7 Country Report The Netherlands

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This report is based on a legal analysis of the Dutch criminal justice system, interviews with practitioners (most notably: judges, prosecutors and defence lawyers) dealing with European Arrest Warrant (EAW) cases, and on a collection of statistical data and other information relating to criminal proceedings in the Netherlands. The report is divided in five parts. The first part will explain the legal status and elaboration of the principle of proportionality in the Dutch criminal justice system (7.1.). The second part will precise the Dutch legal rules and experiences with issuing EAWs (7.2). The third part will deal with the execution of EAWs in the Netherlands (7.3.). The fourth part will analyse the relevant factors for the degree of mutual trust (7.4). We will conclude with some observations on the evaluation methods applied (7.5).[278]

7.1 The principle of proportionality in the Dutch criminal justice system

7.1.1 The Status and Content of the Proportionality Principle

The principle of proportionality is not explicitly enshrined in Dutch constitutional law or in the relevant statutory law, at least not as a principle with general application. It must primarily be considered a general – non-codified - principle of law, which applies as such to criminal procedure law as well.[279] Within this domain, legal doctrine distinguishes a category of 'general principles of criminal procedure law'. The normative value of the general principles of criminal procedural law is acknowledged in case law of the Dutch Supreme Court.[280] The proportionality principle is in this context, however, not considered as a separate legal principle but it rather forms part of the principle of the *redelijke en billijke belangenafweging* ('fair balance between the relevant interests'). This latter principle entails that every decision/action should be the result of a proper balancing of interests. This balance contains two elements. First, the least intrusive means of action should be chosen. The legal doctrine applies the concept of subsidiarity to refer to this element, which mirrors thus a different understanding of subsidiarity than the principle with the same name enshrined in the constitutional system of the EU. The second element is that the negative consequences of a measure may not be disproportionate to the objectives achieved by the order. This element is referred to as the proportionality test.

It is important to note that the principle of a 'fair balance between the relevant interests' carries both an abstract and a concrete dimension. The abstract dimension concerns the requirement that law and policy should be the result of a fair balance of interests. The concrete dimension concerns the individual decision based on law. The application of law in the individual case must be proportionate as well. In light of the margin of discretion awarded to the prosecution authorities, review by courts is limited to *manifest* breaches of the proportionality principle.

The principle of proportionality has not been laid down as a general principle in statutory law governing criminal procedure, *e.g.* in the Criminal Procedure Code (CPP). The principle does appear, however, with

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[279] G.J.M.Corstens, *het Nederlands strafprocesrecht*, Deventer: Kluwer, 2011, p. 50.

[280] See e.g. case 'Braak bij binnentreden, Supreme Court 12 December 1978, NJ 1979; case '*niet-ontvankelijkheid openbaar ministerie*', Supreme Court 22 December 1981, NJ 1982, 233.

regard to specific issues, for example in relation to the use of specific investigative powers (see below). The principle of proportionality can furthermore be found in administrative guidelines. This may in part be explained by the opportunity principle on which the Dutch Criminal Justice system is based. Administrative guidelines serve to ensure consistency in the application of the public prosecutor's discretion.

In the administrative guidelines concerning the prosecution of fiscal, customs and surcharge crimes (financial crimes),[281] the proportionality principle is reflected in the choice for either administrative or criminal enforcement. Criminal enforcement is appropriate according to the guidelines in case of a severe damage to the interests of the citizen or state.

Other guidelines relate to sentences the public prosecutor should demand in criminal proceedings. These so-called Polaris guidelines are extremely precise.[282] Sentences are prescribed in relation to specific crimes and specific circumstances. Since 1999, computer software programs (BOS) provide automatic guidelines, which now cover almost eighty percent of the prosecuted common criminality.[283] Obviously, this has a substantial unifying effect on national sentence policies.[284] The proportionality principle is, nevertheless, largely left intact, as many proportionality arguments, which affect the severity of the sentence, are included in the guidelines.

Separate mention should be made of the proportionality principle in relation to the development of EU criminal law. In 2011,[285] the Dutch government communicated to the Dutch Parliament its general views on the development of EU criminal law. In its letter to Parliament, the government formulated a set of criteria to evaluate new European proposals. One of the 8 criteria that was put forward, concerns the proportionality principle defined as: "what is expected from the Member States, citizens and business to comply with the measure in question, must be proportionate to the problem the measure aims to address". As such, it may influence not only the Dutch position taking in the EU decision making process, but also emerge as an important parameter for the implementation of EU law in the field of criminal matters.

7.1.2 Application of the proportionality principle

Dutch courts are bound by the proportionality principle when imposing a criminal sentence. This is *inter alia* implied by Art. 6 of the European Convention of Human Rights (ECHR). The European Court of Human Rights (ECtHR) has decided in the *Albert and Le Compte* case that a judge should be competent when imposing a criminal sanction 'to assess the proportionality of the sanction'.[286] Art. 94 of the Dutch Constitution establishes the precedence of directly effective binding provisions of international treaties over national law. The ECHR is therefore directly applicable in the Dutch legal order which binds Dutch courts to the proportionality principle.

[281] Amendments to the '*Aanmeldings- transactie en vervolgingsrichtlijnen van fiscale delicten, douane- en toeslagendelicten*', *Strc* 5 July 2011, nr. 11782.

[282] The so-called Polaris guidelines are publicly available at the website of the Dutch public prosecutor office: www.om.nl. However, they only apply to the most common crimes for which rapid handling is necessary.

[283] T. P. Marguery, *Unity and Diversity of the Public Prosecution Services in Europe: a study of the Czech, Dutch, French and Polish Systems*, Dissertation University of Groningen, 2008, p. 126.

[284] Marguery, 2008, p. 126.

[285] Letter of the Minister of Security and Justice of 8 November 2011, *Kamerstukken II*, 32 317, nr. 80.

[286] ECtHR, ECtHR, judgment of 24 October, application nos. 7299/75 and 7496/76, *Albert and Le Compte v. Belgium*, § 36.

The Dutch public prosecution is also bound by the proportionality principle. The application of the opportunity principle entails substantive policy discretion for public prosecution to assess whether criminal prosecution is desirable in individual cases. Such policy discretion includes the assessment whether alternatives for criminal enforcement must be preferred (criminal enforcement as *ultimum remedium*). The Polaris guidelines mentioned in the previous section indicate that the public prosecution takes account of the principle of proportionality when demanding a sentence.

7.1.3 Investigative Measures and Proportionality

Investigative measures that affect fundamental rights and freedoms of citizens laid down in the Dutch constitution, such as taping of telephone conversations, are fully subject to what was labelled earlier as subsidiarity (but what is actually an element of the proportionality principle).[287] The least intrusive means to conduct the investigation must be chosen. Furthermore, the principle of proportionality requires the authorities to balance the interest of prosecution and the violation of the constitutional rights of the suspects before taking investigative measures.

[287] G.J.M. Corstens, *het Nederlands strafprocesrecht*, Deventer: Kluwer, 2008, p. 442.

7.1.3.1 *Role of the investigative judge*

The police are required to request the investigative judge leave to impose investigative measures. The latter decides whether the conditions which are set out in the relevant statutory provision (providing the police with the competence to take the investigative measure) are fulfilled and that the principle a fair balance between the relevant interests is complied with. An example of such a provision is Art. 126m (1) CCP which entails the power to tap telephones. The judge leading the investigation in the final trial has to decide whether the investigative judge could reasonably have come to his decision and whether the public prosecutor has acted in accordance with the authorization issued by the investigative judge.[288] The judge in the final trial, who reviews whether the discretionary powers have been exercised reasonably, can only conduct a limited review, meaning that a level of discretion is granted to the investigative judge. The court only reviews whether the limits of this discretion have been respected.[289]

However, on the basis of an evaluation of the Special Investigative Powers Act (*Wet Bijzondere Opsporingsbevoegdheden*) it has become clear that investigative judges are not able to consider properly whether or not an investigative measure is proportionate in the case at hand. Assessing proportionality by the investigative judge comes therefore often down to a merely rubber-stamping exercise in which the investigative judge without further investigation approves requests of the law enforcement authorities.[290]

7.1.3.2 *Arrest and pre-trial detention*

The competence of the police to arrest individuals is regulated in Art. 53 and 54 CCP. Art. 53 provides for the competence to arrest a suspect *in flagrante delicto* whereas Art. 54 covers other arrests. The proportionality principle applies to arrests as well, for instance with regard to the use of violence.[291] Non-compliance with proportionality may have as a consequence that the public prosecution loses its right to initiate proceedings, as disproportionate violence constitutes a "serious form default" (and thereby an obstacle to prosecution) in the sense of Art. 359a(3) CCP.[292]

Art. 133 CCP regulates pre-trial detention. This type of detention must be requested by a senior police officer ('*hulpofficier van Justitie*') or a public prosecutor and be approved by a judge.[293] The judge determines whether the following conditions as set out in Art. 67 CCP are met:

There should be a 'serious presumption' that the offender has committed an offence:

- that carries a maximum statutory prison sentence of four years or more; or
- that is specifically designated by law, or
- that carries the penalty of imprisonment while the suspect does not have a fixed domicile or residence in the Netherlands.

[288] Supreme Court, 11 October 2005, NJ 2006,625; Supreme Court, 21 November 2006, NJ 2007, 233.

[289] G.J.M. Corstens, *het Nederlands strafprocesrecht*, Deventer: Kluwer, 2011, p. 33.

[290] P.A.M. Mevis, ‚*Rechterlijke controle impliceert onderzoeken door de zittingsrechter*', DD 1997, p. 913.

[291] G.J.M.Corstens, *het Nederlands strafprocesrecht*, Deventer:Kluwer, 2008 p. 379.

[292] See e.g. case of Amsterdam District Court of 2 June 2008, LJN:BD2980, in which the suspect pleaded that the police had used a disproportionate amount of violence when arresting him. The prosecutor should therefore loose his right to prosecute the suspect. The court however did not follow this reasoning.

[293] Article 63 Dutch CCP.

The term 'serious presumption' (*ernstige bezwaren*) implies a qualified suspicion that the suspect has indeed committed the crime of which he is suspected. Art. 67a CCP specifies that pre-trial detention may be applied only if there is a serious risk that the suspect might flee or if public safety requires the immediate detention of the suspect.

The proportionality principle, in the sense of subsidiarity as explained above, is relevant in this context as well. Courts must consider whether the objectives of pre-trial detention can only be met by fully depriving the person of his freedom or whether less intrusive means are possible, for example house arrest.[294] In the Dutch criminal legal system as it is now, these less intrusive measures (see Art. 80 CCP) are possible only as alternative for pre-trial detention, i.e. they may only be applied if pre-trial detention is a legal possibility. Currently, however, legislation is in preparation to widen the scope of application of these measures.[295]

With regard to such less intrusive means of control over the suspect, mention needs to be made of the Dutch implementation of the Framework Decision on Mutual Recognition of Decisions on Supervision Measures as an Alternative to Provisional Detention.[296] The proportionality principle plays an important role here as well. The Dutch government has indicated that it will make a declaration conform Art. 21 of the said Framework stating that the threshold of Art. 2 (1) of the EAW Framework Decision will be applied in the context of the application of decisions on Supervision measures as well. This will exclude the use of the Supervision Measures Framework Decision in cases in which the maximum sentence does not exceed 12 months of imprisonment for offences for which a control of dual criminality is allowed.

7.1.4 Overview of provisions regarding procedural safeguards relating to proportionality

7.1.4.1 Maximum periods of detention

In statutory law, three types of pre-trial detention are distinguished:

- Remand in Custody ('*Bewaring*'): is that phase in the pre-trial detention during which a suspect is deprived of his freedom for a maximum of 14 days (Art. 64(1) CCP);
- Remand in Detention ('*Gevangenhouding*'): this phase follows the remand in custody. A suspect may be deprived of his freedom for a period of maximum 90 days until the proceedings start (Art. 66(3) CCP). This form of detention may not only be applied in the pre-trial stage but also after the investigation for the trial has commenced (Art. 65(2))
- Detention Pending Trial ('*Gevangenneming*'): a judge if the suspect is still free or when the investigation at trial has commenced can order this.[297] The maximum period of detention is also 90 days.

[294] Raad voor Strafrechtstoepassing en Jeugdbescherming, 'Voorlopige hechtenis- maar dan anders', July 2011, p. 13. Available at: www.rsj.nl.

[295] *Kamerstukken II* 2012-2013, 29 279, 132.

[296] Framework Decision 2009/829/JHA of 23 October 2009, OJ 2009, L 294/20.

[297] G.J.M.Corstens, *het Nederlands strafprocesrecht*, Deventer:Kluwer, 2008 p. 403.

The total period of pre-trial detention may not exceed 104 days. However, after the initiation of the hearing, Dutch statutory law provides no maximum period for pre-trial detention. On the basis of the abovementioned conditions, pre-trial detention may subsequently be extended for sixty days following the final judgment (Art. 66(2) CCP). If pre-trial detention has not been terminated in the meantime, it does so as soon as the judgment becomes irrevocable. In practice this means, especially in complicated cases, that pre-trial detention may sometimes last for several years.

7.1.4.2 Right to contract a lawyer

Art. 63(4) CCP grants the suspect a right to a lawyer in pre-trial detention. The lawyer can be present while the suspect is being interrogated, and is allowed to speak. (Art. 63(4) CCP).

A more general provision of the CCP provides that a person is entitled to contract a lawyer (Art. 28). The second paragraph of this article provides that the suspect should be able to contact his lawyer whenever he wishes to do so.

7.1.4.3 Legal remedies during pre-trial detention

During the pre-trial detention, the suspect has the right to be heard and assisted by a lawyer in decisions on imposing or extending detention. The following remedies are at his disposal:

- He may appeal to the Court of Appeal (*'Gerechtshof'*) against the remand detention order, or the order to prolong it. This appeal can only be lodged once (Art. 71, par. 1 and 2 CCP);
- He may repeatedly request the court that issued the remand in custody order or the remand order, to terminate this (Art. 69 CCP). He may appeal to the Court of Appeal against a negative decision of the court (Art. 87(2) CCP).
- He may repeatedly request the judge who issued the order, to suspend his detention (Art. 80-87 CCP); he may appeal to the Court of Appeal against a negative decision of the court (Art. 87(2) CCP).

The possibility of appeal to the Court of Appeal can only be used once. So if a suspect has already filed an appeal against the decision of a court not to suspend its pre-trial detention, no appeal may subsequently be lodged against the decision of the court not to terminate his detention.

If the existing possibilities for disputing pre-trial detention do not give any prospects for a swift decision, the suspect may submit a request for termination or suspension to a civil judge by initiating summary civil proceedings.[298]

[298] Report of the Netherlands responding to Public Open Tender JLS/D3/2007/01 published in the Official Journal of the European Union no. S93 of 16-05-2007. Study: an analysis of minimum standards in pre-trial detention and the ground for regular review in the Member States of the EU Contracting Authority: European Commission. Available at: http://www.ecba.org/extdocserv/projects/JusticeForum/Netherlands_2_180309.pdf.

7.1.4.4 *Legal remedies against a ruling of conviction*

When a suspect has been convicted, several legal remedies remain available. The Dutch legal system makes a distinction between 'regular' legal remedies and 'special' legal remedies. Regular legal remedies are available to the convicted person as long as the decision has not become final. The special legal remedies become available after the judgment has become final. Regular legal remedies furthermore have a suspending effect whereas special legal remedies do not.

Regular legal remedies

- Appeal (Art. 404 CCP): the Court of Appeal ('*Gerechtshof*') has the power to review the judgment of lower district courts. It conducts a full review of both the legal aspects and the facts.
- Appeal to the Dutch Supreme Court (Art. 427 CCP): This will not entail a factual review of the entire case, but concerns a review of the application of the legal aspects only.

Special legal remedies

- Cassation in the interest of the law ('*cassatie in het belang der wet*') (Art. 456 CCP): This can only be instituted by the procurator-general (*Procureur-generaal*) of the Dutch Supreme Court in cases relevant for the general 'development of the law'.
- Revision ('*Herziening*') (Art. 457 CCP): even after the judgment has become final, in very exceptional circumstances a revision of the judgment is possible. Such circumstances may be found when final judgments of a later date contradict the judgment in **casu** or when new facts contradict the judgment.

Also when the ECtHR has given a different ruling in a case where the same facts were at hand and the person is convicted based on the same evidence, revision is possible.

7.1.5 The Principle of Opportunity

The Dutch criminal justice system provides for discretion of the competent authority whether to prosecute or not ('principle of opportunity'). The opportunity principle may be defined as the freedom for the public prosecution to select which criminal cases to prosecute and when to opt for other settlements (most notably transactions or dismissals).

Art. 167 and 242 CCP provide that the public prosecution may decide not to prosecute or to prosecute further. This mirrors the opportunity principle '*in optima forma*'. In reality, the freedom for the public prosecution is restricted to a greater extent than may be implied on the basis of these provisions. First, the notion of the 'general interest' as a reason not to prosecute is linked to the responsibility of the Minister of Justice.[299] The decision not to prosecute is therefore taken with a view on the political responsibility of the Minister of Justice.[300] Furthermore, the meaning of the notion of 'general interest' has been defined in policy instructions ('*Vervolgingsrichtlijnen*') provided by the Board of General Prosecutors ('*College van Procureurs-generaal*'), which prescribe in which circumstances prosecution is warranted. Examples of such circumstances are: [301]

[299] D.H. de Jong and G. Knigge, *Teksten Strafvordering*, Deventer: Kluwer, 2005, p. 14.

[300] D.H. de Jong and G. Knigge, *Teksten Strafvordering*, Deventer: Kluwer, 2005, p. 138.

[301] Examples of grounds are listed in the guidelines of the Board, such as 'Aanwijzing gebruik sepotgronden van het College van Procereurs-Generaal, 2009A016, 1 September 2009.

- Another type of procedure/ sanctioning other than criminal prevails (e.g. administrative or tort law).
- There is insufficient national interest, for example, the suspect will be extradited.
- The impact of the criminal act on the legal order is minimal.
- The criminal act itself is minor.
- Although the time limit to prosecute has not elapsed, the facts are old.
- There are circumstances particular to the accused such advanced age or poor health.

Lastly, the earlier mentioned Polaris guidelines curtail the public prosecution's discretion with regard to the type and severity of the sanction. All in all, although the opportunity principle applies to Dutch criminal procedure law, important limits and conditions curtail the discretion of the public prosecution.

7.2 The principle of proportionality and its relevance for the authority issuing a European Arrest Warrant

7.2.1 The role of the judicial authorities

Art. 44 of the Dutch Surrender Act (*'Overleveringswet'* hereafter DSA) provides that any public prosecutor may issue a EAW.[302] No distinction is made between prosecution and conviction cases. There is no special procedure in order to take the decision to issue a EAW.

A EAW can only be issued for acts punishable by a custodial sentence of a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months (Art. 2 DSA). Provided these conditions are met, "the competent public prosecutor makes an independent decision on whether or not to issue a EAW based on the case details."[303] There is no judicial control of these decisions.

The *Internationale Rechtshulp Centra* (IRC) play an important role in the issuing and executing phases of EAWs. There are seven IRC in the Netherlands. Each service consists of several public prosecutors and legal advisors. The service is specialized in extradition and EAW cases. The service provides advices to local public prosecutors who want to issue a EAW. In particular the IRC gives advice on how to implement the handbook. The IRC does not give any specific guidelines for deciding on issuing a EAW. It is a case-by-case assessment. In particular, IRCs receive and execute EAWs.

[302] *Overleveringswet*, Stb. 2004, 195.

[303] Evaluation Report on 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, Council of the European Union, 27 February 2009, 15370/2/08, REV 2, 7.

7.2.2 Proportionality review

7.2.2.1 *The legal basis for review*

The DSA does not provide for a specific proportionality review. The legal basis for this control can be found in national law and in the general principles of EU law (see above).[304]

A temporary proportionality check is, however, provided for in the DSA. Art. 35(3) of the DSA provides that a public prosecutor may postpone the surrender of a person on humanitarian grounds. Nevertheless, this article cannot provide a ground to refuse the surrender of the requested person.[305]

7.2.2.2 *The criteria of review*

Prosecutors give consideration to proportionality when they issue EAWs. Until the publication of the European handbook on how to issue a EAW, no guidelines or agreed standards concerning a proportionality check *specific* to the issuance of EAWs were applied.[306] Now prosecutors use the handbook when they decide on the issuance of a EAW. However, the principle of opportunity applies in the Netherlands, therefore the decision to issue is made on a case by case basis and it is hard to pinpoint the exact extent of the review. Nevertheless, prosecutors carry out a proportionality check according to national and European criteria. In particular, the seriousness of the offence is taken into account.

It stands out of the peer review, that all practitioners agree on the fact that the judicial authorities of the issuing country should perform a proportionality check. At least, all assume (on the basis of mutual trust) that it is arranged this way. They assume that the check is not a significant delaying factor in the procedure of the execution of EAWs.

Peer reviews confirm the importance of the criteria mentioned in the handbook.

However, it is difficult to determine which criteria of the guideline exactly the issuing prosecutors are using, because it depends on the case. The issuing prosecutors balance the criteria and some others include the precise circumstances of the case such as the likeliness of the person to be convicted. There are no specific examples given. The gravity of the facts of the case and their consequences for victims are important criteria for the issuance of a EAW.

[304] The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law-enforcement area, October 2010, p. 280.

[305] Dutch Supreme Court, 28 November 2006, LJN:AY6631 and Dutch Supreme Court, 28 November 2006, LJN:AY6633.

[306] Ealuation Report on 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, Council of the European Union, 27 February 2009, 15370/2/08, REV 2, 7.

7.2.2.3 *The seriousness of the offence*

Art. 2 DSA provides that a EAW can only be issued for acts punishable by a custodial sentence (or a detention order) of a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months. This is a transposition of Art. 2(1) of the Framework Decision on the EAW. Recent research conducted in the Netherlands indicates that in general "Dutch prosecutors ask for surrender of persons for heavier crimes only."[307]

The peer review showed that prosecutors use the Handbook as a guideline for deciding whether to issue a EAW or not. In fact, all the circumstances of the facts are taken into account when deciding to issue a EAW. Public prosecutors do not issue EAWs for 'minor offences'. Nevertheless, it remains unclear what a minor offence is since prosecutors enjoy discretion in the application of the opportunity principle. If an offence falls within the scope of Art. 2 of the Framework Decision, prosecutors may simply issue a EAW.

Whether the public prosecutors consider the reasonable chance of conviction, the effective exercise of defence rights, the privacy rights of the suspect, the cost and effort of a formal extradition proceeding, the age of the sought person and other factors, cannot be concluded on the basis of the peer review interviews.

If a decision not to issue a EAW is taken, proceedings are not necessarily terminated. A court can give a verdict *in absentia* for example.

7.2.2.4 *Problems regarding the execution of EAWs issued in the Netherlands*

According to the peer review only few problems have been made explicit. Nevertheless, one can mention the following problem, which relates to defence lawyers with a mandate to represent their client. A statement from the lawyer that he has a mandate to represent a client is valid in the Netherlands whereas it is not considered as sufficient evidence in other Member States.

[307] The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law-enforcement area, October 2010, p. 253.

7.2.2.5 *Alternative means and suggestions*

Peer review evidence revealed that prosecutors always try alternative measures first before issuing a EAW. Public prosecutors issue a EAW only when no alternative means are possible or when they have no idea of the whereabouts of the wanted person. For example, they often take recourse to the SIS, the EJN or Eurojust. However, it has not been always made clear how prosecutors proceed when deciding on alternative means and which alternatives are used.

Most EAW-cases are considered to be proportionate by practitioners in the field of the EAWs (including defence lawyers).

The defence lawyers and the national coordinating public prosecutor both point out the need of fine-tuning the system of alternative means and developing more alternative means to the EAW system.

Suggestions of the defence lawyers for alternative means and for improving of the system are, inter alia: creating a European wide legal-aid system, raising the thresholds for issuing a EAW, call in the help of networks of public prosecutors (EJN) and lawyers.

7.3 The principle of proportionality and its relevance for the authority executing a European Arrest Warrant

7.3.1 General framework

Some discretion to refuse the execution of a EAW is left to the competent executing authorities. Firstly, the Netherlands has transposed certain optional grounds for refusal. Secondly, the Netherlands provides for a ground to refuse a EAW in case of humanitarian problems or of violation of fundamental rights of the person sought (see below 7.3).

7.3.1.1 *Judicial authorities having jurisdiction to execute EAWs*

Three authorities have a power of decision with regard to the surrender of a person subject to a EAW. First of all, public prosecutors, in particular the public prosecutors at the Amsterdam District Court where requested persons shall be transferred have a large margin of discretion when executing a EAW and applying refusal grounds. Secondly, the Amsterdam District Court has exclusive jurisdiction to decide upon the surrender of the requested person (Art. 22 DSA). It is therefore also the only authority competent to conduct a proportionality test. Finally, the Minister of Justice has certain discretion to decide on the suspension of a decision to surrender (Art. 9(2) DSA).

Because of the short period of time for a court to decide upon the surrender (60 days according to Art. 22(1) DSA) appeal and cassation have been abolished. The Minister of Justice has justified this by arguing that an appeal only aims at guaranteeing the uniformity of the law. Since the Amsterdam District Court decides on all cases of incoming EAWs, uniformity is guaranteed.

The peer reviews confirms that the absence of appeal against decision on EAWs is not seen as problematic. Moreover, there is always a possibility for the Attorney General to lodge a complaint 'in the interest of the law' before the Supreme Court. The Court may stay proceedings until the Supreme Court has decided on the case. Nevertheless, the decision of the Supreme Court cannot have any influence on the outcome of proceedings. No appeal is available. However, a person subject to a EAW may request a court hearing. The Court consists of three judges.

7.3.1.2 Transposition of optional grounds for non execution of EAWs

Art. 4(2) FD EAW[308] constitutes a mandatory ground for refusal transposed in Art. 9(1)(a) DSA. This does not cover the situation when investigative measures have been executed with regard to a person or someone who has been arrested and put in detention, but the authorities never planned on prosecuting the person in question.[309] For example, if someone was subject to a house search in the Netherlands upon a request from another Member State, this person is not considered to have been subject to 'criminal proceedings in the Netherlands.'

However, the Minister of Justice may order the public prosecutor to surrender the person when he is of the opinion that the person can be better prosecuted in the issuing country.[310] For example, when the requested person has its place of habitual residence in the issuing state or is already prosecuted for other crimes in that State. [311]

[308] "Where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based."

[309] See e.g. Amsterdam District Court, 24 April 2009, LJN:BJ0779 and Amsterdam District Court, 11 September 2009, LJN:BK9181; H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 203.

[310] Article 9(2) DSA. This is a special competence of the Minister of Justice with regard to extradition. The more general competence of the Minister to give orders/guidance to the Public Prosecutor is laid down in Article 128(6) Act on Judicial Organisation (*Wet RO*) see H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 204.

[311] H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 205, footnotes 907-909.

Art. 4 (4) FD EAW[312] has been implemented in Art. 9(1)(f) DSA as a mandatory ground for refusal. If prosecution becomes statute-barred according to Dutch law, the Dutch authorities have to refuse extradition, but only if a Dutch court had jurisdiction with regard to the original prosecution.[313] This also implies that the double criminality requirement must be fulfilled, even if the issuing state has defined the crime as a crime for which the requirement of double criminality does not have to be fulfilled. The Amsterdam District Court decides *in abstracto* whether a prosecution is statute-barred. This means that the court will judge in a hypothetical manner whether a similar case would be statute-barred in the Netherlands.[314]

Art. 5(3) FD EAW[315] is implemented in Art. 6(1) DSA. The Dutch authorities can surrender a Dutch national or an alien with a residence permit for an indefinite time to the issuing state, as long as that State gives the Dutch authorities a so-called 'return guarantee'. This return guarantee applies to both a fine and a custodial sentence.[316]

Art. 4 (7) (a)[317] **and Art. 4 (7) (b)**[318] **FD EAW** are implemented in Art. 13(1) DSA. According to Art. 13(2) DSA, a public prosecutor can surrender a person, despite the fact that a crime occurred on Dutch territory. Prosecutors have a wide discretion to use this power. The Amsterdam District Court can however review their decision. Yet, the Court conducts only a marginal review and cannot impose on public prosecutors an obligation to motivate their decision extensively.[319]

This Court however held that the personal circumstances of the requested person should be taken into account when judging upon Art. 13(2). A decision made by a public prosecutor omitting to take these circumstances into account would be unreasonable and surrender would have to be refused.[320] In contrast, the Dutch Supreme Court always refuses a similar reasoning and decides that such a decision must be made on application of Art. 35(3) DSA, which provides for humanitarian grounds.[321]

.....

[312] "Where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law."

[313] Amsterdam District Court, 28 December 2012, LJN:BZ0414.

[314] Amsterdam District Court, 13 February 2008, LJN:BF8822, Amsterdam District Court, 1 March 2013, LJN:BZ3240; H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 216.

[315] "Where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject 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."

[316] Amsterdam District Court, 6 February 2007, LJN: AZ8784.

[317] "Where the European arrest warrant relates to offences which are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such."

[318] "Where the European arrest warrant relates to offences which have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory."

[319] Dutch Supreme Court, 28 November 2008, NJ 2007, 488; Amsterdam District Court, 20 January 2012, LJN:BV1745 and BV1743; Amsterdam District Court, 16 March 2012, LJN:BW0644; Amsterdam District Court, 25 January 2013, LJN:BZ3594; H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 237.

[320] Amsterdam District Court, 2 July 2004, LJN:AQ6068.

[321] Supreme Court, 28 September 2006, NJ 2007, 486 and 487.

In later cases, the Amsterdam District Court found that the 'return guarantee' as provided for in Art. 6(1) DSA was enough to meet the interests of the requested person.[322] In conformity with a judgment of the Supreme Court of 28 September 2008 the Amsterdam District Court decided in later cases that it could not take the personal interests of the requested person into account (e.g. the possibility to lose one's job, house or affect one's pregnancy).[323]

Art. 4bis FD EAW[324] is implemented in Art. 12 and 12a DSA. In conformity with the principle of mutual trust, the Amsterdam District Court does only carry out a formal review of the guarantees provided by the issuing state that the rights of defence of a person subject to a EAW will be respected.[325] The Dutch rules on the rights of defence are not applicable.[326]

7.3.1.3 Refusal to execute a EAW on humanitarian and human rights grounds

Art. 35(3) DSA provides that

> *"As an exception, the actual surrender may be omitted where there are serious humanitarian reasons against actual surrender, especially where it is irresponsible for the requested person to travel, given his state of health. The issuing judicial authority shall immediately be informed of this. The public prosecutor, in consultation with the issuing judicial authority, shall decide the time and place at which actual surrender can yet take place. Actual surrender shall then take place no later than ten days after the set date."*[327]

This ground can only lead to postponement of the surrender, and not to a refusal. However, the humanitarian grounds may be permanent, for example when the state of health of the person involved does not seem to improve.[328] Nevertheless, in such a case, the Amsterdam District Court refuses to carry out the EAW because it would not be proportionate. The Court does not apply Art. 35 DSA.[329] This is remarkable, because Art. 35 paragraph 3 explicitly formulates the exception to the duty to surrender the requested person if ".. especially when considering the health condition of the requested person it is not safe to travel". Strictly speaking this provision was not applicable, because the requested person in the case had a severe brain tumor and was expected to pass away in the foreseeable future (as medical experts advised). That explains the reference to the proportionality principle in this judgment as a ground for refusal of surrender.

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[322] Amsterdam District Court, 12 January 2007, LJN:AZ7048; Amsterdam District Court, 5 January 2010 LJN:BK9107 and BK9117.

[323] Amsterdam District Court, 25 March 2009. LJN:BI0772 and Amsterdam District Court, 10 December 2010 (LJN:BO8099).

[324] Decisions rendered following a trial at which the person did not appear in person as amended by Framework Decision 2009/299/JHA of 26 February 2009, OJ 2009, L 81/24.

[325] See for example, Amsterdam District Court, 25 January 2013, LJN:BZ3593.

[326] Amsterdam District Court, 24 February 2012, LJN: BV7998.

[327] Translation available at http://www.asser.nl/default.aspx?site_id=8&level1=10789&level2=10836&level3=11077&text id=29576 (last visited December, 2012).

[328] N. Rozemond, 'Bevat het overleveringsrecht een humanitaire weigeringsgrond?', Nederlands Juristenblad, 2007, issue 11.

[329] Amsterdam District Court, 1 March 2013, LJN:BZ3203.

It is possible to institute interlocutory proceedings against a public prosecutor's decision to refuse the application of Art. 35(3). In some circumstances the humanitarian grounds fall within the scope of the protection of Art. 3 ECHR, which renders the surrender inhumane, for example when the person involved is seriously ill or dying. In that case surrender would lead to flagrant breach of the fundamental rights of the person concerned and should be refused according to Art. 11 DSA.[330]

Art. 11 DSA provides that

> *"Surrender shall not be allowed in cases in which, in the opinion of the court, there is justified suspicion, based on facts and circumstances, that granting the request would lead to flagrant breach of the fundamental rights of the person concerned, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms concluded in Rome on 4 November 1950."*

This refusal ground cannot be traced back to the text of the Framework Decision on the EAW. Human rights defences have to be based on a 'justified suspicion' that is based on 'facts and circumstances'.[331] It has to concern an imminent or flagrant threat of a violation of human rights, not just the general situation the issuing country.[332] The court's starting point is the trust that the issuing country respects the rights enshrined in the ECHR.[333] The concept 'flagrant' means that if the breach concerns a reasonable time as set out in Art. 6 of the ECHR, a violation occurs when this cannot be compensated by lowering the sentence and this can have no other consequence that the dissolution of the right to prosecute.[334] The Amsterdam District Court will only refuse surrender if the suspect cannot dispose of an effective remedy in the issuing Member State.[335] In application of the Strasbourg case *MSS v. Belgium*, the Court may refuse surrender if there is a strong motivated suspicion that the surrender will lead to the violation of an absolute right of the requested person such as Art. 3 ECHR.[336] Even so, the court choose to refer to the proportionality principle and not to refer to Art. 11 DSA in this case. One wonders if this is the beginning of a new line of jurisprudence or just an exceptional case.

[330] N. Rozemond, 'Bevat het overleveringsrecht een humanitaire weigeringsgrond?', Nederlands Juristenblad, 2007, issue 11; this seems confirmed by the Amsterdam District Court in its judgment of 1 March 2013 mentioned in footnote 51 although the Court did not refer expressly to Article 11 DSA.

[331] Amsterdam District Court, 21 June 2012, LJN:BX4049.

[332] Amsterdam District Court, 24 December 2004, LJN:AR8435, Amsterdam District Court, 21 January 2005, LJN:AS7084, Amsterdam District Court, 10 October 2010, LJN:AZ1408, Amsterdam District Court, 29 May 2012, LJN:BX3744, Amsterdam District Court, 16 October 2012, LJN:BZ0835.

[333] Amsterdam District Court, 17 August 2012, LJN:BY1996.

[334] Amsterdam District Court defined this concept in a case of 1 July 2005 (LJN:AT8580)

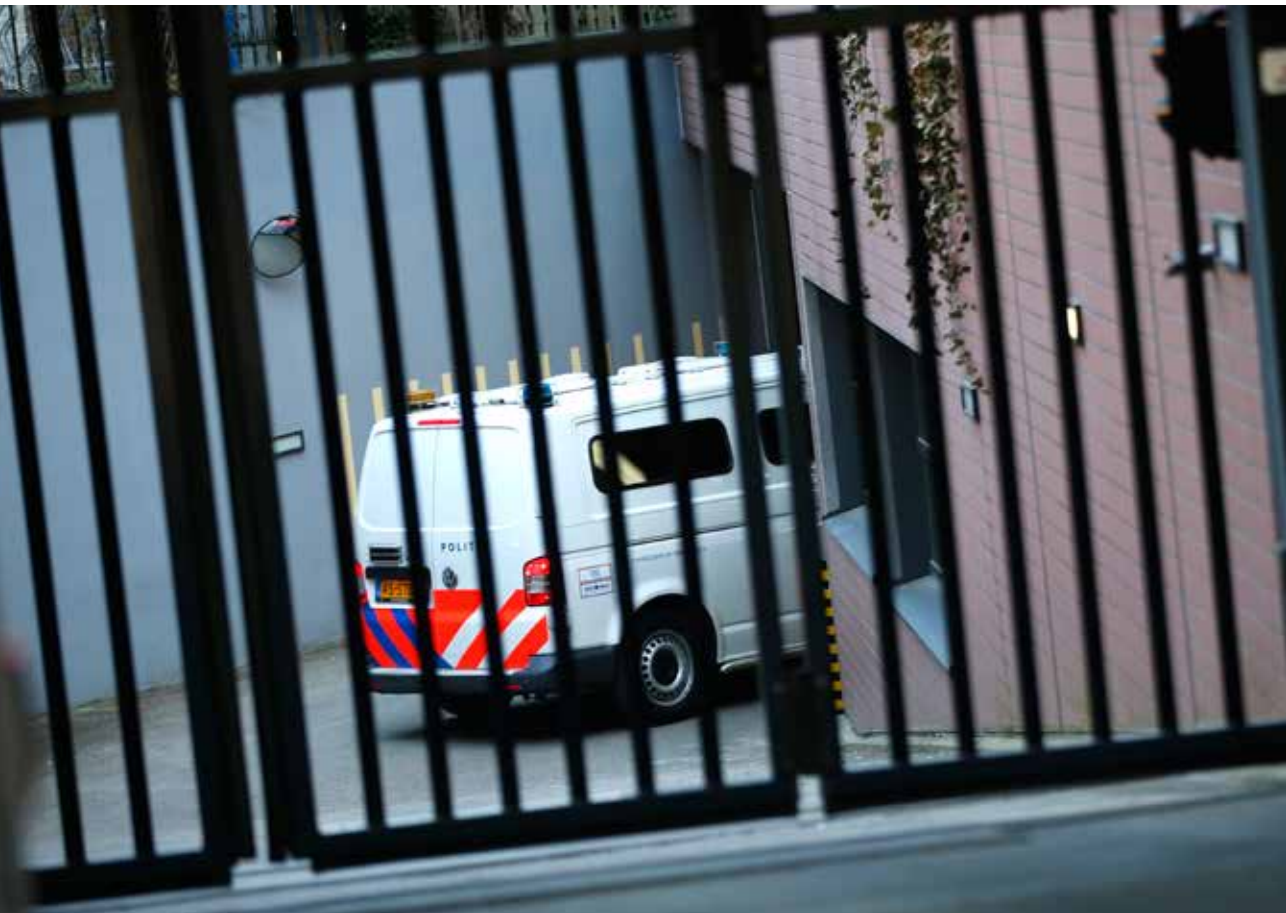
[335] Amsterdam District Court, 1 July 2005 (LJN:AT8580.)

[336] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, European Court of Human Rights, 21 January 2011.

7.3.1.4 Judicial review of proportionality

Once a suspect is arrested, he may choose between

- The 'short procedure' where the suspect waives the principle of specialty, then the prosecution service decides on the EAW within 10 days out of court. The prosecution service can reject the EAW if there is a ground of refusal for example. It is only when no doubt arise that the prosecution service refuses the execution.
- The 'normal procedure', where the suspect challenges the EAW before the court. The Court has exclusive jurisdiction in the Netherlands to decide on matters concerning the EAWs and traditional extraditions. In the case of a EAW received by the Netherlands, proceedings are brought to this Court if the person subject to the EAW refuses his surrender. The prosecution service has otherwise jurisdiction to execute EAWs received in the Netherlands.



7.3.1.5 Criteria concerning the proportionality test

So far only one case is known in which the Amsterdam District Court has refused the surrender of a requested person on the grounds of proportionality.[337] This Court distinguishes two types of proportionality:[338]

- The proportionality of the DSA (*stelselevenredigheid*): that Act is based on the assumption that in conformity with the proportionality principle enshrined in Art. 5(4) TEU, the competence to surrender does not exceed what is necessary to achieve the goal of the Framework Decision on the EAW. The Court refers to recital 7 of the Framework Decision on the EAW and to the ECJ case *Advocaten voor de Wereld* and the Opinion of the Advocate General in that case (at 18-26).[339] This proportionality test is general and abstract. It only concerns the proportionality of the act adopted by the Netherlands in order to implement the Framework Decision on the EAW. Therefore, it must be distinguished from the proportionality test that a court performs concretely on the facts of a specific case.
- The proportionality of the execution of a EAW in a specific case: a court must interpret national law in the light of EU law.[340] Dutch courts also consider EU Recommendations when deciding on a case. Therefore, they take the "Handbook on how to issue a European Arrest Warrant" into account even if the latter is not binding when deciding on the execution of a EAW. The Court refers in particular to the following grounds provided in the Handbook: "Considering the severe consequences of the execution of a EAW as regards restrictions on physical freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant, bear in mind, where possible, considerations of proportionality by weighing the usefulness of the EAW in the specific case against the measure to be applied and its consequences." However, only in very exceptional circumstances the execution of a EAW can be refused in application of the proportionality principle.[341]

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[337] Amsterdam District Court, 1 March 2013, LJN:BZ3203.

[338] Amsterdam District Court, 30 December 2008, LJN:BG9037, 11 December 2012, LJN BZ0832.

[339] Case C-303/05 *Advocaten voor de Wereld* (2007) I-03633.

[340] Case C-105/03 *Pupino* (2005) I-05285.

[341] In a case decided on 26 June 2012, (LJN:BY8250) the counsel for the requested person argued that surrender would be disproportionate given the highly exceptional circumstances of her client. The person concerned suffered from serious mental health problems, he was receiving treatment but it was feared that a transfer to France would deteriorate his status, also because he would not receive the same, intensive care in prison in France. In the light of the principle of proportionality the Court did not exclude to possibility that if the French authorities had been informed they would have chosen for a less intrusive solution instead of issuing a EAW. The Amsterdam District Court therefore stayed the proceedings for an indefinite amount of time, and requested the French authorities if it would be possible – given the circumstances at hand – to take over the prosecution of the person concerned. By contrast, in the case decided on 1 March 2013 (mentioned in footnote 53) the Court – relying on medical expertise – refused the execution of the EAW because the person concerned suffered from a heavy form of brain cancer for which the estimated life expectancy is 15 months. The Court decided that the combination of the heavy treatment supported by the person and the short life expectancy would in fact render in this "very exceptional circumstance the surrender illusory".

Practitioners feel in general that it is not the task of the executing country to control the proportionality of a EAW even if this may be possible in exceptional circumstances. The issuing Member State should be in charge with a control of the proportionality of the EAW.

Prosecutors and judges rely on the principle of mutual trust.

The seriousness of the offence

Until today, the Amsterdam District Court has always rejected pleas on the *dis*proportionality of a EAW issued for minor offences regarding the consequences that its execution would have on Treaty freedoms.[342] Even for obvious 'petty crimes' such as bribing a prison guard with 100 zloty (21€) the Court authorized surrender.[343] According to the Court, the importance of a crime cannot be determined by the amount of money concerned, but by the interests violated.

If a minor offence fulfils the minimum standards as set out in Art. 2(1) of the FD EAW, the proportionality will be presumed as mentioned earlier.[344] In such a case, the proportionality argument with regard to the seriousness of the offence will not succeed.[345] Commentators refer to the legality principle in force in certain Member States as being one reason for such decisions.[346] One might say that prosecutors of an executing state where the principle of opportunity applies are bound to execute a EAW issued by a prosecutor in a Member State where the legality principle is in force.[347]

The likely penalty imposed if the person sought is found guilty of the alleged offence

In a case of the Amsterdam District Court, the Court refused the plea of the defence counsel who argued that if the suspect would be punished in the Netherlands, he would probably be sentenced to imprisonment for a very short period or to paying a fine.[348] Another case concerned the execution of a EAW concerning a man charged with the offence of misappropriation of goods of little value.[349] In Poland and according to the defence, the sentence for such an offence would be limited to a suspended sentence or a small fine. However, the Court decided that the execution of the EAW was not disproportionate. It relied on the

[342] Amsterdam District Court, 30 December 2008 LJN: BG9037, 17 September 2009 LJN:BN8264.

[343] Amsterdam District Court, 22 July 2009, LJN:BJ4810.

[344] A.H. Klip, *Overleveringsperikelen*, Delikt en Delinkwent 2010, 32.

[345] Amsterdam District Court, 4 March 2009, LJN:BH6183 (smuggling of 1000 kg. hash), Amsterdam District Court, 25 March 2009, LJN:BI0772 (illegal trade in narcotics), Amsterdam District Court, 11 September 2009, LJN:BK9181 (trade in narcotics), Amsterdam District Court, 12 January 2010 LJN:BL3019 (possession of 425gr. of narcotics), Amsterdam District Court, 21 May 2010, LJN:BM6497 (misappropriation of goods: will probably just get a suspended sentence or a fine in Poland), Amsterdam District Court, 15 June 2010, LJN:BM8538 (serious violence and property crimes), Amsterdam District Court, 10 December 2010, LJN:BO8099 (smuggling committed by an organized group), Amsterdam District Court, 21 June 2012, LJN:BX4049 (acquired a knowingly counterfeit passport, personal identity card and driver's licence), Amsterdam District Court, 25 September 2012, LJN:BY2657 (theft of a mobile phone).

[346] A.H. Klip, *Overleveringsperikelen*, Delikt en Delinkwent 2010, 32.

[347] The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law-enforcement area, October 2010, p. 276.

[348] Amsterdam District Court, 10 December 2010, LJN:BO8099.

[349] Amsterdam District Court, 21 May 2010, LJN:BM6497.

information provided in the EAW and on the principle of mutual trust. The crime of misappropriation is sentenced in both the Netherlands and Poland with a maximum imprisonment of 12 months. It therefore fulfils the minimum requirements as set out in the DSA.

Use of less intrusive means to ensure protection/ alternative measures of legal assistance
The possibility of taking over a sentence in the future in application of Framework Decision 2008/909/JHA[350] cannot be a reason to set aside the jurisdiction requirement and refuse extradition.[351]

Effective exercise of defence rights (information of defence rights, providing translation and interpretation)
The Court rejects pleas concerning a possible violation of the principle of a fair trial as set out in Art. 6 ECHR, because of the length of the proceedings. The Court motivates its decision by a reference to the principle of mutual trust and to the fact that Member States are party to the ECHR. [352]

Privacy rights of the suspect (e.g. possibility to have contact with family members)
If the conditions of detention in the issuing State raise doubt on the respect of Art. 3 ECHR, the Court may stay proceedings and ask the issuing State for information. However, the Court has never refused the execution of a EAW on this ground.[353]

Human rights grounds

It follows from the peer review that EAWs are hardly ever refused because of a violation of human rights of the person subject to the EAW. Only in very exceptional cases (e.g. flagrant breaches of human rights) execution is refused.

On their side, defence lawyers observe that more than 80 % of the EAWs are proportionate (all included issuing and executing). Problems occur very rarely.

However, it almost never happens that lawyers obtain from the Court or the public prosecution service the refusal to execute a EAW on human rights grounds. They have to be very specific in their argumentation if they want to prove the existence of an actual flagrant breach of right (for example, with regard to degrading treatment, the Court requires to know in which prison the person will be sent, what is the actual situation in this prison that is problematic in the light of fundamental rights protection...). Lawyers always try to find an alternative to the execution of a EAW, but rely on the will of the public prosecution service in the issuing country.

[350] Framework Decision 2008/909/JHA of the European Council of 27 November 2008 on the application of principle of mutual recognition to judgments in criminal matters imposing custodial measures or measures involving the depravation of liberty for the purpose of their enforcement within the EU, OJ (2008) L 327/27.
[351] Amsterdam District Court, 5 January 2010, LJN:BK9060, Amsterdam District Court, 6 March 2012, LJN:BV8667.
[352] Amsterdam District Court, 3 January 2012, LJN:BV1112.
[353] Amsterdam District Court, 22 February 2011, LJN:BP5390.

7.3.1.6 Problems with regard to the proportionality of EAWs issued in another Member State

If a EAW complies with the offence requirements as set out in Art. 2 of the FD EAW as implemented in Art. 2 DSA, it is presumed proportionate. It makes no difference whether or not the issuing Member State applies a proportionality test. An example of this is a case concerning a request for surrender from Poland. Poland's criminal law recognizes the principle of legality and the authorities/the public prosecutors are therefore obliged to issue a EAW for all crimes which comply with the offence requirements.

The peer review showed that the Dutch practitioners, in particular judges and public prosecutors, have the impression that the participating countries use a standard proportionality check before issuing a EAW. However, this is only an assumption, it is not built on factual knowledge. There is no habit of sharing procedural rules and standards concerning the proportionality check between the Member States. All participants stressed the fact that the EAW is, in general, a very good instrument and that there are very few problems relating to its application.

However, the executing authorities carry out a formal check of incoming EAWs and will refuse the execution when a EAW does not meet all the formal requirements laid down in the Framework Decision. There is hardly any mention of petty cases issued by one of the Member States participating in the present research.

Nevertheless, there is an increasing tendency for the IRCs to ask more evidence from French prosecutors (e.g. act of indictment.) than the Framework Decision of the EAW allows. Sometimes the complete file is requested. However, it is not clear whether the request comes from the IRC or the Court of Amsterdam actually or from lawyers that act through the IRC. Nevertheless, in December 2007 six EAW issued by France were refused by the Amsterdam Court because of a lack of evidence.
It seems that it takes a longer time to obtain a return guarantee from France and Germany. This is especially true for drug offences where the Netherlands is felt to be less harsh in the level of penalty applied to these offences.

With regard to other Member States:

- Poland is mentioned several times by different practitioners (judges, public prosecutors, national coordinating of prosecutors and IRC South), in relation to disproportionate cases. It is not clear whether a proportionality check is performed in Poland. It is believed that Poland issues a lot of EAWs because of the duty to prosecute every offence, which contrasts with the principle of opportunity. Some of these Polish EAWs are considered to concern 'petty' cases (in comparison, the Czech Republic is also a Member State where the principle of legality is in force; however there is no problem with this Member State since it issues only few EAWs.) It also occurs that Poland sends old case for offences that would be considered 'petty' offences in the Netherlands. These cases are an exception and it has been observed that the country shows progress. Mutual trust is the leading principle. It ought to be noted that the Netherlands has a very large Polish community.

- It happens quite often that Belgium issues a EAW in order to just hear a person.
- Another problem concerns the cooperation with the United Kingdom that has complained about the long duration of the surrendering procedure from the Netherlands to the United Kingdom. This long duration is often caused by medical issues, which can lead to delay of extradition in the Netherlands.

From the **lawyers' side**, the peer review showed that the assistance of a lawyer (legal aid) in the requesting country is essential. If the lawyers' cooperation in Europe is improving, access to legal aid remains problematic.

- When a person subject to a EAW is granted legal aid in the Netherlands he will not receive legal aid in the issuing Member State for example.
- Poland often violates the speciality principle and prosecutes persons who have been subject to a EAW for other offences than the offence for which he has be surrendered. Therefore, lawyers are in favour of a stronger mechanism for monitoring EAWs.

7.3.1.7 Monitoring system

The EAW has not laid down any monitoring system. Once a person is surrendered, the executing state does not undertake the follow up of the case even in cases where surrender was subject to conditions.

The peer review showed two different opinions with regard to a monitoring system.

The first is a rather positive view with regard to a follow-up system. The second is, however, they do not experience a pressing need for such a monitoring-system. It does not seem to be a need or wish of the practitioners (an additional issue being a concern for possible follow up tasks to be carried out), except for the defence lawyers. They would welcome a follow-up system.

With Dutch nationals public prosecutors always follow up because of the return guarantee in these cases. It is the responsibility of the minister of justice to keep track of the lengthiness of the return guarantee procedure.

7.3.2 Nationals (and return guarantees)

There is no additional proportionality test carried out when a EAW requests the surrender of a Dutch national. However, a double criminality check is required, also for facts for which double criminality is abolished according to the Framework Decision on the EAW, if a EAW concerns a Dutch national (or a resident with a residence permit for an indefinite time). It furthermore requires more procedural safeguards.

Art. 6(1) DSA provides that extradition of a Dutch citizen is allowed for the purpose of prosecuting the suspect. However, extradition of a national is only allowed when the issuing Member State provides the Dutch authorities with a 'return guarantee'. Extradition for executing a sentence is not allowed.

The Amsterdam District Court assesses return guarantees. Art. 6(1) does not clarify which authority should issue the 'return guarantee'. It is assumed that the issuing judicial authority should issue the return guarantee. A guarantee given by another judicial authority (such as the Minister of Justice) also suffices in practice,[354] if this authority is competent to do so under the applicable national law.[355] As a consequence of the principle of mutual trust, the executing judicial authority presumes that a competent authority issues the return guarantee.

7.3.2.1 Requirements for a valid return guarantee

A return guarantee does not only have to contain a guarantee that the detention order will be executed in the Netherlands, but also that the sentence will be transposed to Dutch standards according to Art. 11 of the Convention on the transfer of sentenced persons or any other applicable convention concerning the transfer of sentenced persons.[356] If this double guarantee is lacking, the Amsterdam District Court will refuse surrender.[357] The guarantee has to be clear and unambiguous, in the sense that if a sentence is imposed upon the suspect, an actual possibility of returning to the Netherlands exits. The DSA does not provide for a fixed term within which a surrendered national must be returned in case she is convicted. The court does not decide on this term.[358]

It is still possible that the extradition of a Dutch national will be refused, even if all the above-mentioned conditions are fulfilled. Taking over of foreign convictions is regulated in the Law on transfer of executing convictions (*Wet overdracht tenuitvoerlegging strafvonnissen*).[359] This law requires that both the executing and the issuing state should be party to a bilateral or multilateral treaty.[360] Such treaties require double criminality.[361] This means in practice that the Amsterdam District Court has to assess whether or not the fact also constitutes a crime under the Dutch legal system. The same goes for crimes for which in the Framework Decision on the EAW the requirement of double criminality has been abolished. It should be noted that return of a national is subject to the consent of the suspect concerned.[362]

Public prosecutors inform the Minister of Justice of every extradition where return guarantee has been given. This way the Minister can monitor if the return guarantee is complied with.[363]

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354 H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 187

355 Amsterdam District Court, 1 August 2008, LJN:BF1897.

356 E.g . Amsterdam District Court, 6 July 2007, LJN: BB2690; Amsterdam District Court, 1 October 2008, LJN:BF1897.

357 Amsterdam District Court, 6 July 2007, LJN:BB2690 and Amsterdam District Court, 1 October 2008, LJN:BF1897.

358 Amsterdam District Court, 20 January 2012, LJN:BV

359 Wet overdracht tenuitvoerlegging strafvonnissen, Stb. 1986, 464.

360 Article 2 Wet overdracht tenuitvoerlegging strafvonnissen.

361 See e.g. Article 3(1)(e) Convention on the transfer of sentenced persons and 3(1)(c) *Wet overdracht tenuitoverlegging strafvonnissen*.

362 Article 3(1)(d) Convention on the transfer of sentenced persons.

363 Kamerstukken (Acts of Parliament) II 2002/03, 29042, nr. 3, p. 13 (MvT).

7.3.2.2 *Union citizens*

A Union citizen is treated as a Dutch national if he has been legally residing in the Netherlands for at least 5 years[364] at the moment when the court decides upon the application of a EAW.[365] In order to enjoy this treatment, the Netherlands should furthermore have jurisdiction to execute the sentence and the Union citizen should not be expected to forfeit his right to residence in the Netherlands as a result of a sentence or order imposed upon him after surrender.

7.3.2.3 *Third country nationals (TCN)*

The provisions regarding the surrender of nationals for the purpose of prosecution or execution of a sentence apply also to a TCN with a residence permit for an indefinite time, where he can be prosecuted in the Netherlands for the acts mentioned in the EAW, and provided he is expected not to forfeit his right of residence in the Netherlands as a result of a sentence or order imposed upon him after surrender. The requirements are cumulative. TCNs who do not meet all the requirements, are not equated with nationals.

However, the Court decided that the requirement of a residence permit for an indefinite time was not decisive. The TCN in question had to have 'reasonable prospects of a future in the Dutch society.'[366]

The peer review confirmed the application of the aforementioned principles.

Prosecutors only perform extra checks on EAWs concerning Dutch nationals and persons equated to nationals, because of the return guarantee. In these cases public prosecutors apply a double criminality check. Besides that no additional proportionality check is performed. Public prosecutors arrange return guarantees.

7.3.3 Proportionality of arrest in EAW proceedings

7.3.3.1 *Legal provisions*

The DSA stipulates that a requested person can only be deprived of his liberty in case of a reasonable risk of absconding (Art. 64(1) DSA). The risk of absconding of a Dutch national or an alien who fulfils the requirements mentioned in the former section is considered much smaller than that of other foreigners, since the former group has the possibility of a return guarantee to lose. If the authorities may not reasonably assume a risk of absconding, the deprivation of liberty is not allowed.[367] There should, furthermore, be a reasonable chance that the Amsterdam District Court will permit the surrender.[368]

[364] See e.g. Amsterdam District Court, 2 December 2009, LJN: BK5504, Amsterdam District Court, 5 January 2010, LJN: BK 9107, BK9114, BK9117, BK9119, BK9120; Amsterdam District Court, 21 February 2012, LJN:BV7120.

[365] Amsterdam District Court, 5 January 2010, LJN: BK9114 and BK9117.

[366] Amsterdam District Court, 17 March 2006, LJN: BD2943.

[367] V. Glerum en V. Koppe, De Overleveringswet, Overlevering door Nederland, Deel 2, 1e druk, Sdu Uitgevers, Den Haag, 2005, p. 103.

[368] H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 90

Another requirement concerns the expectation on the part of the authorities that the EAW will be issued within a short period of time.[369] Lastly, it could be argued that the principle of proportionality as a general principle of EU law requires that if the EAW has the purpose of executing a sentence the detention period before surrender cannot extend beyond the length of the sentence imposed on the requested person in the issuing Member State.[370]

Article 5 ECHR
Art. 5(1)(f) ECHR allows for the deprivation of liberty of a person subject to a surrender procedure. If one interprets this provision strictly, deprivation of liberty is only allowed if a EAW has already been issued. However, a broader interpretation includes the deprivation of liberty prior to the issuing of a EAW.[371] Such an interpretation is applied to the surrender proceedings.[372] The ECHR furthermore requires that the deprivation of liberty be in accordance with a procedure prescribed by law.

Art. 5(2) ECHR requires that the requested person should be informed promptly, in a language he understands, of the reasons of his arrest. Art. 59 DSA provides therefore that a copy of the order for the deprivation of liberty (which includes the reasons for the issuing of the order) will be delivered to the person concerned.

Art. 5(4) ECHR provides that anyone who is deprived of his liberty shall be entitled to have a court speedily review the legality of the detention. The DSA provides for this right in the Art. 19(a), 21(9) and 33(a) DSA. The investigative judge and the Amsterdam District Court have to decide speedily upon the legality of the detention and will have to order release if detention is unlawful. If the court or the investigative judge does not decide upon the legality of the detention within a reasonably short period, the requested person can turn to the provisionary judge (*voorzieningenrechter*) of the Hague District Court.[373]

Finally it should be noted that if the detention of a person should be in violation of Art. 5 ECHR, he can demand compensation according to Art. 5(5) ECHR. Compensation should be granted if the detention was unlawful or has exceeded the maximum period as prescribed by law.[374] If the District Court of Amsterdam has permitted surrender, the requested person has to turn to the civil court in order to claim compensation. If surrender is refused, Art. 67 DSA applies, which states that the court may award the requested person compensation if surrender is refused.[375]

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[369] V. Glerum en V. Koppe, De Overleveringswet, Overlevering door Nederland, Deel 2, 1e druk, Sdu Uitgevers, Den Haag, 2005, p. 103.

[370] H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 90.

[371] A.H.J. Swart, *Nederlands Uitleveringsrecht*, Zwolle: Tjeen Willink, 1986, p. 532-533.

[372] Amsterdam District Court, 3 September 2004, LJN: AS 3861.

[373] V. Glerum en V. Koppe, De Overleveringswet, Overlevering door Nederland, Deel 2, 1e druk, Sdu Uitgevers, Den Haag, 2005, p. 105.

[374] Ibid.

[375] See e.g. Amsterdam District Court, 17 June 2009, LJN:BJ4764. The requested person was granted compensation in accordance with article 67 DSA. However, not on grounds of the refusal of the surrender, but on the basis of the issuing state that had withdrawn its arrest warrant. See also, Amsterdam District Court, 10 February 2012, LJN:BW6578.

7.3.3.2 Procedural safeguards

Detention for the purpose of surrender

Two phases can be distinguished with regard to detention with the purpose of surrender: detention prior to receiving a EAW from the issuing state (provisional arrest) and detention after having received a EAW (arrest).

The provisions regarding 'provisional arrest' (*voorlopige aanhouding*) are laid down in Art. 17-19 DSA. If a person has been arrested by a foreign police officer after a pursuit involving the crossing of country borders (hot pursuit), a public prosecutor or deputy public prosecutor may order for a person to be held in detention if there is *good cause* to expect that a Schengen/Interpol alert will be issued concerning the person without delay or that a EAW will be received (Art. 16 DSA). A person may be held in detention for 6 hours (this does not include the hours between midnight and 9 o'clock in the morning) (Art. 61 (1) and (3) of the Dutch CCP).

On the basis of an Interpol/SIS alert, a person may be arrested provisionally (Art. 15 DSA). Since the law refers to a requested person in general, it may concern both a national and an alien. Art. 17(1) provides that every (deputy) public prosecutor is competent to order a provisional arrest. If it is not possible to await the order of a (deputy) public prosecutor, every police officer may provisionally arrest the requested person. The police officer is competent to enter any place (Art. 565 (1) CCP and 60(3) DSA).

The (deputy) public prosecutor is required to hear the requested person before an order for the requested person to be held in custody for three days may be issued (Art. 17(3) DSA). The person being heard needs to be informed of the EAW and he has the right to react. The requested person needs furthermore to be informed about the possibility to consent to immediate surrender (Art. 39-40 DSA).

The period of being held in custody may be prolonged once with another 3 days. The maximum period of being held in custody is therefore 6 days (parallel to Art. 58(2) of the Dutch Code on Criminal Procedure). Extension may only be granted by the public prosecutor in Amsterdam and only in case of a serious risk of absconding.

Termination of the detention for the purpose of surrender may be decided *ex officio* or on the explicit request of the requested person by the public prosecutor, the investigative judge or the Amsterdam District Court (Art. 19a DSA). Art. 19b DSA furthermore determines that a person shall be released if the detention has lasted twenty days and no EAW has been received yet. It is however possible to detain a person once again after the termination of the detention for the purpose of surrender if the Dutch authorities do ultimately receive a EAW. The principle of *ne bis in idem* is irrelevant for the surrender procedure.[376]

With regard to the detention for the purpose of surrender after receiving a EAW, if the requested person has been provisionally arrested, a conversion into a formal arrest is necessary after the Dutch authorities have received the EAW. The decisive date is the date on which the public prosecutor has dealt with the arrest warrant as laid down in Art. 20(2) DSA. The conversion from a provisional arrest into a formal arrest is necessary, because the period in which a person should be surrendered starts when the requested person is

[376] H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p 81.

arrested.[377] The conversion is merely an administrative act, but the requested person should be notified of the conversion and be informed that the arrest will continue until the court has decided on imprisonment (Art. 21(3) DSA). The requested person can request the court at any time to lift the imprisonment. Since Art. 21(9) does not apply to a requested person who has been arrested provisionally, Art. 19(a) applies.[378] In case the court refuses the first request for termination of custody, the requested person may appeal to the court or the court of appeal (Art. 64(2) DSA in conjunction with Art. 87(2) CCP).

If the requested person has not been arrested provisionally, he has to be arrested on the basis of the EAW if it meets the requirements laid down in Art. 2 DSA. No further formalities are needed (Art. 21(1) DSA). Since Art. 21(1) refers to 'requested persons', these may be either Dutch nationals or aliens.[379] The requested person shall within 24 hours be brought before the public prosecutor or, in his absence, before the deputy public prosecutor (Art. 21(4) DSA). The public prosecutor may order for the requested person to remain in custody for three days counting from the day of his arrest (21(5) DSA). If the requested person has been arrested outside of the district of Amsterdam, he will be transferred to the public prosecutor of Amsterdam within three days (21(6) DSA). The public prosecutor of the district of Amsterdam may order for the requested person to remain in custody until the court has decided upon his imprisonment after having heard the person concerned (Art. 21(8) DSA). The DSA does not set a maximum time limit within which the court should decide on custody. However, arbitrary results are not acceptable since Art. 23(2) DSA obliges the public prosecutor to request (in written form) for the court to deal with the arrest warrant within no more than three days after its reception by the public prosecutor. Art. 24(1) DSA furthermore urges the court to decide on the case in a speedily manner.[380]

Art. 21(9) DSA provides that the public prosecutor or court may at any time lift the custody, *ex officio* or at the request of the requested person or his counsel. In case of a refusal of a first request to terminate custody, the requested person may appeal to the court or the court of appeal (Art. 64(2) DSA in conjunction with Art. 87(2) CCP).

Continuation of custody

If the requested person is no longer in custody when the court decides upon surrender, the court may order custody of the requested person. This is only possible if the public prosecutor has ordered the court to do so (Art. 21(7)) DSA. The public prosecutor has to bring forward reasons in order to justify the request. Such reasons may include the fact that the requested person has escaped after his arrest, the fact that he is being held in custody with regard to a Dutch criminal case or the expiration of a former reason for the deprivation of liberty.[381] The decision of the court on the continuation of custody will depend *inter alia* on the reasonable chance that the court will allow the surrender of the requested person.[382]

[377] Kamerstukken II 2002/03, 29042, nr. 3, p. 21 (Explanatory Memorandum).

[378] V. Glerum and V. Koppe, De Overleveringswet, Overlevering door Nederland, Deel 2, 1e druk, Sdu Uitgevers, Den Haag, 2005, p. 98-99.

[379] H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 82.

[380] A.H.J. Swart, *Nederlands Uitleveringsrecht*, Zwolle: Tjeenk Willink 1986, p. 521.

[381] A.H.J. Swart, *Nederlands Uitleveringsrecht*, Zwolle: Tjeen Willink, 1986, p. 522.

[382] H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 84.

Before the examination is concluded the court will rule on the custody of the requested person (Art. 27(2) DSA). The court should take into account the time limits as set out in Art. 22 DSA. Art. 22 DSA decides that the court should decide upon the EAW within sixty days of the requested person's arrest. This period can be extended with a maximum of 30 days (Art. 22(3) DSA). If the court still has not decided upon the EAW after 90 days, the court may extend the term indefinitely. The detention may only serve the purpose of preventing the risk of absconding (Art. 64(1) DSA).

Custody after the decision of the court on the EAW
Art. 35(1) DSA determines that the requested person should be surrendered as soon as possible after the verdict, but in any case no later than 10 days after the verdict. The detention will end after 10 days if the person has not been surrendered. An exception may occur when the court has extended the detention (33(b) DSA) at the public prosecutor's request. This order for extension has to be granted within 10 days.

The detention can be extended for a maximum period of 10 days (Art. 34(1). If the actual surrender is not possible within 20 days, the detention may be extended by a maximum of 30 days if the International Criminal Court or another international tribunal has requested surrender of the requested person and the Minister of Justice has not yet decided upon the request (Art. 34(2)(a) DSA).

The detention may also be extended with a maximum of 30 days if the surrender has been allowed, but the actual detention has proved impossible (Art. 34(2)(b) DSA). This concerns situations of '*force majeure*' (Art. 35(2) DSA) or extension on grounds of serious humanitarian reasons, such as the health condition of the requested person (Art. 35(3) DSA). In the abovementioned cases, the public prosecutor will set a new deadline and the requested person should be surrendered 10 days after the expiry of this deadline.

Art. 35(4) DSA prescribes that the detention of the requested person shall be terminated after the terms as described in Art. 35 (1)-(3) have expired.

If the requested person is not in custody at the moment of the court verdict on the EAW, the public prosecutor may order his arrest for a maximum of three days in order to facilitate the surrender. If the surrender cannot take place within the three-day period, the public prosecutor may extend the order for arrest with a maximum of three days (Art. 37(1) DSA). After the public prosecutor has extended the arrest with six days, only the court may extend it further. In case special circumstances prevent the factual surrender, the court may (upon the request of the public prosecution) extend the arrest with a maximum of ten days (Art. 37(2)-(3) DSA). If after 16 days surrender still has not taken place, the detention shall be terminated.

7.3.3.3 Arrest and detention in EAW cases compared to domestic criminal proceedings in general

Several similarities and differences may be pointed out. An important similarity regards the provision of the CCP according to which a person may only be arrested if serious presumptions exist that he has committed the crime of which he is suspected (Art. 67 CCP). This is similar to the requirement in the DSA that a person may only be detained in case of a reasonable chance that the court will allow the surrender.[383] Furthermore, both the CCP and the DSA only allow detention in case of strong indication of a reasonable risk of absconding (Art. 67a CCP and Art. 64(1) DSA).

Custody under the CCP is only allowed in case of a suspicion of a crime that carries a statutory prison sentence of four years or more (Art. 67 Dutch Criminal Code). This is different from the provisions on surrender which allow custody awaiting surrender for persons requested in relation to acts punishable with a statutory prison sentence of 12 months or more (Art. 2(1) DSA). The DSA therefore allows for custody with regard to less serious crimes.

7.3.4 Procedural rights in EAW proceedings

7.3.4.1 Procedural rights relating to interpretation and translation

Art. 2(3) DSA provides that the EAW should be translated into the official language or one of the official languages of the executing Member State. The Netherlands, as the executing state, accepts EAWs issued in Dutch or English.[384] The Minister of Justice did not consider it a violation of Art. 6 ECHR to act on a EAW issued in English. If the requested person is not able to understand English, an official translator may translate the EAW during proceedings before the court.[385]

Art. 30(1) provides that Art. 275, 276 and Art. 325 CCP shall apply. Art. 275 CCP provides that an investigation will be suspended until a translator can assist a suspect if it becomes apparent during the investigation that he is not able to speak or understand Dutch properly. Art. 276 CCP provides that if it appears during the proceedings that assistance of a translator is needed, the court will call upon a translator. Art. 325 CCP provides furthermore that there should be an interpreter present at the time of the verdict in such cases.

Very recently, a new law has been adopted with regard to the implementation of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.[386] This act includes a change of the DSA, more in particular Art. 23. A new paragraph is added providing for the right of the requested person for a written translation in a language he understands of at least the "relevant parts" of the EAW if he is not able to understand the languages in which the EAW has been received and the translation thereof. The following elements of the EAW will be considered as "relevant parts" of the EAW: the Member State that has issued the EAW; the decision underlying the EAW, the length of the sentence to be executed or a brief description of the criminal act that underlies the EAW.

[383] H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p 90.
[384] H. Sanders, *Handboek overleveringsrecht*, (2011) Intersentia, p. 67.
[385] *Kamerstukken I* 2003/04, 29042, C, p.10-11 (Explanatory Memorandum)
[386] Law of 28 Februari 2013 regarding the Implementation of Directive 2010/64/EU, *Staatsblad* 2013, 85.

7.3.4.2 *Providing information on legal rights, legal aid and legal representation*

The police are required to point the requested person at his right to remain silent before being heard by the police and/or the public prosecutor (Art. 29(2) CCP). The suspect furthermore has a right to consult a lawyer before being heard. If the suspect is a minor, the lawyer will also be allowed to be present during the interrogation by the police.[387] Art. 275 CCP furthermore requires that a translator will assist the requested person during the investigation.

Art. 61(2) DSA provides that the right to an attorney as laid down in Art. 40 CCP is also applicable to the requested person put in detention on the basis of the DSA. Consequently, the requested person lacking an attorney will be assigned a picket lawyer (Art. 40(1) CCP). Assignment of an attorney is restricted to the period when the requested person remains in custody (Art. 40(2) CCP).

Art. 62(2) DSA provides that the detained requested person will be assigned a lawyer. The assignment of this lawyer is not restricted to the period of detention, but also encompasses the actual surrender and the proceedings before the district court of Amsterdam. It should furthermore be noted that according to Art. 30(1) DSA, Art. 45-49 CCP regarding the assignment of a lawyer and the payment of his services shall apply.

Legal aid can also be necessary after the verdict of the Amsterdam District Court with regard to court proceedings on the extension of detention or serious humanitarian reasons that prevent the factual surrender of the requested person. The DSA does not provide for legal aid after the verdict of a court, but the Legal Aid Board (*'Raad voor Rechtsbijstand'*) may assign a lawyer in such cases based on Art. 24 of the Act on Legal Aid (*Wet op de Rechtsbijstand*).

7.3.4.3 *Additional rights and vulnerable persons*

The requested person does not possess formal rights to inform a person that he is deprived of its liberty after the arrest. However, practice shows that he will be allowed to contact his embassy. When he is put into custody, the requested person is in principle allowed to contact his family or friends. However the public prosecutor may prohibit this, when special circumstances require so. None of this is, however, laid down in statutory law.

Art. 10 DSA provides that surrender will be refused if the requested person had not yet reached the age of 12 at the time when the crime was committed. Art. 287 CCP inspires this age limit.

If the requested person has a hearing deficiency, interrogation during the trial will be carried out in writing. Should the requested person on top of that be unable to properly write or read, an interpreter will be assigned (Art. 274 CCP which applies in light of Art. 30(1) DSA).

[387] Supreme Court cases of 30 June 2009, LJN: BH3079, LJN: BH3081 and LJN:BH3084.

7.4 Factors relevant for the degree of mutual trust

7.4.1 Factors relating to mutual trust, general observations

A high level of 'internalization' of the principle of mutual trust may be deduced from the interviews of the judges involved in executing EAWs issued by other Member States. The centralization of executing EAWs may be an important factor in this regard: only the District Court of Amsterdam (and within the district court a specialized chamber in international matters – the IRK) is competent to execute EAWs. This internationalization of the principle of mutual trust leads to a rather minimal review of the request and is limited to checking whether the formal conditions of the EAW have been fulfilled.

The interview with the judges of the Court highlighted their perspective on mutual recognition and mutual trust as legal principles. As the default principle in dealing with incoming EAWs, trust in other Member States' legal systems is assumed. Some room for assessment remains available, however: the respondents put forward that the legal principles do not fully replace actual trust. The public prosecutors that have been interviewed shared this view. They claimed that no differences are made between the Member States. "Only in exceptional circumstances when specific information concerning extreme situations would be received concerning this would be taken into account in the process." In general and without counter-indicative information the principle of mutual trust should be respected. The defence lawyers confirmed this attitude and stated that it is very difficult to claim anything that would stand in the way of the application of mutual trust.

General arguments relating for instance to human rights conditions in other Member States are not taken into consideration, and it proves even quite difficult to have the court to take specific circumstances of a suspect into consideration. The interviewee of the EJN confirmed that on the operational level the level of trust is quite high, even higher than at the political level. Nevertheless, a general issue that has been put forward is the lack of adequate information regarding specific circumstances (e.g. prison conditions, ground for suspicion) and the fact that mutual trust may be an obstacle in demanding such information from other Member States.

It has been observed that the Framework Decision has marked a distinction between EU Member States and third countries, although some level of mutual trust may be assumed in case of Council of Europe Member States which are subject to the European Convention of Human rights (ECHR). A consequence of the high level of 'internalization' of the principle of mutual trust is that none of the factors mentioned in the questionnaire seem to substantially influence the actual level of mutual trust.

7.4.2 Specific problems with regard to mutual trust

One of main issues in the early years of the Framework decision concerned the Polish issuing of EAWs for what were considered petty crimes. This has been seen as unwarranted claims on scarce resources. According to the judges, this problem has greatly diminished and is no longer seen as a major obstacle to the proper functioning of the Framework decision. An issue that was raised in relation to Poland relates to the application of the specialty principle, for instance, it has occurred that people extradited to Poland are prosecuted for offenses which have not been included in the EAW.

With regard to Germany, the differences in treating *in absentia* convictions have been mentioned. This has caused problems with the German execution of Dutch EAWs based on *in absentia* convictions.[388]

7.4.3 Statistical data and international review

The following statistical data regards factors that have been identified as possibly influencing mutual trust between the Member States.

7.4.3.1 International review of national detention conditions

In August 2012, a report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visit to the Netherlands in October 2011 was published. With regard to prison conditions, the CPT found that most detainees were detained in single cells, which were described as well equipped and of high standard.

The following comment was made regarding the food supply in detention "However, the delegation was inundated with complaints concerning the food provided to prisoners. They received three meals a day, including a main meal. However, the latter was systematically delivered in a frozen box, and needed to be heated in the microwave before consumption. The delegation observed for itself that a large quantity of the frozen meals remained untouched and was ultimately wasted. The CPT would like to be informed of any measures taken to address the above-mentioned issue."[389]

[388] Nevertheless, the harmonization of the procedural safeguards in case of trial in absentia pursuant to the Framework Decision 2009/299 should streamline the problems.

[389] CPT Report 2012, p. 23 available at http://www.cpt.coe.int/documents/nld/2012-21-inf-eng.htm (last visited 14 March 2013).

With regard to the regime, the following conclusion was drawn "This difference in treatment was confirmed by different sources, including monitoring bodies, NGOs, the prison staff and the prisoners themselves. The CPT recommends the Dutch authorities to review the programme of activities available to foreign prisoners with "VRIS" status, in particular in respect of education, vocational training, and re-socialization activities, with a view to ensuring that they are not disadvantaged in comparison with the general prison population in the Netherlands."[390]

Although special attention was paid to "foreign nationals held under aliens legislation", the issue of detainees detained for the purpose of extradition was not addressed in the report of the CPT.

7.4.3.2 ECtHR review

In case *Nelissen v. the Netherlands*[391] the ECtHR held that a schizophrenic patient's continued detention in remand prison upon completion of the sentence was not justified and constituted a violation of Art. 5(1) (right to liberty and security) ECHR. Similarly, in case *S.T.S. v. the Netherlands*[392] the ECtHR ruled that the Netherlands had violated Art. 5(4) of the Convention because of a failure to rule on the legality of the detention of the applicant, a minor, on the ground that the order authorizing his detention had expired – a decision which denied him access to compensation.

[390] CPT Report 2012, p. 24

[391] *Nelissen v. The Netherlands*, Application no. 6051/07, European Court of Human Rights, Judgment, 5 April 2011.

[392] *S.T.S. v. the Netherlands*, Application no. 277/05, European Court of Human Rights, Judgment, 7 June 2011.

7.5 Experiences with the current evaluation methodology of the peer-reviews EAW

The authors of the Dutch report cannot build on extensive experience in carrying out peer review visits as an element of academic research. The following remarks regarding our observations must, therefore, be seen in that light. First, the combination of legal analysis, statistics and peer review visits seems to allow for the most comprehensive approach to assess the functioning of the EAW. The similarities between the systems of the countries included in the project are substantial. Moreover the Netherlands' authorities seem to experience little problems in the cooperation with these countries.

The inclusion of more countries – such as Poland, Bulgaria, Romania but also the UK – might have born a greater potential for the comparative analysis. Another methodological observation regards the approach of the country visits. It was the observation of the Dutch research team that the yields of especially the visits with a high number of participants were sub-optimal. Interviews conducted by a small number of persons might induce interviewees to speak without any reservations.

Moreover, the status of the team might also play a role here since it consisted of independent researchers, Ministry of Justice representatives and foreign researchers and peers. The public prosecution has a special responsibility towards the national Ministry of Justice apart from the evaluation project. Also court judges' answers tend to primarily fit legal and formal parameters. To underline scientific independence and objectivity it might help to compose a research team that consists only of independent researchers.

Another recommendation would regard the possibility to carry out follow-up visits if preliminary findings would give rise thereto. Such visits could include interviewees that have not been identified at an earlier stage as possibly interesting for the project.

With regard to statistics, the Dutch team has noted that much of the required information has been unavailable or too general in nature, at least for the Dutch situation. This even relates to data that can be considered quite crucial for understanding the functioning of the EAW. More systematic collection of data in this regard would enhance the understanding of the actual functioning of the EAW. Given the various evaluations of the EAW up until now, and the quintessential importance of the adequate functioning and development of the Area of Freedom, Security and Justice, both from the individual's perspective and the perspective of the EU's interest, it is necessary to dispose of such data.

The last observation regards the relation between the questionnaire for the interviews and the interviews themselves. The questionnaire is a comprehensive and detailed document. This made it quite difficult to address all elements of the questionnaire during the interviews. It might be useful to explore possibilities for the interviewees to deal with the questionnaire before the interview, serving as a basis to address more general issues during the interview itself.

Annex to the Country Report The Netherlands - Statistics

Marlies Blesgraaf and Philip Langbroek

1. For which type of criminal acts the European Arrest Warrant is most often issued?

We did not receive any recent information on this from the Dutch Public Prosecutions office . Therefore we draw on a previous research for the years 2006-2008.[393] We received information from the international legal aid centre of the PPO in the Hague on 105 cases during 2006 – 2008, which definitely does NOT constitute a random sample for the Netherlands.[394]

Table 1 Offences and issued EAW's

Offences in issued EAW's [395]	N	Percent	Percent of Cases
illicit trafficking in narcotic drugs and other substances	25	17,0%	26,9%
murder, grievous bodily injury	22	15,0%	23,7%
organised or armed robbery	21	14,3%	22,6%
participation in a criminal organisation	17	11,6%	18,3%
kidnapping, illegal restraint and hostage-taking	17	11,6%	18,3%
fraud, etc.	14	9,5%	15,1%
Swindling	8	5,4%	8,6%
Rape	5	3,4%	5,4%
trafficking in human beings	4	2,7%	4,3%
forgery of means of payment	4	2,7%	4,3%
forgery of administrative documents and trafficking therein	3	2,0%	3,2%
laundering of the proceeds of crime	2	1,4%	2,2%
racketeering and extortion	2	1,4%	2,2%
sexual exploitation of children and child pornography	1	,7%	1,1%
counterfeiting of currency, including the euro	1	,7%	1,1%
arson	1	,7%	1,1%
Total	**147**	**100,0%**	**158,1%**

This table shows that most of the cases issued are related to drugs offences, next to the most serious crimes. It should also be noted that in a EAW more than one crime can be mentioned.

[393] Ph.M. Langbroek and Elina Kurtovic, The EAW in the Netherlands, in:Boaventura de Sousa Santos, Conceição Gomes The European Arrest Warrant In Law And In Practice: A Comparative Study For The Consolidation Of The European Law-Enforcement Area, p. 316-329

[394] Langbroek and Kurtovic 2010, p. 323.

[395] One arrest warrant can have more offences listed.

2. From which of the European Member States do you receive the highest number of requests for executing a European Arrest Warrant?

We received a limited amount of information from the Office of Prosecutor's General. So, we also refer to the findings of an earlier research.

The data for the EAW's issued to the Netherlands were gathered by drawing a random sample of 250 out of approximately 1600 files of concluded cases (2006-july 2008), of the international legal aid centre in Amsterdam. Frequently we were confronted with incomplete files. We could not always fill out all the data we wanted.[396]

Table 2 Issuing Country 2006-2008

Issuing Country	Frequency	Percent	Valid Percent	Cumulative Percent
Germany	71	28,4	28,7	28,7
Belgium	54	21,6	21,9	50,6
Poland	31	12,4	12,6	63,2
Italy	27	10,8	10,9	74,1
France	18	7,2	7,3	81,4
Spain	10	4,0	4,0	85,4
Austria	6	2,4	2,4	87,9
United Kingdom	6	2,4	2,4	90,3
Hungary	5	2,0	2,0	92,3
Czech Republic	4	1,6	1,6	93,9
Lithuania	3	1,2	1,2	95,1
Portugal	3	1,2	1,2	96,4
Latvia	2	,8	,8	97,2
Luxembourg	2	,8	,8	98,0
Sweden	2	,8	,8	98,8
Bulgaria	1	,4	,4	99,2
Finland	1	,4	,4	99,6
Slovakia	1	,4	,4	100,0
Total	**247**	**98,8**	**100,0**	
Missing/ND	3	1,2		
Total	**250**	**100**		

[396] Langbroek and Kurtovic, 2010. p. 290

In 2006-2008 most of the EAW's were issued by Germany and Belgium, followed by Poland. Together they issued almost two thirds of the EAW's received by the Netherlands.

Since 2008 the number of EAW's received has gradually increased up to 804 in 2011.

Table 3 Number of EAW's received by The Netherlands

Year	Number of EAW's issued
2009	683
2010	737
2011	804

For 2011, the frequencies per issuing country are displayed in the next table:

Table 4 Number of EAW's per issuing country[397]

Issuing Country	Number		Issuing Country	Number
Belgium	171		Latvia	9
Bulgaria	3		Lithuania	26
Cyprus	0		Luxemburg	3
Denmark	6		Malta	1
Germany	141		Austria	4
Estonia	1		Poland	242
Finland	4		Portugal	3
France	30		Romania	18
Greece	0		Slovenia	0
Great Britain	37		Slovakia	3
Hungary	52		Spain	9
Ireland	4		Tsjech Republic	9
Italy	18		Sweden	10

[397] Data acquired by the kind cooperation of the Office of Procurators General in The Hague.

3. Looking at the participating States in the pilot project (Germany, France and the Netherlands), which of those three countries are issuing the most EAW's?

Based on the table above, most of the EAW's are issued by Poland, Belgium and Germany. France issued 30 EAW's to Dutch authorities in 2011.

4. General country information

a. Number of inhabitants[398]

Table 5 Number of inhabitants of The Netherlands 2009-2011	
Year	**Number of Inhabitants**
1 january 2009	16 485 787
1 january 2010	16 574 989
1 january 2011	16 655 799

b. Annual State budget

Table 6 Annual state budgets[399]				
year	**2008**	**2009**	**2010**	**2011**
total revenues (in million euros)	277.684	262.788	271.669	273.318
total expenses (in million euros)	274.781	294.782	301.213	299.928

c. Annual budget allocated to courts, public prosecution and legal aid[400]

[398] http://statline.cbs.nl/StatWeb/publication/?DM=SLNL&PA=71090ned&D1=0&D2=0&D3=0&D4=0&D5=0&D6=0,12,24,36,48,60&HDR=T,G3,G1&STB=G2,G4,G5&P=T&VW=T

[399] http://statline.cbs.nl/StatWeb/publication/?DM=SLNL&PA=81191NED&D1=0,28&D2=0&D3=55,60,65,70&HDR=G1,G2&STB=T&VW=T

[400] http://www.rijksbegroting.nl/2012/voorbereiding/begroting,kst160360_8.html (last accessed 15 March 2013)

d. Annual budget allocated to the police, customs, border police, prisons[401]

Table 7 Annual budgets for justice administration police and prisons				
year →	**2009**[402]	**2010**	**2011**	**2012**
x € 1.000				
budget allocated to courts[403]	x	904 692	944 786	993 131
budget allocated to public prosecution[404]	611 165[5]	589 216[5]	594 0175	568 603
budget allocated to legal aid[405]	455 200	458 368	496 695	494 816
budget allocated to police[406]	115 972[5]	129.084	121 093	116 276
budget allocated to customs[407]				
budget allocated to border police[408]				
budget allocated to prisons[409]	1 164 888	1 035 610	1 043 413	991 2

e. Number of public prosecutors and number of public prosecutors responsible for issuing a EAW

Since all Dutch Public Prosecutors are in principle competent to issue a EAW, the total number of Public Prosecutors should be found.[410] According to the table below, the number of Public Prosecutors in fte's has grown from 674 in 2006 to 780 in 2011.

.....

[401] http://www.rijksbegroting.nl/2012/voorbereiding/begroting,kst160360_8.html

[402] http://www.rijksbegroting.nl/2011/voorbereiding/begroting,kst148608_7.html (last accessed 15 March 2013)

[403] categorie 12.3.1.: Council for the Judiciary – Courts.

[404] categorie 13.3.2: Prosecutor's offices.

[405] categorie 12.2.1: Raden voor rechtsbijstand.

[406] categorie 13.3.1: Law enforcement.

[407] Not traceable.

[408] Not traceable.

[409] categorie: 13.4.1: DJI prisonorganisation-regular.

[410] Art. 44 Overleveringswet (http://wetten.overheid.nl/BWBR0016664/geldigheidsdatum_29-10-2012#HoofdstukIII)

Table 8 Personnel categories of justice administration[411]					
Justice ppo/judiciary	**31/12/2007**	**31/12/2008**	**31/12/2009**	**31/12/2010**	**31/12/2011**
PPO prosecutors	714	756	787	796	780
PPO support staff	3542	3776	3897	3863	4039
Judges	2127	2176	2203	2275	2230
Court support staff	7095	7214	7467	7409	7167
Support suprem Courts	113	135	147	135	127
Total fte	**13591**	**14058**	**14501**	**14478**	**14343**

f. Number of police officers, custom officers, border police (in general and more specific the no. of officers responsible for the EAW procedure (for example arrest, transit, etc).

Table 9 Police personnel[412]					
Police	**31/12/2007**	**31/12/2008**	**31/12/2009**	**31/12/2010**	**31/12/2011**
KLPD	4865	4900	4975	4933	4939
Politie academie	1775	1800	1706	1619	1583
Politieregios;	47139	47400	48340	48756	49365
Total – fte's	**53779**	**54100**	**55021**	**55311**	**55887**

In this table, the total number of police officers at the national level is depicted in fte's. It was not possible to finds accurate information on the categories requested.

g. Total number of (professional) judges and the number of judges responsible for the judicial part of the EAW procedure (to make the surrender decision)
In this table, the total number of fte's dedicated to the judiciary ("rechtspraak") is displayed. This number refers to judges only.

The surrender decision is made in particularly by the judges of the Amsterdam District Court, since the Netherlands has assigned this court the task of being the Dutch executing authority. However, it has not been possible to deduce the number of judges in the International legal aid chamber at Amsterdam District Court.

[411] http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/jaarverslagen/2012/05/10/jaarrapportage-bedrijfsvoering-rijk-2011-hoofdstuk-2-het-rijk-in-cijfers/jaarrapportage-bedrijfsvoering-rijk-2011-hoofdstuk-2-het-rijk-in-cijfers-140512.pdf (accessed 16 March 2013).

[412] http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/jaarverslagen/2012/05/10/jaarrapportage-bedrijfsvoering-rijk-2011-hoofdstuk-2-het-rijk-in-cijfers/jaarrapportage-bedrijfsvoering-rijk-2011-hoofdstuk-2-het-rijk-in-cijfers-140512.pdf (accessed 16 March 2013).

5. Performance

a. Number of EAWs issued in a given year (including information about the category of crimes committed)

Table 10 Number of issued EAW's per year

Year	Number of EAW's issued
2009	683
2010	737
2011	804

b. Number of EAWs executed in a given year (including information about the category of crimes committed)
ND

c. Average duration of a EAW procedure from the formal transmission of the request until the surrender and transit of the requested person (including information about the duration of the sub-steps) in days
ND

d. Average duration of judicial proceedings (including the sub-steps of duration of the pre-trial period, the judicial proceedings in first instance, appeal and highest court), if possible related to certain categories of crime, instead of the average total duration of a EAW procedure from the formal transmission of a EAW request until the final judgment in a judicial proceeding (including the sub-steps of duration of the pre-trial period, the judicial proceedings in first instance, appeal and highest court)
The average term from the moment of conversion of the provisional arrest into arrest to a decision by the ADC was in 2004: 41 days, in 2005: 56 days, in 2006: 74 days, and in the first half of 2007: 85 days. The average term from the moment of arrest under Section 21 OLW until the decision by the ADC was in 2004: 48 days, in 2005: 59 days, in 2006: 70 days, and in the first half of 2007: 76 days.[413]

e. Total number of incoming criminal cases in the courts of first instance compared to the total number of EAW cases to be reviewed by a judicial authority responsible for granting or refusing a request to surrender a person
There is only one court dealing with incoming EAW's, the District Court of Amsterdam.

In 2011 there were 804 incoming EAWs.

72 were dealt with in a short procedure (consent of suspect with surrender).

16 Cases were rejected by the PPO (no double criminality, Dutch citizen and irrevocable judgement)

64 Cases there has been no arrest of the requested person and therefore no court proceedings

[413] Evaluation Report on 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, published February 2009, Council-Document 15370/2/08 REV 2 –EJN 777, p. 25

25 EAW's were revoked by the issuing state.

The actual number of cases submitted to the court was 804 – 177 = 627.

f. Average workload of a judge responsible for the handling of EAW cases
ND

g. Average workload of a public prosecutor responsible for issuing a EAW and/or the pre-trial procedure of a EAW-related case
We did not receive adequate information from the Office of Procurators' General and from Amsterdam District Court at this point. There are no separate registries and statistics on this point.

6. Arrest and detention

a. Remand detention rate (detainees / population; detention on remand / detention for other reasons), maybe also immigrant detention rates and juvenile detention rates
Information on these ratios has been found in a publication by WODC and CBS.[414] Information was given on the capacity of the prisons designated to detention of immigrants. However, the number of people actually detained there was not included in the information.[415]

Interestingly, one of the tables mentioned "bewaring, uitlevering" which can be interpreted as detention prior to extradition. These numbers have been added to the table.

[414] "Justitie in Statistiek, Criminaliteit en Rechtshandhaving 2011." Eindredactie: M.M. van Rosmalen (CBS), S.N. Kalidien (WODC) N.E. de Heer-de Lange (CBS), available at http://www.cbs.nl/nl-NL/menu/themas/veiligheid-recht/publicaties/publicaties/archief/2012/2012-criminaliteit-en-rechtshandhaving-2011.htm (accessed 16 March 2013).

[415] Table 7.3, attached to the report of footnote 383.

Table 11 Arrest and detention[416]

Year	2006	2007	2008	2009	2010	2011
detainees[a]	20.642	20.871	20.114	19.532	19.588	20.160
population[b]	16.334.210	16.357.992	16.405.399	16.485.787	16.574.989	16.655.799
detainees / population	0,001263728	0,00127589	0,00122606	0,001184778	0,001181781	0,001210389
detention on remand[c]	5.924	5.823	5.488	5.571	5.703	5.723
detention for other reasons[d]	7794	6946	6446	6111	6033	5822
detention on remand / detention for other reasons	0,76007185	0,838324215	0,851380701	0,911634757	0,945300845	0,982995534
bewaring uitlevering	41	45	31	57	62	67
juveniles[e]	1398634	1400438	1399638	1397361	1389915	1388579
detained juveniles[f]	3.003	2.790	2.441	2.292	2.255	1.844
juvenile detention rate	0,002147095	0,001992234	0,001744022	0,001640235	0,001622401	0,001327976

b. average duration of detention on remand / average duration of criminal proceedings

The average duration of detention on remand has not been published in one of the reports used here.

The average duration of criminal proceedings has been discussed in the "Jaarverslag Rechtspraak". The following table shows the duration (in Dutch: doorlooptijd) of criminal cases.[417]

[416] Notes with table on question 6a
a) the number of detainees has been taken for table 7.2 from the beforementioned report. In this number, all types of detainees were included.
b) the population has been displayed earlier in question 4
c) Detention on remand has been translated as "voorarrest". In the tables of the report, no such category existed. However, the categories 'voorlopige hechtenis' en 'bewaring' have been added up.
d) All types of detention, without 'detention on remand'
e) As indicated by the CBS, the focus is on people between 12-18 years old, since they are considered a juvenile in criminal law.
f) Total number of juveniles detained (exclusively because of a criminal conviction)

[417] Jaarverslag Rechtspraak 2011, table 9a: average duration of the proceedings

Table 12 Average duration of criminal cases in weeks				
Year	**2008**	**2009**	**2010**	**2011**
Duration in weeks				
Criminal case, first instance adult	15	15	17	18
Criminal case, first instance juvenile	5	5	5	6
Criminal case, Appeal	33	38	42	44

7. Information of international organisations

a. Detention conditions (reports of the CPT)

In August 2012, a report of the CPT's visit to the Netherlands in October 2011was published. With regard to the material prison conditions, the CPT found that most detainees had a cell for themselves. The cells were described as well equipped and of a high standard. A comment was made regarding the food supply in detention:

> "However, the delegation was inundated with complaints concerning the food provided to prisoners. They received three meals a day, including a main meal. However, the latter was systematically delivered in a frozen box, and needed to be heated in the micro-wave before consumption. The delegation observed for itself that a large quantity of the frozen meals remained untouched and were ultimately wasted. The CPT would like to be informed of any measures taken to address the above-mentioned issue."[418]

With regard to the regime, the following conclusion was drawn:

"This difference in treatment was confirmed by different sources, including monitoring bodies, NGOs, the prison staff and the prisoners themselves.

The CPT recommends that the Dutch authorities review the programme of activities available to foreign prisoners with "VRIS" status, in particular in respect of education, vocational training, and re-socialization activities, with a view to ensuring that they are not disadvantaged in comparison with the general prison population in the Netherlands."[419]

Although special attention was paid to "foreign nationals held under aliens legislation", no special attention was paid to detainees detained for the purpose of extradition.

[418] CPT Report 2012, p. 23
[419] CPT Report 2012, p. 24

b. Number of convictions by the ECtHR for violations of Art. 5 ECHR and Art. 6 ECHR (length of criminal proceedings)[420]

- Nelissen v. the Netherlands (5 April 2011): Schizophrenic patient's continued detention in remand prison upon completion of sentence unjustified: Violation of Article 5 § 1 (right to liberty and security)
- S.T.S. v. the Netherlands (7 June 2011): Failure to rule on the legality of the detention of the applicant, a minor, on the ground that the order authorising his detention had already expired – a decision which denied him access to compensation: Two violations of Article 5 § 4 (right to liberty and security)

In Conclusion

Statistical information about the EAW practice in the Netherlands is not systematically generated or assembled in the Netherlands. This makes it a very time consuming work for the public prosecutions offices and for Amsterdam district court to gather this information.

[420] Press Country Profile of the Netherlands, August 2011, p. 4, available at:http://www.echr.coe.int/NR/rdonlyres/067903DB-68CE-424E-A6EF-C95C2449A980/0/PCP_Netherlands_en.pdf (accessed 16 March 2013).