have problems with detention conditions.

We are not aware of cases in which it was established that, after surrender, the issuing Member State did not (eventually) honour a guarantee given by its authorities, although some complaints in this regard have reached the District Court of Amsterdam.

In one case, the authorities of the issuing Member State did not honour the guarantee initially. However, when the surrendered person's legal counsel in the issuing Member State drew their attention to the guarantee, the surrendered person was placed in a cell that did comply with that guarantee.

It should be pointed out that there is no system in place to monitor compliance with guarantees.

49a. In case of a refusal to execute an EAW on account of detention conditions, what steps did your Member State take, as issuing or executing Member State, to prevent impunity (*e.g.* in case of an execution-EAW, initiating proceedings to recognise the judgment and enforce the custodial sentence in the executing Member State on the basis of FD 2008/909/JHA)?

Answer

According to one of the prosecutors who were interviewed, the Netherlands undertook no steps to prevent impunity in these cases. In his opinion, enforcing the custodial sentence in the Netherlands would not contribute to the improvement of conditions of detention in the issuing Member State.

50. Have the issuing judicial authorities of your Member State experienced any difficulties when requested to provide additional information in application of the *Aranyosi and Căldăraru* test? If so, please describe those difficulties and how they were resolved.

Answer

We did not come across difficulties experienced by authorities involved in issuing EAW's in our research.

51. Have the executing judicial authorities of your Member State experienced any difficulties when applying the *Aranyosi and Căldăraru* test? If so, please describe those difficulties and how they were resolved.

Answer

One of the difficulties arose in situations in which there were grave concerns with regard to step 1 of the test, but no sufficient information was available that was objective, reliable, specific and properly updated to base the establishment of a real risk in step 1 on. Although this might not be quite in line with the test, the District Court of Amsterdam requested additional information in some of these situations in order to carry out the assessment as

ImprovEAW
RESEARCH PROJECT

required in step 1[316]. One could call this step 0[317]. The District Court of Amsterdam decided in a later stage to abandon this approach, since a lack of sufficient information should lead to the conclusion that a real risk cannot be established in step 1 considering the principal of mutual trust that can only be limited if sufficient information is available.

Related to this difficulty is the issue of the 'burden of proof'. A considerable part of this burden is on the requested person with regard to step 1 (establishing a real risk in general). Sometimes, however, it is problematic for the requested person to substantiate his claims in this regard. Therefore, the District Court also engages *ex officio* in obtaining the relevant information. We point out, that once a real risk in general is established the 'burden of proof' is on the issuing authority/Member State[318]

Another difficulty can arise when information and/or a guarantee are not provided by the issuing judicial authority but by other authorities (*e.g.*, a Ministry, the Director of the prison service)[319]. After all, according to the Court of Justice the executing judicial authority must rely on an assurance given, or endorsed, by the issuing judicial authority, 'at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter'.[320] On the other hand, an assurance not given, or endorsed, by the issuing judicial authority 'must be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority'.

A further complication arose due to the fact that is not certain beforehand in which detention facilities the requested person would be detained after surrender. Once the District Court of Amsterdam has ruled that there is a real risk of inhuman or degrading detention conditions in an certain Member State, the public prosecutor will usually ask the issuing judicial authority in which prison(s) the person concerned likely will be detained after surrender. Often the requested person will be transferred to other facilities than the facility in which he will be detained immediately after surrender. Initially, it was not clear the conditions of which facilities have to be assessed by the executing authority. In the *Generalstaatsanwaltschaft (Conditions of detention in Hungary)* judgment, the Court of Justice made it clear that the executing judicial authority should only assess conditions of detention in prisons in which, according to the information available to it, it is likely that the person concerned will be detained, including on a temporary or transitional basis.[321] Unfortunately, every once in a while the District Court of Amsterdam erroneously includes in its assessment other prisons than those in which it is likely that the person concerned will be detained.[322]

---

[316] District Court of Amsterdam, judgment of 7 June 2016, ECLI:NL:RBAMS:2016:3409 (Belgium) and District Court of Amsterdam, judgment of 30 June 2020, ECLI:NL:RBAMS:2020:3208 (France)
[317] See: Exploring mutual trust through the lens of an executive judicial authority: The practice of the Court of Amsterdam in EAW proceedings (Adriano Martufi and Daila Gigengack, New Journal of European Criminal Law (2020, Vol 11 (3) 282-298))
[318] In this regard this test is different from the 'Celmer test' (see the answer to question 55).
[319] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, ECLI:EU:C:2018:589.
[320] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, ECLI:EU:C:2018:589, paragraphs 112-114.
[321] Ibid., paragraph 117.
[322] See, *e.g.*, District Court of Amsterdam, judgment of 25 June 2019, ECLI:NL:RBAMS:2019:4929; District Court of Amsterdam, judgment of 21 November 2019, ECLI:NL:RBAMS:2019:9684; District Court of Amsterdam, judgment of 1 October 2020, ECLI:NL:RBAMS:2020:6098; District Court of Amsterdam,

All of these cases concern Romanian EAWs. In all of these cases Romanian authorities explained that 'after enforcement of one fifth of the penalty, the sentenced person will be again subject to the evaluation of the commission for the establishment of the enforcement regime with a view to changing the enforcement regime. The development of the enforcement regime cannot be forecast because it depends mainly on the detainee's behaviour during the enforcement period'. In each case, Romanian authorities added that *if* the enforcement regime were to be changed to another regime, *then* the person concerned would likely be detained in a certain prison. It is clear that *this* prison is not a prison in which it is likely that the person concerned will be detained, because a future change of enforcement regime is, at best, possible.
In some of the cases, the District Court of Amsterdam refrained from giving effect to the EAW on account of conditions of detention in such prisons.

Every now and then the question pops up how to assess whether available information is sufficiently up to date. This occurs in the situation that a real risk is established in step 1 on the basis of properly updated information. Surely, the District Court can rely on its assessment in a case that follows shortly after the case in which the real risk was established and can assume that the information available is still properly updated. But in a situation in which there is a longer interval between the first and the second case, this might no longer be justified[323].

In 2019, the District Court of Amsterdam examined whether it still had 'properly updated' information demonstrating a real risk of inhuman or degrading conditions of detention in Hungarian prisons. It answered this question in the negative based on the following findings:

- The most recent judgment of the ECtHR concerning a violation of Art. 3 of the ECHR by Hungary dated from 2016 and concerned conditions of detention in 2012;
- Since then, the ECtHR had declared complaints against Hungary inadmissible because the applicant had failed to exhaust national remedies against bad conditions of detention which according to the ECtHR were effective remedies,[324] had made use of those remedies but the national decision was still pending,[325] or had received adequate compensation.[326] In one decision, the ECtHR had declared 305 complaints against Hungary inadmissible, the oldest of which dated from 2012 and the most recent from 2015;[327]
- The District Court was not aware of complaints against Hungary about conditions of detentions that were submitted after 2015;

judgment of 20 August 2021, ECLI:NL:RBAMS:2021:2021:4366; District Court of Amsterdam, judgment of 7 September 2021, ECLI:NL:RBAMS:2021:5308.
[323] See, *e.g.*, District Court of Amsterdam, judgment of 6 August 2019, ECLI:NL:RBAMS:2019:5853.
[324] ECtHR, decision of 14 November 2017, *Domján v. Hungary*, ECLI:CE:ECHR:2017:1114DEC000543317.
[325] ECtHR, decision of 31 January 2019, *Fülöp v. Hungary*, ECLI:CE:ECHR:2019:0131DEC001401015.
[326] ECtHR, decision of 29 November 2018, *Magyar v. Hungary*, ECLI:CE:ECHR:2018:1129DEC003326216.
[327] ECtHR, decision of 31 December 2018, *Molnár e.a. v. Hungary*, ECLI:CE:ECHR:2018:1213DEC000710112.

- The most recent CPT report about Hungary dated from 2014, concerning a visit in 2013.[328]

This decision does not refer to any ‘positive’ development regarding the conditions of detention since the finding of a real risk of inhuman or degrading conditions of detention in the issuing Member State and, therefore, seems to imply that mere passage of time without any evidence of improvement of those conditions could result in a finding that the real risk no longer exists. It could be argued that, once the executing judicial authority has established a real risk of inhuman or degrading conditions of detentions, only such evidence is capable of discounting that risk.

Assuming the information at hand is no longer properly updated, can the District Court justifiably assume there is still a real risk until new properly updated information proves the contrary? Or is it more reasonable to conclude that the District Court cannot justifiably assume there is still a real risk even though no additional information to certify this is available? Or is there a need for the Court to request additional information in such a situation and, if so, *ex officio* or only when the defense counsel puts forward a substantiated defense?

Another angle to the issue of properly updated information arises from the fact that often the documentation refers to information about a situation in the past, *i.e.* the reports of the CPT contain information about visits prior to the report and judgements of the ECHR also look back in time and refer to situations in the distant past.

Deficiencies in the system of justice

52. Have the executing judicial authorities of your Member State had any cases in which they established that there is a real risk of a violation of the right to an independent tribunal in the issuing Member State on account of systemic or generalised deficiencies liable to affect the independence of the judiciary (the first step of the *Minister for Justice and Equality (Deficiencies in the system of justice)* test)? If so:

- with respect to which Member State(s);
- on the basis of which sources?

Answer

- Yes
- With respect to Poland, the District Court of Amsterdam held that structural or generalized deficiencies existed from the Autumn of 2017 on.[329] In subsequent judgments concerning Polish EAW’s, the District Court of Amsterdam refers to this finding, implying that this finding is still up to date. Indeed, in two judgments in 2020, the District Court held that the deficiencies actually had increased.[330]

---

[328] District Court of Amsterdam, interlocutory judgment of 6 August 2019, ECLI:NL:RBAMS:2019:5853 in combination with District Court of Amsterdam, judgment of 27 August 2019, ECLI:NL:RBAMS:2019:6354.

[329] District Court of Amsterdam, judgment of 4 October 2018, ECLI:NL:RBAMS:2018:7032; District Court of Amsterdam, judgment of 22 April 2021, ECLI:NL:RBAMS:2021:2321.

[330] District Court of Amsterdam, judgment of 31 July 2020, ECLI:NL:RBAMS:2020:3776; District Court of Amsterdam, judgment of 3 September 2020, ECLI:NL:RBAMS:2020:4328.

- Sources mentioned in the 2018 judgment[331] are the following.
  - *Opinion No. 904/2017* of 11 December 2017, of *the European Commission for Democracy through Law (Venice Commission)*;
  - *The reasoned proposal of the European Commission of 20 December 2017 (COM(2017) 835 final) and the supplement of 18 August 2018.*
  - *Information from the European Network of Councils for the Judiciary, in particular:*
    - *ENCJ Lisbon declaration* (1 June 2018)
    - *Issues that the ENCJ delegation would like to discuss at the meeting with the Polish National Judicial Council* (KRS) *on 21 June 2018*
    - *Position Paper of the Board of the ENCJ on the membership of the KRS of Poland* (16 August 2018)
  - *Report of the Special Rapporteur on the Independence of judges and lawyers on his mission to Poland*, 5 April 2018, A/HRC/38/38/Add.1, *United Nations, General Assembly, Human Rights Council*;
  - *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, 5 May 2017, JUD-POL/305/2017-Final [AlC/YM], *OSCE/ODIHR*;
  - *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland*, 30 August 2017, JUD-POL/313/2017 [AlC], *OSCE/ODIHR*;
  - *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland (as of 26 September 2017)*, 13 November 2017, JUD-POL/315/2017 [AlC], *OSCE/ODIHR*;
  - *Addendum to the Fourth Round Evaluation Report on Poland (Rule 34)* of the Council of Europe's Group of States against Corruption (GRECO), of 22 June 2018, Greco-AdHocRep(2018)3.
  - *The white paper on the Reform of the Polish Judiciary*, of 7 March 2018, by the Polish government.
  - *Answers to the questions asked by the ENCJ regarding the issues the ENCJ wanted to discuss at the meeting with the National Council of the Judiciary on 21 June 2018* from *the Chairman of the national council of the judiciary of Poland*, 12 July 2018.

53. Having established a real risk as referred to in the previous question:

- what kind of information did the executing judicial authorities of your Member State request from the issuing judicial authorities in order to assess whether the requested person would run such a risk if surrendered (the second step of the *Minister for Justice and Equality (Deficiencies in the judicial system)* test);

- did the executing judicial authorities of your Member State actually conclude that a requested person would run such a real risk, if surrendered;

- if so, was such a real risk excluded within a reasonable delay? If not, what was the decision taken by the executing judicial authorities of your Member State?

Answer

[331] District Court of Amsterdam, judgment of 4 October 2018, ECLI:NL:RBAMS:2018:7032.

- *The requested information.*
  - In August 2018, the District Court of Amsterdam applied the second step of the two-step test of *Minister for Justice and Equality (Deficiencies in the judicial system)*[332]. This second step is, in itself, divided in two steps.
    - The first step (2.a) consists of answering the question whether the systemic or generalized deficiencies as identified in step 1 are liable to have an impact on the decision of the courts having jurisdiction over the requested person's case.
    - If so, the second step (2.b) consists of answering the question whether there are, in the light of specific concerns and possible information put forward by the requested person, substantial grounds for believing that he will run a real risk of a violation of his fundamental right to an independent tribunal having regard to his personal situation, the nature of the offence for which he is being prosecuted and the factual context that form the basis of the EAW.
  - In October 2018, the District Court decided to ask a number of questions with regard to step 2.a, before turning to step 2.b.[333] These questions were asked in all cases concerning Polish prosecution-EAWs. They were also asked in cases of Polish execution-EAW's, but only if the judgment of conviction was rendered from the Autumn of 2017 on[334] or because it was plausible that, after surrender, proceedings concerning the sentence would be conducted, provided that these proceedings would fall within the ambit of the right to a fair trial[335].
    - Which courts have jurisdiction over the requested person's case(s)?
    - Changes in the staffing for each of the competent courts
      - Were judges dismissed after the amendment to the Law on the organization of common courts on 12 August 2017 came into force? If so, when and on which grounds?
      - Did judges retire as a consequence of the amendment to the retirement age? If so, how many in relation to the total number of judges in the court?
      - Were there any cases in which the mandate of these judges was prolonged after reaching the retirement age?
      - Were there any appointments of assistant-judges after the coming into force of the Law on the national school for the judiciary and the public prosecution? If so, do they handle criminal cases and, if so, as *unus judex* or as a member of a chamber consisting of multiple judges?
    - Allocation and handling/adjudication of cases
      - Were there any changes in the rules and procedures for allocating cases, such as the cases against the requested person

[332] District Court of Amsterdam, judgment of 16 August 2018, ECLI:NL:RBAMS:2018:5925.
[333] District Court of Amsterdam, judgment of 4 October 2018, ECLI:NL:RBAMS:2018:7032.
[334] District Court of Amsterdam, judgment of 27 September 2018, ECLI:NL:RBAMS:2018:6952.
[335] District Court of Amsterdam, judgment of 25 October 2019, ECLI:NL:RBAMS:2019:8151; ECJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629; ECJ, judgment of 22 December 2017, *Ardic*, C-571/17 PPU, ECLI:EU:C:2017:1026.

after the coming into force of the amendment to the Law on the organization of common courts on 12 August 2017?

- Were there any changes after the coming into force of the amendment to the Law on the organization of common courts in the rules for the adjudication of cases with regard to facts for which the surrender of the requested person is requested?

- Disciplinary matters
  - After the coming into force of the amendments to the Law on the national school for the judiciary and the public prosecution (20 June 2017), the Law on the organization of the common courts (12 August 2017), the Law on the National Council for the Judiciary (1 January 2018) and the Law on the Supreme Court (3 July 2018), were there any disciplinary procedures against judges? If so, for what reason and what was the outcome?
  - After the coming into force of the amendment to the Law on the organization of common courts (12 August 2017), were there any changes in the remuneration of judges? If so, what was the reason?
  - Were there any other measures taken against (deputy-)presidents, like the submission of 'written remarks' by the Minister of Justice? If so, for what reason?
- Procedures for the protection of the right to an independent tribunal
  - Which remedies are available to the requested person in case he has concerns with regard to the independence and impartiality of the judge in his case? Are these remedies available to the requested person already during the procedure in the case for which is surrender is requested? Which legal consequences can be brought about by these remedies and grounds? Which authorities take the decisions in case a remedy is sought?
  - To what extent have these remedies been used in cases like the case against the requested person since the coming into force of the amendment to the aforementioned laws? How many of these requests for a remedy have been declared well-founded in these cases?
- Extraordinary appeal
  - Were there any criminal cases in which the possibility of the procedure of the 'extraordinary appeal' to the Supreme Court was used? If so, on what grounds and what was the outcome?

- About one year later, in September 2019, the Court decided[336] that it was no longer necessary to ask all of the aforementioned questions, because in the meantime it had become clear that the systemic and generalised deficiencies as established in step 1 are liable to have a negative impact at the level of all courts in Poland and, therefore, also at the level of the courts with jurisdiction over the case(s) of requested persons. The questions about disciplinary matters remained relevant in the context of step 2.b.

[336] District Court of Amsterdam, judgment of 27 September 2019, ECLI:NL:RBAMS:2019:7161.

- A few months later, in January 2020, the Court decided it was sufficiently informed about disciplinary matters in general. Furthermore, the Court decided that the questions about disciplinary matters remained of relevance in the context of step 2.b, but it would refrain from asking these questions unless the requested person had put forward circumstances concerning his personal situation that would justify asking those questions.[337]
- In July and August 2020, the District Court referred two cases (L and P) to the Court of Justice in Luxemburg.[338] Shortly before the Luxemburg Court rendered its judgments in the cases of L and P[339] on 17 December 2020, the District Court put the following questions to the issuing judicial authorities in those cases.
    - The District Court took notice of a letter of 13 September 2019 of the Polish Ministry of Justice asking the presidents of Polish courts not to respond to questions of foreign executing judicial authorities concerning the changes in the legal system and concerning individuals, particularly requested persons, but to direct those questions to the Ministry. The District Court asked the issuing authorities in both cases whether they could confirm the existence of the letter and, if so, whether that letter had any consequences for judicial cooperation in EAW matters. The District Court also notified the Court of Justice that these questions were asked.
- After the judgments of the Luxemburg Court in the cases of L and P, which made clear that the national courts cannot dispense with the second step of the two-step test (assessing the individual risk), the District Court requested additional information from the issuing judicial authority in a number of cases. It did not return to its previous practice concerning requests for supplementary information. What follows are some examples of questions which were asked.
    - With regard to a letter sent by the Ministry of Justice to the prosecutor in charge of the case, in which the deputy-minister requested information on the state of affairs in the case of the requested person and asked which first instance court will be the competent court in his case, the District Court asked the following questions to the issuing authority[340].
        - Did the Ministry of Justice actually send this letter to the prosecutor in charge of the case?
        - If so, what was the reason for sending this letter and what was done with the information received?
        - What was the reason for asking which court is competent in the case of the requested person, what is the relevance of this information and what was done by the Ministry with the information?

[337] District Court of Amsterdam, judgment of 16 January 2020, ECLI:NL:RBAMS:2020:181 and District Court of Amsterdam, judgment of 16 January 2020, ECLI:NL:RBAMS:2020:184.
[338] District Court of Amsterdam, judgment of 31 July 2020, ECLI:NL:RBAMS:2020:3776 and District Court of Amsterdam, judgment of 3 September 2020, ECLI:NL:RBAMS:2020:4328.
[339] ECJ, judgment of 17 December 2020, *L & P*, C-354/20 PPU and C-412/20 PPU, ECLI:EU:C:2020:1033.
[340] District Court of Amsterdam, judgment of 22 April 2021, ECLI:NL:RBAMS:2021:1975.

- General observations with regard to asking questions to the issuing judicial authority.
    - In some cases the questions were answered in a complete and comprehensible way.
    - In some cases the questions were answered in an incomplete and/or incomprehensible way.
    - In some cases the questions were not answered at all by responding that the information was not available or by not responding at all (in some cases even after repeated reminders).
    - In some cases the issuing judicial authority responded that the question should be referred to another authority than the issuing judicial authority (*e.g.* the Supreme Court).

- *The decisions of the District Court (after 17 December 2020)*
    - Between 17 December 2020 (the day the judgement in L and P was rendered) and 1 May 2021, the District Court decided to allow the surrender of the requested person to Poland in 19 final decisions on Polish EAWs dealing with the execution of one or more sentences. Most of these decisions concerned EAWs dealing with the execution of a sentence which was based on a Polish decision from before the Autumn of 2017. In those cases, the District Court held - either explicitly or implicitly - that it was not shown that a nexus existed between that decision and the structural or general deficiencies the court already had established in its earlier judgments.[341]
    - Moreover, between 17 December 2020 and 1 May 2021, the District Court established a real risk in general (and took step 1, step 2.a and step 2.b) in 21 final decisions dealing with Polish execution- and prosecution-EAWs. In these decisions, the Court allowed the surrender of the requested person, because the defense did not put forward any – substantial – grounds for establishing an individual risk and the court was not aware of such grounds *ex officio*.[342] In execution-cases, the national decision was rendered from the autumn of 2017 on,[343] distinguishing these cases from the ones mentioned after the previous bullet. One of those cases was the case of Mr P.[344]
      In principle, it is up to the requested person and his legal counsel to put forward information about 'risk factors' pertaining to his personal situation, the nature of the offence, or the factual context of the EAW, *i.e.* factors that are capable of demonstrating an individual real risk of a violation of the right to an independent tribunal. However, the court does not exclude the possibility that it *ex officio* is aware of such information. In the absence of information about

[341] See, *inter alia*, District Court of Amsterdam, judgment of 4 March 2021, ECLI:NL:RBAMS:2021:866; District Court of Amsterdam, judgment of 26 March 2021, ECLI:NL:RBAMS:2021:1886 (not published); District Court of Amsterdam, judgment of 15 April 2021, ECLI:NL:RBAMS:2021:1813.
[342] See, *inter alia*, District Court of Amsterdam, judgment of 30 April 2021, ECLI:NL:RBAMS:2021:2153; District Court of Amsterdam, judgment of 29 April 2021, ECLI:NL:RBAMS:2021:2320; District Court of Amsterdam, judgment of 6 April 2021, ECLI:NL:RBAMS:2021:1624.
[343] See, *inter alia*, District Court of Amsterdam, judgment of 27 January 2021, ECLI:NL:RBAMS:2021:179. English translation (partially): https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Nieuws/Paginas/International-Legal-Assistance-Division-allows-surrender-to-Poland-to-serve-prison-sentence.aspx.
[344] Ibidem.

'risk factors', the court will not engage in a 'dialogue' with the issuing judicial authority by requesting supplementary information, but will hold that an individual real risk of a violation is not established.

- In two decisions, the District Court of Amsterdam adjourned the hearing after taking step 1 and step 2.a, in order to assess whether it needed to request supplementary information[345] and to actually request such information.[346]
- In one decision, concerning a prosecution-EAW, the District Court of Amsterdam established an individual real risk (after having taken step 1, step 2.a and step 2.b).[347] This was the case of Mr L.

- *Establishing an individual risk*
  - Yes, in one case the District Court of Amsterdam decided that there was such a real risk.[348]

- *Reasonable delay and final* decision
  - In the aforementioned case the District Court decided not to (further) delay the decision on the execution of the EAW. The court decided to bring the procedure to an end, *i.e.* to declare the request of the prosecutor to process the EAW inadmissible.[349]

54. Have the issuing judicial authorities of your Member State experienced any difficulties when requested to provide additional information in application of the *Minister for Justice and Equality (Deficiencies in the judicial system)* test? If so, please describe those difficulties and how they were resolved.

Answer

No.

55. Have the executing judicial authorities of your Member State experienced any difficulties when applying the *Minister for Justice and Equality (Deficiencies in the judicial system)* test? If so, please describe those difficulties and how they were resolved.

Answer

See the answer to question 53.

In addition to this, we would like to point out that the issue of the 'burden of proof' is not unproblematic. In establishing a real risk in general (step 1) the District Court expects the requested person to make available relevant information to substantiate his claims, but also adopts also a substantial *ex officio* role in this phase. In establishing a real individual risk (step

[345] District Court of Amsterdam, judgment of 13 April 2021, ECLI:NL:RBAMS:2021:1865.
[346] District Court of Amsterdam, judgment of 22 April 2021, ECLI:NL:RBAMS:2021:1975.
[347] District Court of Amsterdam, judgment of 4 February 2021, ECLI:NL:RBAMS:2021:420.
[348] District Court of Amsterdam, judgment of 4 February 2021, ECLI:NL:RBAMS:2021:420.
English translation (partially): https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Nieuws/Paginas/International-Legal-Assistance-Division-decides-against-surrender-of-a-Polish-accused.aspx.
[349] Ibid.

2), the 'burden of proof' in principle is on the requested person, but the District Court takes into account information of which it is aware *ex officio*.[350]

55bis. Did your courts consider to refer questions to the Court of Justice? If so, on which issues? Why did they not do so in the end?

Answer
On two occasions the District Court of Amsterdam referred sets of preliminary questions to the Court of Justice of the European Union.

The first set of preliminary questions concerned the application of the two-step test of *Ministry for Justice and Equality (Deficiencies in the system of justice)* and resulted in *Openbaar Ministerie (Independence of the issuing judicial authority)*.[351]

The second set of preliminary questions concerns the applicable test to determine whether a real risk of a violation of the right to a tribunal established by law can block surrender. These cases are still pending.[352]

E. Surrender to and from Iceland and Norway

Explanation

Part 4E concerns the application of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, *OJ* 2006, L 292/2.

The Agreement entered into force on 1 November 2019 (*OJ* 2019, L 230/1). It 'seeks to improve judicial cooperation in criminal matters between, on the one hand, the Member States of the European Union and, on the other hand, the Republic of Iceland and the Kingdom of Norway, in so far as the current relationships among the contracting parties, characterised in particular by the fact that the Republic of Iceland and the Kingdom of Norway are part of the EEA, require close cooperation in the fight against crime' (ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, paragraph 72).

According to the preamble to the Agreement, the contracting parties 'have expressed their mutual confidence in the structure and functioning of their legal systems and their capacity to guarantee a fair trial'.

The provisions of the Agreement 'are very similar to the corresponding provisions of Framework Decision 2002/584' (ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, paragraph 74). Equally, the Arrest Warrant-form, set out in the Annex to the Agreement, is very similar to the EAW-form.

---

[350] In this regard, there is a difference between this test and the Aranyosi/Căldăraru test. In this last test, the 'burden of proof' is fully on the issuing authority/Member State.
[351] ECJ, judgment of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)*, C-354/20 PPU and C-412/20 PPU, ECLI:EU:C:2020:1033.
[352] C-562/21 PPU and C-563/21 PPU.

56. Have the issuing judicial authorities of your Member State issued any Arrest Warrants under the EU Agreement with Iceland and Norway? If so, have they experienced any difficulties? If so, please describe those difficulties and how they were resolved.

Answer

The authorities which answered this question have had no experience with issuing Arrest Warrants under the EU Agreement with Iceland and Norway.

57. Have the executing judicial authorities of your Member State been confronted with any Arrest Warrants under the EU Agreement with Iceland and Norway? If so, have they experienced any difficulties? If so, please describe those difficulties and how they were resolved.

Answer

Yes, four Norwegian Arrest Warrants (AWs).

All four Norwegian AWs were prosecution-AWs issued by Norwegian public prosecutors.[353] Two issues arose.

The first issue concerns the status of 'issuing judicial authority'. According to the District Court of Amsterdam, the case-law of the Court of Justice on the concept of an 'issuing judicial authority' under FD 2002/584/JHA[354] applies to that concept under the EU agreement with Iceland and Norway.

> The definition of the concept 'issuing judicial authority' under the agreement (Art. 9(1) of the Agreement) is more or less the same as the definition of that concept under FD 2002/584/JHA. Pursuant to Art. 37 of the Agreement (entitled 'Case law'), the Contracting Parties, 'in order to achieve the objective of arriving at as uniform an application and interpretation as possible of the provisions of this Agreement, shall keep under constant review the development of the case law of the Court of Justice of the European Communities (…) relating to these provisions *and to those of similar surrender instruments*'.[355] Moreover, the rationale of the Court of Justice's interpretation of the concept 'issuing judicial authority' under FD 2002/584/JHA – *i.e.* that the executing judicial authority must be able to trust that the decision to issue an AW was a *judicial* decision and therefore a decision taken by an authority which is independent from the executive – also applies in the context of surrender to Iceland or Norway.

Consequently, the question was whether the decision to issue an AW and, *inter alia*, the proportionality of such a decision, is capable of being the subject, in the issuing Member

[353] District Court of Amsterdam, judgment 4 August 2020, ECLI:NL:RBAMS:2020:3894; District Court of Amsterdam, judgment of 30 November 2020, ECLI:NL:RBAMS:2020:5327; District Court of Amsterdam, judgment of 25 February 2021, ECLI:NL:RBAMS:2021:1895.

[354] See, *e.g.*, ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, Joined Cases C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456; ECJ, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457.

[355] Emphasis added.

State, of court proceedings which meet in full the requirements inherent in effective judicial protection.[356] The District Court answered that question in the affirmative.[357] The situation concerning Norwegian prosecution-AWs issued by public prosecutors is comparable that that of Swedish prosecution-EAWs issued by Swedish public prosecutors.[358]

The second issue concerned a guarantee of return (Art. 8(3) of the Agreement) issued by a police officer. See the answer to question 47.

57bis. How would you answer questions 56 and 57 in relation to the United Kingdom?

Answer
The Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part[359] was applied provisionally as of 1 January 2021 and entered into force on 1 May 2021.

The Law Implementing the Trade and Cooperation Agreement EU – UK Justice and Security (*Uitvoeringswet Handels- en Samenwerkingsovereenkomst EU – VK Justitie en Veiligheid*) only entered into force on 17 July 2021. In the period of 1 January 2021 – 17 July 2021 it was not possible for Dutch judicial authorities to issue or to execute an arrest warrant under that Agreement.

However, under Art. 62(1)(b) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('Council Framework Decision 2002/584/JHA (48) shall apply in respect of European arrest warrants where the requested person was arrested before the end of the transition period for the purposes of the execution of a European arrest warrant, irrespective of the decision of the executing judicial authority as to whether the requested person is to remain in detention or be provisionally released'), as interpreted by the District Court of Amsterdam, if a requested person was arrested on the basis of an EAW issued by a UK judicial authority before 1 January 2021 (*i.e.* before the end of the transition period: Art. 126) the regime of FD 2002/584/JHA (*i.e.* national legislation adopted to transpose FD 2002/584/JHA) continued to apply up to and including the moment of actual surrender of the person concerned.[360] This interpretation allowed Dutch authorities to decide on the execution

[356] ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, Joined Cases C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 75; ECJ, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)*, C-509/18, ECLI:EU:C:2019:457, paragraph 53.
[357] District Court of Amsterdam, judgment 4 August 2020, ECLI:NL:RBAMS:2020:3894.
[358] See ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Swedish Public Prosecutor's Office)*, C-625/19 PPU, ECLI:EU:C:2019:1078.
[359] Brussels and London, 30 December 2020, *OJ* 2021, p. 10.
[360] District Court of Amsterdam, judgment of 20 October 2020, ECLI:NL:RBAMS:2020:5051; District Court of Amsterdam, judgment of 26 November 2020, ECLI:NL:RBAMS:2020:6104.
Although Art. 5 of the Law on Surrender explicitly states that surrender can only take place with judicial authorities of *other Member States* and the UK no longer is a Member State, the District Court of Amsterdam held that, against the background of Withdrawal Treaty, a reasonable interpretation of that provision required the court to *regard* the UK as a Member State of the EU *when applying the transitional regime of Art. 62(1)(b)*: District Court of Amsterdam, judgment of 16 February 2021, ECLI:NL:RBAMS:2021:667.

of British EAWs and to execute decisions to surrender after 31 December 2020 provided the requested person was arrested before 1 January 2020.[361]

As stated before, the national legislation required to operate the surrender scheme of the Trade and Cooperation Agreement only entered into force on 17 July 2021. The executing judicial authority under that legislation, the District Court of Amsterdam, has until now dealt with only a few AWs issued by a British authority under the Trade and Cooperation Agreement.

The District Court encountered two issues. The UK did not make a notification as meant in Art. 599(4) of the Agreement,[362] which means that, pursuant to Art. 599(2) of the Agreement, surrender is subject to the condition that the acts for which the arrest warrant has been issued constitute an offence under the law of the executing State, even if the issuing authority designated those act as one of the 'listed offences' of Art. 599(5) of the Agreement.[363] Furthermore, the public prosecutor was of the opinion that with regard to conditions of detention in the UK, the *Aranyosi and Căldăraru* test is no longer applicable since the UK is no longer a member of the EU and that the court should apply the the *Muršić*[364] judgment of the European Court of Human Rights. The District Court held that, as the Agreement is part of Union law,[365] when deciding on the execution of an AW issued on the basis of that Agreement the court is implementing Union law within the meaning of Art. 51(1) of the Charter. Therefore, Art. 4 of the Charter applies. However, the District Court of Amsterdam decided to leave unanswered the question which specific test applied to the case at hand, because the person concerned had not made out his case under either test.[366]

As far as we know, Dutch issuing judicial authorities, the examining judges in District Courts, have not issued EAWs under that Agreement yet.

Ebis. The EPPO

57ter. Does your Member State's legislation provide for executing EAWs issued by the EPPO?

Answer

---

[361] See District Court of Amsterdam, judgment of 22 January 2021, ECLI:NL:RBAMS:2021:225; District Court of Amsterdam, judgment of 16 February 2021, ECLI:NL:RBAMS:2021:667; District Court of Amsterdam, judgment of 18 February 2021, ECLI:NL:RBAMS:2021:1403; District Court of Amsterdam, judgment of 5 March 2021, ECLI:NL:RBAMS:2021:1115 (not published); District Court of Amsterdam, judgment of 26 March 2021, ECLI:NL:RBAMS:2021:1885; District Court of Amsterdam, judgment of 25 May 2021, ECLI:NL:RBAMS:2021:2736.

[362] See E. Grange, B. Keith & S. Kerridge, 'Extradition under the EU-UK Trade and Cooperation Agreement', *New Journal of European Criminal Law* 2021, Vol. 12(2), p. 220. At the request of the District Court of Amsterdam, Eurojust confirmed that the UK has not made a notification under Art. 599(4) (e-mail of Eurojust sent to one of the authors of this report on 18 October 2021).

[363] See E. Grange, B. Keith & S. Kerridge, 'Extradition under the EU-UK Trade and Cooperation Agreement', *New Journal of European Criminal Law* 2021, Vol. 12(2), p. 217: 'Therefore, at the moment dual criminality will have to be proved in all cases except those offences falling within Article [599(3) (a) and (b)'. However, if the acts do not constitute an offence under the law of the executing State refusal is only optional (Art. 602 (1)(a) of the Agreement).

[364] ECtHR, judgment of 20 October 2016, *Muršić v. Croatia*, ECLI:CE:ECHR:2016:1020JUD000733413.

[365] Art. 216(2) of the Treaty on the functioning of the European Union. See, *e.g.*, ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, paragraph 49.

[366] District Court of Amsterdam, judgment of 2 November 2021, parketnummer 13/751024-21.

The Netherlands is one of 22 Member States participating in the European Public Prosecutor's Office (EPPO).

European Delegated Prosecutors (EDPs) act on behalf of EPPO in their respective Member States and have at least the same powers as national public prosecutors in respect of investigations, prosecutions and bringing cases to judgment, in addition to the specific powers conferred on them (Art. 13(1) of the EPPO regulation).[367] EDPs must be active members of the public prosecution service or judiciary of the respective Member States which nominated them (Art. 17(2) of the EPPO regulation).

According to Art. 33(2) of the EPPO regulation, where it is necessary to arrest and surrender a person who is not present in the Member State in which the handling European Delegated Prosecutor (EDP) is located, he shall issue or request the competent authority of that Member State to issue an EAW in accordance with FD 2002/584/JHA.

FD 2002/584/JHA pertains to surrender on behalf of (an authority of) a *Member State*, not on behalf of *EPPO*. Prior to 7 May 2021, the same held true for the Law on Surrender. However, on that date the Implementation Law EPPO (*Invoeringswet EOM*) entered into force.[368] As a result, the Law on Surrender was amended to accommodate the *execution* by the Netherlands of EAWs issued by or on behalf of an EDP. By broadening the definitions of 'European arrest warrant', 'issuing judicial authority' and 'issuing Member State' to include the EPPO, the rules that apply to the execution of an EAW issued on behalf of a Member State now also apply to an EAW issued on behalf of EPPO (Art. 1a of the Law on Surrender).

Concerning *issuing* EAWs, the Dutch legislator is of the opinion that the EPPO regulation does not confer the power to issue EAWs on EDP's. According to the Dutch legislator, the EPPO regulation presupposes that the EDP uses his *national* powers.[369] Because a Dutch public prosecutor is not an issuing judicial authority and, therefore, cannot issue an EAW, it follows that, in the opinion of the Dutch legislator, an EDP located in the Netherlands will have to request an issuing judicial authority - an examining judge in the competent District Court - to issue an EAW (unless, of course, the EDP chooses to disregard the opinion of the Dutch legislator and issues an EAW himself on the basis of Art. 33(2) of the EPPO regulation).

F. (Analogous) application of the *Petruhhin* judgment

Explanation

Part 4F concerns the (analogous) application of the *Petruhhin* judgment.

***Petruhhin* judgment**
Some Member States do not extradite their own nationals, but do extradite nationals of other Member States. If such a Member State, to which a national of another Member State has

[367] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *OJ* 2017, L 283/1.
[368] Wet van 17 maart 2021 tot aanpassing van enkele wetten ter uitvoering van de Verordening (EU) 2017/1939 van de Raad van 12 oktober 2017 betreffende nauwere samenwerking bij de instelling van het Europees Openbaar Ministerie («EOM») (PbEU 2017, L 283) (Invoeringswet EOM), *Stb*. 2021, 125.
[369] *Kamerstukken II* 2019/20, 35429, nr. 6, p. 22.

moved (and thus exercised his right of free movement (Art. 21 TFEU)), receives an extradition request from a third State, it must inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it, in accordance with the provisions of Framework Decision 2002/584/JHA, *provided that*:

- that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory, and

- in order to safeguard the objective of preventing the risk of impunity, the EAW must, at least, relate to the same offences as the extradition request (ECJ, judgment of 6 September 2016, *Petruhhin*, C-182/15, ECLI:EU:C:2016:630, paragraph 50; ECJ, judgment of 10 April 2018, *Pisciotti*, C-191/16, ECLI:EU:C:2018:222, paragraph 54).

***Ruska Federacija* judgment**
In the *Ruska Federacija* judgment, the Court of Justice held that the *Petruhhin* judgment is applicable by analogy to unequal treatment regarding extradition of own nationals and nationals of a European Economic Area (EEA) State who in exercise of their EEA free movement rights have moved to the requested Member State. (The EEA consists of the EU Member States, Iceland, Liechtenstein and Norway.)

Thus, the requested Member State must inform the EEA State of which the requested person is a national and, should that State so request, surrender the requested person to it, in accordance with the provisions of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, under the provisos described above (ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, paragraphs 75-77). (Liechtenstein is not a party to the aforementioned agreement on surrender. Therefore, the *Ruska Federacija* judgment only seems relevant for nationals of Iceland and Norway.)

***Petruhhin* judgment**
58. Does the national law of your Member State, as interpreted by the courts of your Member State, prohibit the extradition of nationals, but allow the extradition of nationals of other Member States? If so:

- have the competent authorities of your Member State applied the *Petruhhin*-mechanism (*i.e.* informed the Member State of which the requested person is a national) and to what effect;

- what kind of information was provided to the competent authorities of the Member State of which the requested person is a national?

Answer

Yes. According to Art. 4 of the Extradition Act (*Uitleveringswet*), a Dutch national will not be extradited for the purpose of executing a custodial sentence or a detention order, but he may be extradited for the purpose of conducting a prosecution, provided that the requesting State

guarantees that the person concerned may be returned to the Netherlands to serve his sentence there if, following his extradition, a custodial sentence other than a suspended sentence or a measure depriving him of his liberty is imposed upon him. According to case-law, the requesting State must also guarantee that the sentence imposed in the requesting State may be converted into a Dutch sentence (unless that guarantee is incompatible with the applicable treaty provisions).[370]

Under Dutch extradition law, Art. 4 of the Extradition Act can only be applied insofar as the applicable extradition treaty allows for that application. Some of the old bilateral extradition treaties totally exclude the extradition of nationals of the requested State, either for the purpose of executing a sentence or for the purpose of conducting a prosecution. Under those treaties, a Dutch national cannot be extradited at all.

Art. 6(1)(a) of the European Convention on Extradition gives the parties to that treaty unfettered room to refuse to extradite their nationals. Under this treaty, Art. 4 of the Extradition Act will be applied.

According to Art. 6(1)(b) of the European Convention on extradition, the parties to that treaty have the option to define the notion of 'national'. The Netherlands have done so: '"nationals" for the purpose of the Convention are to be understood as meaning persons of Netherlands nationality as well as foreigners integrated into the Netherlands community insofar as they can be prosecuted within the Kingdom of the Netherlands for the act in respect of which extradition is requested and insofar as such foreigners are not expected to lose their right of residence in the Kingdom as a result of the imposition of a penalty or measure subsequent to their extradition'. This means that such foreigners will not be extradited for the purpose of executing a custodial sentence or a detention order, but can be extradited for the purpose of conducting a prosecution under the same conditions as persons of Dutch nationality.

Application of the Petruhhin-mechanism

The Netherlands apply that mechanism in about 10-15 cases each year. Requesting states: *e.g.* the United States of America and Switzerland. Member State concerned: *e.g.* Romania.

None of the cases in which the Netherlands notified another Member State of a request for extradition concerning a national of that Member State resulted in issuing a prosecution-EAW by the competent authority of that Member State.[371]

Information provided

Judging from case-law, it seems that prior to the Court of Justice's *Generalstaatsanwaltschaft Berlin (Extradition to Ukraine)* judgment[372] the competent Dutch authority, the Ministry of Justice and Security,[373] contented itself with merely informing the issuing Member State of the existence of a request for extradition. To safeguard respect for Art. 8 of the ECHR, in

[370] Supreme Court, judgment of 31 March 1995, *NJ* 1996/382, para. 3.3.4.
[371] Interview with an official of the Ministry for Justice and Security, 16 March 2021.
[372] ECJ, judgment of 17 December 2020, *Generalstaatsanwaltschaft (Extradition to Ukraine)*, C-398/19, ECLI:EU:C:2020:1032.
[373] Supreme Court, judgment of 1 November 2019, ECLI:NL:HR:2019:1690.

some cases information about the personal situation of the requested person must be included.[374]

According to the *Generalstaatsanwaltschaft Berlin (Extradition to Ukraine)* judgment, the requested Member State must inform the authorities of the Member State of which the requested person is a national 'not only of the existence of an extradition request concerning that person, but also of all the matters of fact and law communicated by the third State requesting extradition in the context of that extradition request' and keep those authorities informed 'of any changes in the situation of the requested person that might be relevant to the possibility of a European arrest warrant being issued with respect to that person'.[375]

In practice, the Member State of which the requested person is a national is provided with:

- Name and address details of the requested person;
- A Statement of the offences for which extradition is sought;
- A copy of the Interpol 'red notice' and
- The extradition request.

Usually, the Dutch ministry sets a limit of four weeks. If it takes the authorities of the Member States of which the requested person is a national longer, that is is not a problem. The authorities of that Member State always respond, if only by e-mail. Again, none of the cases in which the ministry applied the *Petruhhin*-mechanism ever resulted in the issuing of a prosecution-EAW.

The *Petruhhin*-mechanism does not delay Dutch extradition-proceedings;[376] the mechanism is applied *parallel* to extradition proceedings and applying the mechanism takes only a fraction of the total duration of the proceedings.[377]

59. Have the competent authorities of your Member State been notified by another Member State of requests for extradition concerning nationals of your Member State, pursuant to the *Petruhhin* judgment? If so:

- was the information provided by that Member State sufficient to decide on issuing an EAW? If not, why not;

- did the competent issuing judicial authority of your Member State actually issue an EAW; and

- if so, did the EAW actually result in surrender to your Member State?

Answer

---

[374] Court of Appeal of The Hague, judgment of 26 June 2018, ECLI:NL:GHDHA:2018:1767; District Court of The Hague, judgment of 27 March 2019, ECLI:NL:RBDHA:2019:3010.
[375] *Generalstaatsanwaltschaft (Extradition to Ukraine)*, paragraph 48.
[376] Compare *Joint report of Eurojust and the European Judicial Network on the extradition of EU citizens to third countries*, November 2020, p. 21: 'The consultation procedure is, in the eyes of many practitioners, a bureaucratic formality, *which mostly merely delays the extradition procedure* and is – depending on how it is applied in a concrete case – costly and *time consuming*' (emphasis added).
[377] Interview with an official of the Ministry for Justice and Security, 16 March 2021.

Yes, in a 'handful' of cases each year. None of those cases resulted in issuing a prosecution-EAW.[378]

The reasons for not issuing a prosecution-EAW are not known to the authors of this report. Lack of jurisdiction does not seem a likely reason, as Art. 7 of the Penal Code establishes extraterritorial jurisdiction over an offence committed abroad by a Dutch national (if the conduct constitutes an offence according to the *lex loci delicti* and constitutes a crime (*misdrijf*) according to Dutch law). A more plausible reason would be that the information provided was insufficient to issue a national arrest warrant and, therefore, to issue an EAW. But even if sufficient information was provided, it could also be that the competent issuing authority was of the opinion that the Netherlands had no interest in prosecuting its national itself.[379] Finally, the judicial authorities of the Member State of nationality are under no obligation to issue a prosecution-EAW.[380]

***Ruska Federacija* judgment**
60. Does the national law of your Member State prohibit the extradition of nationals, but allow the extradition of nationals of EEA States? If so:

- have the competent authorities of your Member State applied the *Petruhhin*-mechanism by analogy (*i.e.* informed the Member State of which the requested person is a national) and to what effect;

- what kind of information was provided to the competent authorities of the EEA State of which the requested person is a national?

Answer

For the answer to the first question see the answer to question 58.

So far, the Netherlands has not received any extradition request with respect to nationals of Iceland or Norway.[381]

G. Speciality rule

Explanation
Part 4G concerns a subject relating to the *consequences* of surrender: the speciality rule (Art. 27 of FD 2002/584/JHA).

[378] Interview with a an official of the ministry of Justice and Security, 16 March 2021; interview with a public prosecutor and an assistant to the public prosecutor, 25 May 2021. A report by Eurojust and the European Judicial Network established that 'in the vast majority of cases, the Member State of nationality decided not to initiate criminal proceedings and not to issue an EAW against its national': *Joint report of Eurojust and the European Judicial Network on the extradition of EU citizens to third countries*, November 2020, p. 16.
[379] Compare *Joint report of Eurojust and the European Judicial Network on the extradition of EU citizens to third countries*, November 2020, p. 16.
[380] *Generalstaatsanwaltschaft (Extradition to Ukraine)*, paragraphs 43 and 52.
[381] Interview with an official of the Ministry for Justice and Security, 16 March 2021.

Except when both the issuing Member State and the executing Member State do not apply the speciality rule on a reciprocal basis (Art. 27(1)),[382] the speciality rule prohibits prosecuting, sentencing or depriving the person concerned of his or her liberty for 'an offence committed prior to his or her surrender other than that for which he or she was surrendered' (Art. 27(2). This rule is subject to a number of exceptions with regard to 'other offences' than those for which surrender took place (Art. 27(3)). Of particular practical importance is the exception relating to an explicit renunciation by the requested person of his or her entitlement to the speciality rule (Art. 13(1) in combination with Art. 27(3)(e)).

This subject has a firm link with the EAW-form. When establishing whether a prosecution, a sentence or a deprivation of liberty concerns the same offence for which the person concerned was surrendered or rather another offence, the description of the offence on which the EAW is based (in section (e) thereof) together, of course, with the decision to execute the EAW – which may contain restrictions, *e.g.*, the exclusion of one or more offences from surrender – is determinative.

The description of the offence in the [EAW] must be compared with the description in a 'later procedural document', such as the charge against the defendant. The competent authority of the issuing Member State must 'ascertain whether the constituent elements of the offence, according to the legal description given by the issuing State, are those for which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document. Modifications concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 of the Framework Decision' (ECJ, judgment of 1 December 2008, *Leymann and Pustovarov*, C-388/08 PPU, ECLI:EU:C:2008:661, paragraphs 55 and 57).

Issues concerning speciality

Missing EAW/decision on surrender
Sometimes, the case-file concerning a surrendered person does not contain the EAW and/or the decision on the execution of the EAW, thus leaving uncertain for which offence the person concerned was surrendered and whether he renounced his entitlement to the speciality rule.

61. Does a decision to execute the EAW state:

- a) for which offence(s) the surrender of the requested person is allowed and, if so, how;

- b) whether the requested person renounced his entitlement to the speciality rule?

Answer

[382] Only Austria, Estonia, and Romania are prepared to renounce the speciality rule on a reciprocal basis.

a) A judgment of the District Court of Amsterdam on the execution of the EAW specifies the offence(s) – *i.e.* the conduct described in section (e) of the EAW – for which the surrender of the requested person is allowed and the offence(s) – *i.e.* the conduct described in section (e) of the EAW – for which his surrender is refused, by referring to the designation of these offences in section (e) of the EAW. For instance, offence number I, offence number 1 or offence A. Usually, a copy of section (e) of the EAW is attached to the District Court's judgment.

b) The Law on Surender distinguishes between ordinary proceedings and summary proceedings. The first type of proceedings concerns requested persons who do not consent to their surrender, the second type of proceedings concerns requested person who consent to their surrender.

As soon as a requested person is placed in custody by a public prosecutor, he will be provided with a legal counsel. Therefore, the requested person is in a position to discuss the pros and cons of consenting to surrender with his legal counsel.

Prior to 1 April 2021, consent to surrender *automatically* entailed loss of entitlement to the speciality rule. This was not in line with Art. 13(1) of FD 2002/584/JHA. This provision refers to 'express renunciation of entitlement to the "speciality rule", referred to in Article 27(2)' and, thus, makes it clear that renunciation is a *distinct* event, not an automatic consequence of consent to surrender, and that renunciation must be *explicit*.

As of 1 April 2021, consent to surrender no longer results in a loss of entitlement to the speciality rule. This is not because the legislator recognised that the automaticity of loss of entitlement to the speciality rule did not conform to Art. 13(1) of FD 2002/584/JHA. Doing away with the automatic loss of entitlement to the speciality rule is intended to entice more requested persons to consent to their surrender.[383]

Under present Dutch law there is no provision which allows a requested person to renounce his entitlement to the speciality rule *prior* to his surrender.

Ordinary proceedings
If the requested person does not consent to surrender, the District Court will deal with the EAW in ordinary proceedings resulting in a *judgment* on the execution of the EAW. Judgments holding execution of the EAW do not state that the requested person did not renounce his entitlement to speciality. As explained above, under Dutch law it is not possible to renounce entitlement to the speciality rule prior to surrender.

> Art. 14 of the Law on Surrender requires the District Court of Amsterdam to *stipulate* that the issuing Member State complies with the speciality rule. This provision is part of Section 1 ('Voorwaarden voor overlevering'; Conditions for surrender) of Chapter 1 ('Overlevering door Nederland'; Surrender by the Netherlands).
>
> However, this provision is not in accordance with the system of FD 2002/584/JHA. The speciality rule concerns an *effect* of surrender (see the rubric of Chapter 3 of FD 2002/584/JHA) and, therefore, is not relevant to the decision whether or not to surrender. Because the Netherlands has not made use of the possibility to do away

[383] *Kamerstukken II* 2019/20, 35535, nr. 3 (herdruk), p. 20.

> with the speciality rule on a reciprocal basis (Art. 27(1) of FD 2002/584/JHA), the authorities of the issuing Member State will have to comply with the speciality rule of Art. 27(2) of FD 2002/584/JHA, which is not dependent on any condition set by the executing judicial authority.[384] The speciality rule confers on the requested person 'the right not to be prosecuted, sentenced or otherwise deprived of liberty except for the offence for which he or she was surrendered'.[385]
>
> The District Court of Amsterdam has given a conforming interpretation to Art. 14 of the Law on Surrender: because of the principle of mutual trust, it must trust that the issuing Member State transposed Art. 27(2) of FD 2002/584/JHA, that the authorities of that Member State will comply with the speciality rule and that the surrendered person will be able to invoke the speciality rule. Therefore, it is not necessary to stipulate something which the authorities of the Member State are already under an obligation to do.[386]

If the District Court of Amsterdam rules that surrender is allowed, the Amsterdam public prosecutor, who is not an issuing judicial authority, but is nevertheless still tasked with effecting actual surrender, will provide the issuing judicial authority with:

- a copy of the (often untranslated) judgment;
- information concerning the duration of the detention of the requested person on the basis of the EAW (see Art. 26(2) of FD 2002/584/JHA);
- if surrender was only *partially* allowed: a report (*afloopbericht*) detailing the offences for which surrender was allowed;
- flight details.

The public prosecutor does not relay to the issuing judicial authority that the person to be surrendered did not renounce his entitlement to the speciality rule. In his experience, this does not cause any problems. Apparently, the authorities of the issuing Member State assume that the speciality rule applies when the requested person did not consent to surrender (unless expressly provided for otherwise).[387]

It seems that the Amsterdam public prosecutor does not use the 'Standard Form on EAW Decision' (*Handbook on how to issue and execute a European arrest warrant*, Annex VII), which explicitly requires indicating whether the speciality rule was renounced.

Summary proceedings

If the requested person consents to surrender and if the District Court of Amsterdam decides to surrender the requested person under summary proceedings (art. 40(1) of the Law on Surrender), the decision of the court must contain the stipulation provided for in Art. 14 (Art. 40(3) of the Law on Surrender). As discussed above, requiring a stipulation concerning

---

[384] See for a more detailed account Vincent Glerum, *De weigeringsgronden bij uitlevering en overlevering. Een vergelijking en kritische evaluatie in het licht van het beginsel van wederzijdse erkenning* (PhD thesis Amsterdam VU), Nijmegen: Wolf Legal Publishers 2013, p. 674-675.

[385] ECJ, judgment of 1 December 2008, *Leymann and Pustovarov*, C-308/08 PPU, ECLI:EU:C:2008:669, para. 44; ECJ, judgment of 24 September 2020, *Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)*, C-195/20 PPU, ECLI:EU:C:2020:749, para. 39.

[386] District Court of Amsterdam, judgment of 30 March 2012, ECLI:NL:RBAMS:2012:BW8970.

[387] Interview with a public prosecutor and an assistant to the public prosecutor, 25 May 2021.

compliance with the speciality rule is not in accordance with Art. 27(2) of FD 2002/584/JHA. However, to avoid any possible confusion, the decision will state that, although the requested person consented to surrender, he did not renounce his entitlement to the speciality rule.

62. Are the issuing judicial authority and the requested person provided with a copy of the (translated) decision to execute the EAW?

Answer

The requested person is provided with a copy of the (untranslated) judgment. If the requested person wishes to be present at the pronouncement of the judgment and does not speak or understand Dutch, an interpreter in his native language or in any other language that he speaks will be provided for (Art. 30(1) of the Law on Surrender jo. Art. 362(3) of the Code of Criminal Procedure).

The issuing judicial authority is provided with a copy of the (untranslated) decision

63. How does the national law of your Member State, as interpreted by the courts of your Member State, ensure that the speciality rule is complied with after surrender to your Member State?

Answer

According to Art. 48 of the Law on Surrender 'conditions set by the executing judicial authority in accordance with to FD 2002/584/JHA when surrendering the requested person to the Netherlands are binding on any person or any authority in the Netherlands who is charged with a public task'.

Prosecuting a defendant in violation of the speciality rule must result in a judgment holding that the prosecution is inadmissible. In each case, the courts are bound to examine *ex officio* whether the prosecution is admissible (Art. 348 in combination with Art. 349(1) of the Code of Criminal Procedure). Inadmissibility of the prosecution, of course, entails the duty to release the defendant from pre-trial detention.

The explanatory memorandum to the Law on Surrender points out that conditions concerning the speciality rule are covered by the notion of 'condition' as mentioned in Art. 48.[388] However, under FD 2002/584/JHA the effect of the speciality rule is not dependent on any condition set by the issuing judicial authority (Art. 27(2) of FD 2002/584/JHA). The speciality rule confers on the requested person 'the right not to be prosecuted, sentenced or otherwise deprived of liberty except for the offence for which he or she was surrendered'.[389] A conforming interpretation of Art. 48 of the Law on Surrender entails that any person or authority charged with a public task in the Netherlands must respect the speciality rule, unless, of course, one of the exceptions to that rule applies (Art. 27(3) of FD

[388] *Kamerstukken II* 2002/03, 29042, 3, p. 31.
[389] ECJ, judgment of 1 December 2008, *Leymann and Pustovarov*, C-308/08 PPU, ECLI:EU:C:2008:669, para. 44; ECJ, judgment of 24 September 2020, *Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)*, C-195/20 PPU, ECLI:EU:C:2020:749, para. 39.

2002/584/JHA).[390] Courts, judges, public prosecutors and the police are all charged with a public task and, therefore, are bound to respect the speciality rule in the performance of their duties.

Unfortunately, because the Law on Surrender is not a well-known act among legal practitioners, Dutch courts, judges and public prosecutors in general seem to have problems identifying the speciality rule's national legal basis.[391] In discussing the speciality rule, they mainly refer to FD 2002/584/JHA,[392] *which does not have direct effect*,[393] instead of referring to Art. 48 of the Law on Surrender.

64. Have the authorities of your Member State as issuing Member State experienced any difficulties with the application of the speciality rule? If so, please describe those difficulties and how they were resolved.

Answer

According to a public prosecutor, in their decision on the execution of an EAW Spanish executing judicial authorities often refer to the offence(s) for which surrender is allowed using Spanish legal designations. This makes it difficult to determine for which offence(s) mentioned in the EAW the person concerned was actually surrendered.[394]

According to the same public prosecutor, obtaining the consent of the executing judicial authority in the sense of Art. 27(3)(g) and (4) of FD 2002/584/JHA is not always easy. Especially Spanish executing judicial authorities do not seem to decide on requests for consent within 30 days.[395] Case-law seems to confirm that consent is not always obtained in time.[396] Of course, in such cases prosecution for an offence other than that for which surrender was allowed can still proceed, provided that no measure restricting liberty is applied during the prosecution or when judgment is given for that offence (Art. 27(3)(c) of FD 2002/584/JHA).[397] However, Art. 27(3)(c) of FD 2002/584/JHA does not preclude a measure restricting liberty from being imposed on the surrendered person before consent has been

[390] See Vincent Glerum, *T&C Internationaal Strafrecht 2021*, art. 48 OLW, aant. 2c.
[391] With some exceptions: *e.g.*, District Court of Amsterdam, judgment of 24 May 2018, ECLI:NL:RBAMS:2018:4014; Court of Appeal of Amsterdam, judgment 10 November 2019, ECLI:NL:GHAMS:2019:3701.
[392] See, *e.g.*, District Court of Midden Nederland, judgment of 10 April 2019, ECLI:NL:RBMNE:2019:1448; District Court of Noord-Nederland, judgment of 19 November 2020, ECLI:NL:RBNNE:2020:11871; District Court of Limburg, judgment of 20 November 2020, ECLI:NL:RBAMS:2020:9077; District Court of Overijssel, judgment of 3 December 2020, ECLI:NL:RBOVE:2020:4151; Court of Appeal of Arnhem-Leeuwarden, judgment of 22 December 2020, ECLI:NL:GHARL:2020:10689; Court of Appeal of Arnhem-Leeuwarden, judgment of 23 December 2020, ECLI:NL:GHARL:2020:10710; District Court of Noord-Holland, judgment of 5 January 2021, ECLI:NL:RBNHO:2021:80; District Court of Amsterdam, judgment of 3 February 2021, ECLI:NL:RBAMS:2021:279.
[393] See, *e.g.*, ECJ, judgment of 24 June 2019, *Popławski II*, C-573/17, ECLI:EU:C:2019:530, para. 69.
[394] Interview with a public prosecutor, 26 February 2021.
[395] Interview with a public prosecutor, 26 February 2021.
[396] See, *e.g.*, District Court of Limburg, judgment of 20 November 2020, ECLI:NL:RBLIM:2020:9077 (Spanish consent requested but not yet received); District Court of Amsterdam, judgment of 3 February 2021 (British consent requested but not yet received).
[397] ECJ, judgment of 1 December 2008, *Leymann and Pustovarov*, C-308/08 PPU, ECLI:EU:C:2008:669, para. 76.

obtained, where that restriction is lawful on the basis of other charges which appear in the EAW.[398]

Because in the Netherlands public prosecutors no longer are 'issuing judicial authorities', in principle they must ask an examining judge to issue a request for consent, if they want to include an 'other offence' in the prosecution of the surrendered person. This has a dilatory effect.[399]

In the experience of the authors of this report, in case of a surrender to the Netherlands case-files of Dutch criminal cases often do not contain the EAW, the decision of the executing judicial authority to execute the EAW and/or information about any entitlement to the speciality rule. The Amsterdam public prosecutor always advises colleagues who issue EAWs to include the EAW and the decision to execute that EAW in the case-file.[400]

64bis. What is the position of your Member State regarding the basis of requests for additional surrender: should these be based on a specific national arrest warrant or could it be possible that the request is not based on a national arrest warrant if the issuing judicial authority states that additional surrender will not bring about an additional deprivation of liberty?

Answer

Pursuant to Art. 27(4) of FD 2002/584/JHA, a request for consent to additional surrender shall be 'accompanied by the information mentioned in Article 8(1)'. Therefore, the request must mention the existence of an enforceable national judicial decision as referred to in Art. 8(1)(c) of FD 2002/584/JHA. This is in line with the Court of Justice's case-law on the 'dual level of protection'. The decision on consent to additional surrender is liable to prejudice the liberty of the person concerned.[401] On the basis of the existence of national judicial decision the executing judicial authority 'may therefore be satisfied' that the request for consent to additional surrender 'is based on a national procedure that is subject to review by a court and that the person in respect of whom that national arrest warrant was issued has had the benefit of all safeguards appropriate to the adoption of that type of decision, inter alia those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision 2002/584'.[402]

Art. 14(3) of the Law on Surrender does not refer to the requirement that a request for consent to additional surrender is accompanied by the information mentioned in Art. 8(1)(c) of FD 2002/584/JHA, but the former provision is interpreted and applied against the background of the latter provision. Consequently, a request for consent to additional surrender for the purpose of conducting a prosecution which is not accompanied by information which mentions the existence of a national arrest warrant in the sense of Art. 8(1)(c) of FD

[398] ECJ, judgment of 1 December 2008, *Leymann and Pustovarov*, C-308/08 PPU, ECLI:EU:C:2008:669, para. 76.
[399] Interview with a public prosecutor, 26 February 2021.
[400] Interview with a public prosecutor and an assistant to the public prosecutor, 25 May 2021.
[401] ECJ, judgment of 24 November 2020, *Openbaar Ministerie (Forgery in documents)*, C-510/19, ECLI:EU:C:2020:953, paragraph 62.
[402] Compare ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 70.

2002/584/JHA cannot result in consent by the executing judicial authority. A statement by the issuing judicial authority that consent to additional surrender will not result in additional deprivation of liberty would not make any difference in this respect.

Incidentally, no consent is needed if the additional offence 'is not punishable by a custodial sentence or detention order' (Art. 27(3)(b) of FD 2002/584/JHA) or if 'the criminal proceedings' concerning the additional offence 'do not give rise to the application of a measure restricting personal liberty' (Art. 27(3)(c) of FD 2002/584/JHA).[403]

65. Have the authorities of your Member State as executing Member State experienced any difficulties with the application of the speciality rule? If so, please describe those difficulties and how they were resolved.

Answer

As discussed before (see the answer to question 22), referring to the principle of mutual trust the District Court of Amsterdam will normally assume that the authorities of the issuing Member State will comply with the rule of speciality after surrender. Therefore, it will not inquire into compliance with the rule of speciality, unless it has sufficient reasons to doubt compliance with that rule.

In one case, the issuing judicial authority itself sowed the seeds of doubt by stating that it could not adapt an aggregate sentence, even though surrender could not be allowed for one of the offences for which that sentence was imposed. However, in the end – after having obtained supplementary information from the issuing judicial authority on the basis of Art. 15(2) of FD 2002/584/JHA – it turned out that the legal system of the issuing Member State did provide for a possibility 'to amend the prior decision so that the penalty shall be executed only as to the offences for which the extradition was granted'.[404]

In the experience of the authors of this country report, surrendered persons sporadically complain about non-compliance with the speciality rule by the authorities of the issuing Member State. It is always difficult to establish whether such complaints are well-founded, if only because of the wide range of exceptions to the specialty rule (Art. 27(3) of FD 2002/584/JHA). As a rule, the District Court of Amsterdam will forward such complaints to the Amsterdam public prosecutor and the surrendered person's Dutch legal counsel.

The Amsterdam public prosecutor reported that in his 10 years of experience with EAWs he received only one complaint from a surrendered person about non-compliance with the speciality rule. If it is certain that a complaint is well-founded, he will inform the issuing judicial authority of the complaint.[405]

[403] Concerning the second exception: if the person concerned is sentenced to a penalty or a measure restricting liberty, consent is required in order to enforce that penalty: ECJ, judgment of 1 December 2008, *Leymann and Pustovarov*, C-388/08 PPU, ECLI:EU:C:2008:669, paragraph 73.
[404] District Court of Amsterdam, judgment of 28 October 2014, ECLI:NL:RBAMS:2015:9873.
[405] Interview with a public prosecutor and an assistant to the public prosecutor, 25 May 2021.

Part 5: conclusions, opinions *et cetera*

66. Do requests for supplementary information by the executing judicial authority have an impact on the trust which should exist between the cooperating judicial authorities?

Answer

In answering this question it is useful to recall that it is the duty of the executing judicial authority to request supplementary information (at least once) if it is of the opinion that it does not have sufficient information to enable it to validly decide on the execution of the EAW.[406] There is no margin of discretion concerning abstaining from requesting supplementary information (at least once), whether such requests have a negative impact on mutual trust or not.

Requests for supplementary information should not have a negative impact on trust. When issuing an EAW and when deciding on the execution of an EAW in general and when requesting and providing supplementary information in particular, the issuing judicial authority and the executing judicial authority enter into a 'dialogue' which is dominated by the duty of sincere cooperation (Art. 4(3) TEU).[407] It would be contrary to the spirit of sincere cooperation to suggest anything other than that either the issuing judicial authority or the executing judicial authority acted sincerely and in good faith.

Moreover, viewed from the perspective of 'mutual trust between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level' one can argue that requesting supplementary information provides the issuing judicial authority with - yet another - opportunity to demonstrate that mutual trust is justified indeed. In this way requesting and providing supplementary information can actually foster mutual trust.[408]

Of course, being mere mortals, issuing and executing judicial authorities do not always fully act in accordance with the lofty duty of sincere cooperation. In practice, the issuing judicial authority is apt to view a request for supplementary information as a vote of no confidence, whereas the executing judicial authority may be of the opinion that having to ask for supplementary information – in some cases: yet again – does not exactly inspire confidence in the ability of the issuing judicial authority to adequately complete the EAW. Nevertheless, it remains the duty of both issuing and executing judicial authorities to rise above such (petty) considerations.

67. What kind of questions should an executing judicial authority ask when requesting supplementary information?

Answer

[406] ECJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 103-104.
[407] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, ECLI:EU:C:2018:589, para 104
[408] Compare ECJ, judgment of 22 December 2017, *Ardic*, C-571/17 PPU, ECLI:EU:C:2017:1026, paras 90-91.

Given the duty of sincere cooperation which dominates the 'dialogue' between executing and issuing judicial authorities (see the answer to question 66) and the duty to decide on the execution of the EAW within the time limits provided for in Art. 17 FD 2002/584/JHA and taking into account that Art. 15(2) FD 2002/584/JHA in general should only be applied as an *ultimum remedium*[409], the executing judicial authority should only ask for information which in its opinion is **absolutely necessary** for a valid decision on the execution of the EAW and which is **directly relevant** to the assessment of the situation at hand in the light of the ECJ's case-law[410], (and without, of course, calling into question the merits of the national judicial decision on which the EAW is based)[411].

The executing judicial authority should, therefore, not ask for general information about the legal system of the issuing Member State, but rather for concrete information about facts (*i.e.* whether the requested person actually received the information about the date and place of the trial, about the time and place of the offence mentioned in section (e) of the EAW) or about specific provisions of the law of the issuing Member State (*i.e.* whether there is a provision for a review of a life sentence, whether the decision of a public prosecutor to issue an EAW can be subjected to court proceedings).

In the same vein, the executing judicial authority should not ask open-ended questions, but rather formulate questions which allow for a 'clear, correct and comprehensive[412] answer by the issuing judicial authority. To facilitate such answers, the executing judicial authority should:
- identify specific parts of a specific section of the EAW which in its view are unclear, insufficient, contradictory or obviously incorrect[413] and
- indicate what kind of information is needed.

Moreover, the executing judicial authority should not leave its counterpart guessing as to the reason why a certain piece of information is needed. Explaining the reason behind the request for supplementary information with reference to relevant case-law of the ECJ helps the issuing judicial authority in providing that information and may also provide it with an opportunity to clear up any misunderstandings in the initial assessment of the executing judicial authority.

68. Do executing judicial authorities occasionally ask too much supplementary information? If so, on what issues?

Answer

---

[409] Compare ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/16, ECLI:EU:C:2018:27, para 61. It seems that in practice this provision is often used not as an *ultimum remedium*. The answers to the questionnaire surely point in that direction.
[410] Compare ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, C-220/18 PPU, ECLI:EU:C:2018:589, paras 103-104.
[411] See the *European Commission's Handbook on how to issue and execute a European Arrest Warrant*, C(2017) 6389 final, p. 34.
[412] Compare the *European Commission's Handbook on how to issue and execute a European Arrest Warrant*, C(2017) 6389 final, p. 27: '(…) it is vital that issuing judicial authorities ensure that the information in the EAW is clear, correct and comprehensive'.
[413] Compare the *European Commission's Handbook on how to issue and execute a European Arrest Warrant*, C(2017) 6389 final, p. 34.

In particular, British and German authorities are critical of Dutch *execution*-EAW's. The United Kingdom almost always asks for supplementary information (see the answer to question 86). German authorities are critical in cases in which the person concerned did not appear at the hearing at which the merits of the case were dealt with. Sometimes executing judicial authorities (in particular authorities from the United Kingdom) request supplementary information by way of a standard questionnaire. In particular, the questions relate to the Dutch legal system in general. The Public Prosecution Service has noticed that British authorities ask the same questions in every case, thereby requiring the Public Prosecution Service to provide the same answers to those questions, *e.g.* the question whether escaping from prison is a criminal offence. Answering such questionnaires takes up a lot of valuable time. Furthermore, such questionnaires call into question the principle of mutual trust.

69. In your opinion, do issuing and executing judicial authorities adequately inform each other about the progress in answering a request for additional information in the issuing Member State and the progress in the proceedings in the executing Member State?

Answer

In the experience of the District Court of Amsterdam, sometimes the issuing judicial authority must be reminded –sometimes even repeatedly – to answer a request for supplementary information. In some cases, supplementary information is received shortly before or even during a court hearing on the execution of an EAW.

70. In your opinion, would designating focal points for swift communications within the organisations of both issuing and executing judicial authorities enhance the quality of communications between issuing and executing judicial authorities?

Answer

It is questionable whether designating a focal point within issuing and executing judicial authorities would enhance the quality of communications between those authorities. *Centralised* focal points, *i.e.* designating 'central authorities' (see Art. 7 of FD 2002/584/JHA) would probably be more helpful.

Also, designating one central executing/issuing judicial authority would contribute to streamlining communications.

Direct and informal communications between judicial authorities is problematic, first, for reasons of transparency *vis-à-vis* the requested person and, second, for practical reasons (language problems). See also the answer to question 72.

71. Are there Member States whose EAW's and/or whose decisions on the execution of EAW's are particularly problematic in your experience? if so, what are the problems that emerge?

Answer

The answer to this question is given from an *ex nunc* perspective and, therefore, presents a snapshot of the current situation.

On the executing side, there were and are problems with respect to a number of Member States with detention conditions, the independence of the judiciary (see the answers to questions 48 and 52) and effective judicial protection concerning EAWs issued by a public prosecutor. However, over the years the District Court of Amsterdam has developed a routine to deal with such matters and such matters can no longer be considered as particularly problematic.

EAW's

Italy: EAWs are usually very verbose, *i.e.* prolix or longwinded, and, sometimes, hard to follow; Italian execution-EAWs still cause difficulties under Art. 4a.

Poland: Polish execution-EAWs still cause difficulties under Art. 4a.

Romania: Romanian EAWs usually contain digressions in a highly technical legal jargon (possible derived from the judgment of conviction) which are hard to follow and which, moreover, seem to be redundant; Romanian execution-EAWs still cause difficulties under Art. 4a.

Decisions on the execution of EAWs

Belgium: refusal to execute an execution-EAW concerning multiple sentences, each of which does not reach the four months threshold (but taken together, they do reach that threshold).

Hungary: often asks questions about the proceedings in the Netherlands the relevance of which is not always clear to the issuing judicial authority.

Ireland: in itself, cooperation with Irish authorities runs smoothly but it can take them a long time to reach a final decision on the execution of an EAW.

Poland: the issue of double criminality results in two to three refusals to execute a Dutch EAW each year.

Spain: problems with regard to the way the offences for which surrender was allowed (use of Spanish legal classifications instead of referring to the description in the EAW); problems with regard to requests referred to in Art. 27(4) of FD 2002/584/JHA (non-compliance with 30 day time limit).

UK: asks a lot of questions when assessing an EAW the relevance of which is not always clear to the issuing judicial authority.

72. Do you have any suggestions to improve FD 2002/584/JHA. If so, which suggestions?

Answer

FD 2002/584/JHA

- The FD should contain a provision on verifying the proportionality of issuing an EAW, detailing the relevant criterion and the relevant alternatives to issuing an EAW, and stating to what extent the executing judicial authority can check the proportionality of an EAW. This would give both the issuing judicial authority and the executive judicial authority more guidance on these matters.

EAW-form

Suggestions for the EU:

- The EAW-form should be augmented with an section dedicated to proportionality
- The EAW-form should be amended in such a way, that it is clear what each section of the EAW-form requires from the issuing judicial authorities, *e.g.*:
  - section (b):
    - In case of an execution-EAW only the *enforceable* judgment should be mentioned
    - This judgment is not necessarily the same as the final sentencing decision referred to in section (d), especially when proceedings on appeal and in cassation were conducted
    - In case of a cumulative judgment, the underlying judgments should also be mentioned
  - section (c): in case of a prosecution-EAW, the maximum penalty for each separate offence should be mentioned
  - section (d): see the *InAbsentiEAW*-project[414]
  - section (e): the concept of 'offence' should be elucidated and the structure of section (e) should be improved in such a way that it forces the issuing judicial authority to clearly number and describe each offence separately
  - the guarantee referred to in Art. 5(3) of FD 2002/584/JHA should be incorporated in the EAW-form, thus obviating the need to specifically request such a guarantee after the requested person has been arrested

Suggestions for (judicial) authorities:

Issuing judicial authorities

- As far as translation of an EAW in the language of the executing Member State is concerned, issuing judicial authorities should only use the official translation of the EAW-form in that language.
- Issuing judicial authorities should not deviate from the form.
- Issuing judicial authorities should always incorporate the guarantee referred to in Art. 5(3) of FD 2002/584/JHA (in section (f) of the EAW-form). It is then up to the executing judicial authority whether it will make the surrender of the requested person dependent on that guarantee. This will reduce the need for supplementary information and communications by/with other authorities than the issuing authority.

Executing judicial authorities

[414] See Kei Hannah Brodersen, Vincent Glerum & André Klip, The European Arrest Warrant and In Absentia Judgments, Eleven International Publishing: Maastricht 2020, *passim*.

- In a decision to execute an EAW, executing judicial authorities should always clearly designate the offence(s) for which surrender was allowed – ideally by referring to the offence(s) as described in section (e) of the EAW – and should always state whether the requested person renounced his entitlement to the speciality rule
- The requested person and the issuing judicial authority should be provided with a translation of the decision to execute an EAW
- After surrender, a copy of the decision to execute a EAW should be included in the case-file, thus ensuring that the authorities of the issuing Member State are aware whether the speciality rule applies

Organisation

- Centralisation
    - Centralising issuing and executing of EAW's will contribute to efficiency and quality.
- Designate 'central authorities' for communications (see also the answer to question 70)
- Where the issuing and execution of EAW's is not centralised, at least a 'central authority' in every Member-state for all issuing and executing judicial authorities of that Member-state would contribute to streamlining the process.

Communication

- Create a (digital) platform for informal non-case related discussions and debate between (issuing/executing) judicial authorities.

73. In particular:

- a) in your opinion, should one or more grounds for refusal and/or guarantees:
    - (i) be totally abolished or amended? If so, which ground(s) and/or guarantee(s) and why;
    - (ii) be introduced? If so, which ground(s) and/or guarantee(s) and why?
- b) given that surrender proceedings are increasingly becoming more complex and protracted, what, in your opinion, is the effect on mutual trust?
- c) in your opinion, should the speciality rule be maintained, amended or abolished? Please explain.

Answer

a) In our opinion, most problems with grounds for refusal could be avoided or would be alleviated if:

- all those grounds for refusal which are not directly based on the obligation to respect fundamental rights are turned into grounds for optional refusal. This legislative action at the EU level;

- all Member States reconsider whether to transpose such grounds for optional refusal and the ground for optional refusal of Art. 4;

- all Member States, when they choose to transpose such grounds for refusal – and the ground for refusal of Art. 4a –, leave a margin for discretion to the executing judicial authority;

- executing judicial authorities apply those optional grounds for refusal from a European perspective, *i.e.* recognising that surrender is the rule and refusal should be an exception.

Against this background, it would not be necessary to abolish grounds for refusal. The same applies, *mutatis mutandis*, to the guarantees referred to in Art. 5 of FD 2002/584/JHA.

In our opinion, there is no need to introduce new grounds for refusal or new guarantees.

b) It is true that, when compared to the early years of the EAW, it is now, in some cases, more difficult to obtain a surrender, but this does not necessarily mean that his has had a negative impact om mutual trust. One could also argue that, in the earlier years, mutual trust was in essence *blind trust* and that the Court of Justice in its later case-law tried to balance the need for effective judicial cooperation in criminal matters with the obligation to respect the fundamental rights of the requested person and with the principle of effective judicial protection. In the end, therefore, one could make the case that mutual trust has actually benefitted from those developments.

c) The speciality rule is closely connected to the sovereignty of the executing Member State and to the system of grounds for refusal and guarantees. As long as grounds for refusal and guarantees remain, the speciality rule is not redundant.

74. What is your opinion on the usability of the *HANDBOOK ON HOW TO ISSUE AND EXECUTE A EUROPEAN ARREST WARRANT* (COM(2017) 6389 final) for judicial practitioners? If, in your opinion, the *Handbook* does not live up to expectations, how could it be improved?

Answer

The usability of the Handbook is limited. It isn't nearly detailed enough to be of practical use for judicial authorities. Too little guidance is given on interpreting and filling in the various sections of the EAW-form.

The Handbook should be replaced with an interactive digital Handbook, which is kept updated in a permanent fashion.

75. Do the issuing and/or executing judicial authorities of your Member State use the *Handbook* in the performance of their duties? If not, why not?

Answer

The Dutch executing judicial authority does not use the *Handbook*. The replies to the questionnaire given by issuing judicial authorities lead us to presume that they do not make use of the *Handbook* either.

76.

a) What is your opinion on the relationship between the EIO and the ESO on the one hand and the EAW on the other, in particular with regard to the proportionality of a decision to issue a prosecution-EAW?

b) What is your opinion on the relationship between FD 2008/909/JHA and the EAW, in particular with regard to the proportionality of a decision to issue an execution-EAW?

c) Should the FD's and/or the directive establishing the instruments concerning the EAW, the transfer of the execution of custodial sentences, the EIO and the ESO be amended in this regard and, if so, in what way?

Answer

a) The EIO could be a viable alternative to issuing a prosecution-EAW. However, to make it a more effective instrument the requirement of consent with respect to videoconferences should be deleted. Furthermore, to be really effective the assessment whether an EIO should be issued instead of an EAW should be incorporated into the assessment of proportionality which should be laid down in the FD and the EAW-form (see also the answer to question 72).

The ESO is not really an alternative to issuing a prosecution-EAW at all. After all, issuing a prosecution-EAW presupposes the existence of an enforceable national arrest warrant. For an ESO to be issued, the competent authority of the issuing Member State – which need not be the same authority as the issuing judicial authority – would first have to replace that arrest warrant with a 'decision on supervision measures' as an alternative to provisional detention. However, an ESO could be an alternative to *executing* an EAW. Therefore, it should be possible during EAW-proceedings in the executing Member State to request the issuing Member State to take a 'decision on supervision measures' and issue an ESO which would have the effect of withdrawing the EAW.

b) Applying FD 2008/909/JHA by transferring the execution of a custodial sentence to the executing Member State, instead of surrendering the requested person to the issuing Member State to serve his sentence there, is an alternative to issuing an execution-EAW. However, Art. 4(6) of FD 2002/584/JHA already provides the necessary tool to make sure that, in the interests of proportionality and of social re-integration, the custodial sentence is enforced in the executing Member State.

c) As far as the answer to question a) goes: yes.

77. What relevance, if any, do your answers to Parts 2-4 have for other framework decisions or directives concerning mutual recognition of decisions in criminal matters?

Answer

Those answers are relevant for:

- surrender under the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway,
- surrender under the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part,[415] and
- FD's and directives that contain grounds for refusal and guarantees similar to those contained in FD 2002/584/JHA, *e.g.* the ground for refusal relating to double criminality of a non-listed offence.

78. What consequences, if any, do measures to combat COVID-19 have on the operation of the EAW-system?

Answer

The consequences of the pandemic are mainly of a practical nature. In the early stages of the pandemic, the measures to combat COVID-19 resulted in delays in dealing with the decision on the execution of EAWs.

The measures to combat COVID-19 did not result in decisions to refuse to execute an EAW. However, for a time decision to execute an EAW could not be put into effect because of these measures.

The measures to combat COVID-19 led to a temporary restrictions to the right to be present *in person* at court hearings in EAW-proceedings.

[415] *OJ* 2021, L 149, 30.4.2021, p. 10.

The Temporary Law COVID-19 Justice and Security (*Tijdelijke wet COVID-19 Justitie en Veiligheid*) provides for temporary exceptions to normal procedural rules as a result of the measures to combat COVID-19, *viz.*

- the possibility to hear persons in criminal cases (*strafzaken*) via videoconference or other audiovisual transmission (Art. 27(1)). The requirement that the person concerned consents, does not apply (Art. 27(3)). However, this provision does not apply to hearings concerning a request by the public prosecutor to order that the person concerned in remanded in to custody (Art. 27(2)).

- The possibility to hold a court hearing in criminal cases (*strafzaken*) via videoconference or other audiovisual transmission (Art. 28(1)). However, this provision does not apply to hearings concerning a request by the public prosecutor to order that the person concerned in remanded in to custody (Art. 28(2)) and to hearings at which the court deals with the merits of the criminal case (*inhoudelijke behandeling van de strafzaak ter terechtzitting*).

It is not clear whether these provisions apply to EAW-proceedings. Such proceedings do not constitute criminal cases.

According to the District Court of Amsterdam, the right of a requested person to be present at an EAW-hearing is less absolute than the right of a defendant to be present at a court hearing in a criminal case.[416] Therefore, it was open for the District Court to balance the requested person's right to be present *in person* against other interests, such as medical health considerations.

In cases in which the requested person was in custody, he was, in principle, not allowed to be present *in person* at court hearings. Rather, the requested person was given the opportunity to participate in the hearing from the penitentiary via a video link.

Funded by the
European Union

Disclaimer: The content of this document represents the views of the ImprovEAW Management Team only and is their sole responsibility. The European Commission does not accept any responsibility for the use that may be made of the information it contains.

[416] District Court of Amsterdam, judgment of 7 July 2020, ECLI:EU:C:2020:3413.