

First Periodic Country Report: The Netherlands

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Introduction

In the Netherlands, Framework Decision 2002/584/JHA is implemented in the *Overleveringswet* (OLW, Dutch Surrender Act; *Stb.* 2004, 195). The District Court of Amsterdam (*'Rechtbank Amsterdam'*; hereinafter: District Court) is the sole competent court of first instance for executing the EAW (Van Eijken & Verhoeven, 2020; Buisman & Hamelzky, 2021). In accordance with article 29 OLW, the judgment of the District Court is immediately enforceable. There is no legal remedy available against its judgments, other than an appeal in cassation 'in het belang der wet' (on a point of law) as referred to in article 456 *Wetboek van Strafvordering* (Sv; Dutch Criminal Procedural Code) (Van Eijken & Verhoeven, 2020; Buisman & Hamelzky, 2021). Over the years, the District Court has been an important actor in clarifying the meaning and scope of Framework Decision 2002/584/JHA by requesting preliminary rulings (Glerum & Klomp, 2019; Eurojust, 2020). The questions asked by the District Court led to several important judgements, such as *Wolzenburg*¹, *Poplawski I* and *II*², *Dworzecki*³ and *Zdziaszek*⁴ (Van Eijken & Verhoeven, 2020). Since 2019, the investigative judge is the competent authority to issue an EAW. The cases of the investigatory judge are not published in the Netherlands, and are therefore not discussed in this report. Thus, this report examines case law from the executing authority (District Court of Amsterdam), the Court of Justice EU, law and parliamentary papers, and literature.

This Country Report examines the judgements of the District Court published on *rechtspraak.nl* (database of the Dutch judiciary). In total, 2663 judgements of the District Court concerning the EAW have been published at *rechtspraak.nl* (reference date 1 December 2021). These judgements have been analysed on several themes,

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¹ CJEU, judgement of 6 October 2009, *Wolzenburg*, C-123/08, ECLI:EU:C:2009:616.

² CJEU, judgement of 29 June 2017, *Poplawski I*, C-579/15, ECLI:EU:C:2017:503, and CJEU, judgment of 24 June 2019, *Poplawski II*, C-573/17, ECLI:EU:C:2019:530.

³ CJEU, judgement of 24 May 2016, *Dworzecki*, C-108/16, ECLI:EU:C:2016:346.

⁴ CJEU, judgement of 10 August 2017, *Zdziaszek*, C-271/17, ECLI:EU:C:2017:629.

namely: issuing judicial authority, proportionality, case-readiness, pre-trial detention, and fundamental right defences, such as detention facilities, fair trial rights, rule of law standards, and the right to family life. A selection of case law has been made taking into account the following criteria:

- National case law in which the District Court has made efforts to conjugate the implementation of the EAW with the EU rule of law and fair trial guarantees, CJEU guidance on the use of the EAW and/or the EU acquis protecting the procedural rights of suspects and accused persons;
- National case law in which the District Court has dealt with or resolved factors affecting trust in criminal justice cooperation on surrender with the EU;
- National case law in which the cooperation under the EAW has been conditioned by constitutional specificities that condition the nature and scope of the material and procedural safeguards allowing for the issuing and execution of EAWs.

The aim of this report is to highlight the key controversies surrounding cooperation through the EAW in the Netherlands. It will discuss the challenges that these controversies raise from the perspective of the principle of mutual recognition on the one hand, and the application of EU fundamental rights and rule of law safeguards on the other hand. The following sections (I-II) will discuss the issuing and execution of EAWs. Section III will provide an overall conclusion on the key controversies surrounding cooperation through the EAW in the Netherlands.

Section I – Issuing of EAWs: rule of law and fundamental rights considerations

In the Netherlands, decisions to issue an EAW are not published (*Besluit selectiecriteria uitsprakendatabank Rechtspraak.nl*). Consequently, the Dutch qualification of ‘issuing authority’ can be found in law (i.e. *Overleveringswet*), parliamentary papers (e.g. *Kamerstukken II 2018/19, 35224, no. 1-3*), and CJEU case law. Dutch case law on the meaning of the concept of ‘proportionality’, ‘case-readiness’ and pre-trial detention in light of the Framework Decision can provide additional insights on how these concepts are interpreted in the Dutch legal system.

The following sub-sections will analyse cases through which Dutch judicial authorities questioned, and/or contributed to define the degree of independence required by a national judicial authority in order to qualify as an issuing authority, and procedural rights of the defence in the issuing phase of the EAW.⁵

I.1. Procedures and competences for issuing EAWs in the Netherlands

Since 2019, the investigative judge (*rechter-commissaris*) is competent to issue an EAW.⁶ When issuing an EAW, the investigative judge will declare that nationals of the executing Member States, may serve their unconditional custodial sentence in the executing Member States and it will state – if applicable – that the possibility of a pardon may be applicable to a life sentence.⁷ In case of an EAW concerning the execution of a judicial decision, the investigative judge will declare – if the suspect has not been in person at trial – that the requested person was aware of the trial date, authorized a lawyer to defend him at trial, the decision was served on him in person, but he did not appeal or oppose the judgement within a reasonable time, or if the decision was not served to him in person, that the decision will be served on him in person without undue delay after his surrender and he will be expressly informed of his right to an opposition procedure or an appeal procedure, at which he has the right to be present, at which time the substance of the case will be re-examined and new evidence is presented allowed, which may lead to a review of the original decision and he is informed of the period within which he must lodge an objection or appeal, as stated in the relevant European Arrest Warrant.⁸ Lastly, the investigative judge will remain in contact with the executing judicial authority.⁹

I.2. Independence of the issuing judicial authority in the Netherlands

The judgement of *OG and PI*¹⁰ – the CJEU case on the meaning of ‘judicial authority’ within the meaning of article 6 Framework Decision 2002/584/JHA – led to a fast-track procedure to amend the *Overleveringswet* in order to comply with the CJEU judgement.¹¹ In accordance with article 44 OLW (old),¹² the prosecutor (*officier*

⁵ For this report, cases have been sought in the *rechtspraak.nl* database on proportionality defences and case-readiness defences. These searches did not result in any published cases on these subjects (search terms: ‘EAB’, ‘proportionaliteit’, ‘evenredigheid’, ‘zaakgereedheid’).

⁶ Article 44 OLW (new); *Stb.* 2019, 259.

⁷ Article 45 OLW (new); *Stb.* 2019, 259.

⁸ Article 45a OLW (new); *Stb.* 2019, 259

⁹ Article 46 OLW (new); *Stb.* 2019, 259

¹⁰ CJEU, judgement of 27 May 2019, *OG and PI*, C-508/18 and C-82/19, ECLI:EU:C2019:456.

¹¹ *Kamerstukken II 2018/19, 35224, no. 1-3.*

¹² *Stb.* 2004, 195.

van justitie) was the competent authority to issue an EAW. However, in light of the judgement of *OG* and *PI*, the Dutch prosecutor does not qualify as ‘issuing judicial authority’ in accordance with article 6 (1) Framework Decision 2002/584/JHA, since he may not be “exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant”.¹³ Under article 127 *Wet op de rechterlijke organisatie* (Dutch law on the judicial organisation; hereinafter: Wet RO), the Minister of Justice and Security may issue general and specific instructions with regards to the exercise of powers and tasks of the Dutch prosecution office (*Openbaar Ministerie*). In addition, article 128 Wet RO provides the power to issue an instruction in a specific case concerning the investigation or prosecution of criminal offenses.¹⁴ The legislative change made the investigative judge (*rechter-commissaris*) – as stated above – the competent authority to issue the EAW.¹⁵ According to the Dutch legislator, the investigative judge complies with the conditions of the CJEU judgment, and is in practice often involved with international judicial cooperation.¹⁶ Under the new system, the Dutch prosecutor will therefore have to demand the investigative judge to issue an EAW. When determining if an EAW should be issued, the investigative judge relies on the concept-EAW of the Dutch prosecutor, which has been checked by the *Internationaal Rechtshulp Centrum* (Dutch International Legal Assistance Center; IRC) (Ouwkerk e.a., 2021, p. 71-72).

I.3. Rights of defence during the issuing procedure

Since the EAW is issued by the investigative judge and, thus, by a judicial authority within the meaning of article 6 Framework Decision 2002/548/JHA, a possibility to appeal or opposition of the decision to issue an EAW is not required. Defences concerning the issuing of an EAW by the Netherlands can therefore only be lodged during the Dutch criminal procedure.¹⁷ If the court determines that the issuing of the EAW was not legitimate – i.e. the EAW did not meet the procedural requirements, including the principle of proportionality –, the EAW is vitiated by a procedural defect (*vormverzuim*). In light of article 359a Sv, the court may attach the following consequences to the procedural defect: note that there has been an irreparable procedural defect, without any legal consequences, reduce the length of the sentence proportionate to the gravity of the procedural defect, exclude the results obtained from the criminal investigation as evidence, bar the prosecution if, as a result of the procedural defect, the criminal trial does no longer meet the requirements of the right to a fair trial.¹⁸

¹³ Cf. CJEU, judgement of 24 November 2021, AZ, C-510/19, ECLI:EU:C:2020:953, in which the Court determined that the Dutch prosecutor did not qualify as ‘executing judicial authority’ in accordance with article 6 (2) Framework Decision 2002/584/JHA in a Belgian preliminary procedure. See also Rb. Noord-Holland, judgement of 3 September 2019, ECLI:NL:RBNHO:2019:7537.

¹⁴ *Kamerstukken II* 2018/19, 35224, no. 3.

¹⁵ Article 44 OLW (new); *Stb.* 2019, 259.

¹⁶ *Kamerstukken II* 2018/19, 35224, no. 3.

¹⁷ E.g. Rb. Noord-Holland, judgement of 3 September 2019, ECLI:NL:RBNHO:2019:7537 and Rb. Limburg, judgement of 9 July 2021, ECLI: NL:RBLIM:2021:5489.

¹⁸ Hoge Raad (Dutch Supreme Court; HR), judgement of 30 March 2004, ECLI:NL:HR:2004:AM2533. HR, judgement of 1 December 2020, ECLI:NL:HR:2020:1890. See for example, Rb. Noord-Holland, judgement of judgement of 3 September 2019, ECLI:NL:RBNHO:2019:7537 (EAW issued by the Dutch prosecutor and not a judicial authority). In this context, exclusion of evidence would most likely not be one of the consequences connected to a procedural defect with the issuing of the EAW.

Section II – The execution of EAWs: national judicial authorities as monitors of trust

Contrary to the Framework Decision, the *Overleveringswet* has since the beginning foreseen in an explicit human rights refusal ground in article 11. In other words, breaches of fundamental rights may give reason to refuse the execution of an EAW under Dutch law (Buisman & Hamelzky, 2021). The former article 11 OLW required that execution of an EAW would lead to a flagrant violation of one of the fundamental rights of the requested person in light of the facts and circumstances of the case.¹⁹ Nevertheless, in light of jurisprudence of the CJEU, the legislator concluded that – even though the Framework Decision has listed limited grounds for refusal – human rights protection should be guaranteed.²⁰ As a consequence, the *Overleveringswet* was revised and article 11 was updated to align it with the jurisprudence of the CJEU.²¹ In line with the CJEU jurisprudence, article 11 now requires compelling and factual grounds that the requested person runs a real risk that his fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union will be violated.²² The existence of substantial grounds is considered a temporary situation, which can be rectified within a reasonable period of time. If the period of time has expired and the issuing state did not provide any complementary information or requested guarantees, the request of the *openbaar ministerie* to execute the EAW will be disallowed (Marguery 2018; Van Eijken & Verhoeven 2020).²³

The following sub-sections will elaborate on the execution of EAW with regards to fundamental rights of the requested person, pre-trial detention, proportionality and case-readiness.

II.1. Execution of EAW's and fundamental rights

In general, the defences presented to the District Court are related to detention facilities (article 4 EU Charter), fair trial rights (articles 47 and 48 EU Charter), the rule of law or an impartial and independent court (article 47 EU Charter) and the right to family life (article 8 EU Charter). The following sub-sections will discuss the way in which (1) the court determines whether substantial grounds exist that the requested person runs a real risk that his fundamental rights will be violated, (2) in which cases the court concluded that the EAW could not be executed and the reasoning behind those decisions, and (3) if those decisions were in line with the jurisprudence of the CJEU, with regards to the identified human rights defences.

II.1.1. Detention facilities

Even though issuing states should ensure that the requested person will not be subject to ill treatment or punishment (article 4 EU Charter and article 3 ECHR), the District Court believes that parties to the ECHR should prevent the execution of an EAW which would lead to a violation of the fundamental rights of the requested

¹⁹ *Stb.* 2006, 24.

²⁰ *Kamerstukken II* 2019/2020, 35535, no. 3. CJEU, judgement of 5 April 2016, *Aranyosi and Caldaru*, C-404/15 and C-659/15 ECLI:EU:C:2016:198. CJEU, judgement of 25 July 2018, *LM*, C-216/18 PPU, ECLI:EU:C:2018:586; CJEU, judgement of 25 July 2018, *ML*, C-220/18, ECLI:EU:C:2018:589.

²¹ *Kamerstukken II* 2019/2020, 35535, no. 3.

²² *Stb.* 2021, 125.

²³ Article 11 (2-4) OLW; *Kamerstukken II* 2019/2020, 35535, no. 3.

person, even when the issuing state is a party to the ECHR or obligations to surrender the person on the basis of the principle of mutual trust exist (Marguery, 2018, p. 210; Van Eijken & Verhoeven, 2020).²⁴

Since the judgements of *Aranyosi and Caldáru*, the District Court applies a two-level test to determine whether the execution of the EAW would lead to a (possible) violation of article 4 EU Charter (Marguery, 2018, p. 214 et seq.; Van Eijken & Verhoeven, 2020).²⁵ First, it needs to be established that there is a real risk *in abstracto* that individuals detained in the issuing state will be subjected to human rights violations, which should be based on objective, reliable, accurate and up to date data on detention conditions. Second, it should be established that there is a real risk *in concreto* that the fundamental rights of the requested person will be violated after his surrender. This risk should be based on substantive grounds, such as information on where the requested person will be detained (Marguery, 2018, p. 214-218).²⁶ As stated in the introduction, the existence of a concrete risk is considered a temporary situation. The EAW can still be executed if the issuing state provides sufficient information on the prison conditions of the specific detention facility where the requested person will be detained, or if guarantees are given that the requested person will not be detained in the specific problematic detention facilities – within a reasonable period of time – in order to safeguard the fundamental rights of the requested person (Marguery, 2018, p. 219).²⁷

Van Eijken & Verhoeven (2020) identify three categories of issuing states with regards to detention facilities. First, there are the states where no evidence exist that their detention facilities could violate article 4 EU Charter, which enables the District Court to execute the EAW. Examples of this category are Hungary²⁸ and Belgium²⁹. Second, there are Member States where evidence exists that certain specific detention facilities are in violation of article 4 EU Charter. In those cases, the detention system as a whole does not lead to a risk of violating article 4 EU Charter.³⁰ Thus, the District Court will request information and/or guarantees on the place where the requested person will be detained, and individual space and other conditions. Examples of the Member States in the second category are France³¹ and Portugal³². When general guarantees have been given by the issuing authority that requested persons will not be detained in the specific detention facilities that could lead to a violation of article 4 EU Charter, an individual guarantee for each requested person will no longer be required by the District Court.³³ Last, there are the Member States where evidence exists that the detention system as a whole runs a real risk of violation article 4 EU Charter. With regards to those states, the District Court will request information or guarantees of the issuing state to ensure that the requested person

²⁴ Rb. Amsterdam, judgement of 22 October 2010, ECLI:NL:RBAMS:2010:BO1448; Rb. Amsterdam, judgement of 22 February 2011, ECLI:NL:RBAMS:2011:BP5390.

²⁵ E.g. Rb. Amsterdam, judgement of 28 April 2016, ECLI:NL:RBAMS:2016:2630; Rb. Amsterdam, judgement of 28 February 2017, ECLI:NL:RBAMS:2017:1269; Rb. Amsterdam, judgement of 13 January 2021, ECLI:NL:RBAMS:2021:40.

²⁶ Rb. Amsterdam, judgement of 28 April 2016, ECLI:NL:RBAMS:2016:2630.

²⁷ Rb. Amsterdam, judgement of 26 January 2017, ECLI:NL:RBAMS:2017:414.

²⁸ Rb. Amsterdam, judgement of 29 August 2019, ECLI:NL:RBAMS:2019:6619.

²⁹ E.g. Rb. Amsterdam, judgement of 11 April 2019, ECLI:NL:RBAMS:2019:2675.

³⁰ E.g. Rb. Amsterdam, judgement of 29 March 2019, ECLI:NL:RBAMS:2019:2381.

³¹ E.g. Rb. Amsterdam, judgement of 25 June 2020, ECLI:NL:RBAMS:2020:3150.

³² E.g. Rb. Amsterdam, judgement of 10 January 2019, ECLI:NL:RBAMS:2019:294.

³³ E.g. Italy, Rb. Amsterdam, judgement of 15 April 2021, ECLI:NL:RBAMS:2021:1804, where a general guarantee was given by the Minister of Justice that all requested persons would not be detained in the 16 detention facilities which are in violation with article 4 EU Charter

will not be subjected to a violation of article 4 EU Charter. An example of this latter category is Romania³⁴. If – in categories II and III – the issuing state does not provide the requested information or guarantees the EAW will not be executed.

Lastly, the District Court of Amsterdam determined that circumstances resulting from the corona pandemic, which affect the prison conditions, cannot lead to the conclusion that (specific) detention facilities are in violation of article 4 EU Charter. These circumstances could possibly play a role in the context of article 35 OLW (i.e. severe humanitarian reasons to postpone the request, such as health or medical issues), which the prosecutor must take into account in the context of the actual surrender (Buisman & Hamelzky, 2021).³⁵

II.1.2. Fair trial rights

II.1.2.1. In absentia judgements

Before the legislative change of 2021, the execution of EAW concerning in absentia judgements was prohibited if the conditions of article 12 and article 12a OLW were not met (Marguery, 2018, p. 223; see more extensive on in absentia judgements Klip, Brodersen & Glerum, 2020).³⁶ The District Court applied a two-fold test in accordance with article 12 and 12a OLW and article 4a Framework Decision 2002/548/JHA, in which the judiciary had to ensure that (1) the requested person will be notified immediately of the verdict after his surrender, and that he will be explicitly informed of his right to an opposition or appeal, in which he has the right to be present and the case is reassessed and new evidence may be admitted, which may lead to a revision of the original judgement, and (2) the requested person is informed of the date before he must admit his objections or appeal, as specified in the EAW.³⁷

In the cases of *Dworzecki* and *Zdziaszek* the CJEU stressed that the refusal grounds of article 4a of Framework Decision 2002/584 are optional, not mandatory.³⁸ In addition to the exceptions mentioned in article 4a (1) (a) to (d), the court may take other circumstances into consideration to ensure that the surrender of the requested

³⁴ E.g. Rb. Amsterdam, judgement of 21 November 2019, ECLI:NL:RBAMS:2019:9684.

³⁵ E.g. Rb. Amsterdam, judgement of 22 May 2020, ECLI:NL:RBAMS:2020:2672

³⁶ *Stb.* 2011, 232; Rb. Amsterdam, judgement of 16 June 2016, ECLI:NL:RBAMS:2016:3643(C-108/16). The conditions of article 12 OLW (old) are: (1) the suspect has been summoned in person and in a timely manner, so that it is unequivocally established that he was aware of the intended hearing; or (2) the suspect was aware of the proceedings at the court hearing and authorized a lawyer or a lawyer was assigned to him by the government to conduct his defense, and the lawyer conducted his defense at the hearing; or (3) the suspect after the judgment has been served to him and he has been expressly informed of his right to appeal or opposition, at which he has the right to present and during which the merits of the case are re-examined and new evidence is being admitted, which may lead to a review of the original judgment and, he has expressly stated he does not contest the judgment, or he has not objected or lodged an appeal or opposition within the prescribed period; or (3) the judgement has not been served in person, but will be served on him in person without undue delay after his surrender and he will be expressly informed of his right to appeal or opposition, at which he has the right to be present, at which time the substance of the case will be re-examined and new evidence is presented allowed, which may lead to a review of the original judgment and he is informed of the period within which he must lodge an objection or appeal, as stated in the relevant European arrest warrant. Article 12a OLW (old) determined that in the cases referred to in Article 12(d) (old), the person against whom the European Arrest Warrant has been issued and who has not yet been officially notified of the criminal proceedings instituted against him may, either directly or through the intermediary of the Public Prosecutor, request a copy of the judgment underlying the European arrest warrant from the issuing judicial authority. In addition, the prosecutor is obliged to immediately provide a copy of the judgement when received. Lastly. The copy of the judgement cannot prejudice the processing of the EAW within the time limits set in Article 22.

³⁷ E.g. Rb. Amsterdam, judgement of 26 March 2020, ECLI:NL:RBAMS:2020:2179.

³⁸ CJEU, judgement of 24 May 2016, *Dworzecki*, C-108/16, ECLI:EU:C:2016:346; CJEU, judgement of 10 August 2017, *Zdziaszek*, C-271/17, ECLI:EU:C:2017:629.

person does not entail a breach of his rights to defence. Consequently, the legislative change of the Overleveringswet in 2021 made article 12 an optional ground of refusal. The article 12 OLW (new) enables the judiciary to take other circumstances into account as well, such as a lack of diligence with the requested person.³⁹ Moreover, the text of the article was adapted to match the wording of *Zdziaszek*.⁴⁰

1.2.2. Other fair trial rights

In case of defences which concern other fair trial rights, such as a hearing within a reasonable time, the right to information, and the right to a lawyer (article 47 and 48 EU Charter), the District Court will in principle not refuse the execution of the EAW. These defences can be presented during the criminal proceedings in the issuing State, and based on the principle of mutual recognition, the District Court trusts that the judiciaries of the issuing state will safeguard the fundamental rights, as set out in articles 47 and 48 EU Charter.⁴¹

1.3. Rule of Law considerations and fair trials rights

Since 2018, the state of the Rule of Law in certain EU Member States – in particular Poland and Hungary – have raised concerns with regards to the independence and impartiality of their judicial authorities.⁴²

In the beginning of 2018, the situation of the Polish Rule of Law only caused concerns. Nevertheless, the state of affairs did not justify the conclusion that surrender of the requested person to Poland would lead to a breach of his right to a fair trial ex. art. 47 EU Charter.⁴³ In April 2018, all Polish prosecution-EAW were postponed while awaiting the CJEU judgement on preliminary questions submitted by the Irish High Court.⁴⁴ In case of an execution-EAW, the District Court found no grounds that execution of the EAW would lead to a breach of the requested person's right to a fair trial,⁴⁵ since the judgements dated from before the reforms of the autumn of 2017.

After the judgement of *LM*, the District Court applies the three-step-test as set out by the CJEU in case of a prosecution-EAW to determine whether there is a risk of a breach of the right to fair trial, namely (1) whether there is a real risk of a breach of the fundamental right to a fair trial, on account of systemic or generalised deficiencies which concerns the independence of the issuing Member State's judiciary, (2) whether the structural or fundamental defects in the independence of the judiciary have an impact at the level of the courts who have jurisdiction over the criminal procedures to which the requested person will be subjected, and (3)

³⁹ *Kamerstukken II* 2019/2020, 35535, no. 3; Rb. Amsterdam, judgement of 15 April 2021, ECLI:NL:RBAMS:2021:1818; CJEU, judgement of 24 May 2016, *Dworzecki*, C-108/16, ECLI:EU:C:2016:346.

⁴⁰ *Kamerstukken II* 2019/2020, 35535, no. 3.

⁴¹ E.g. Rb. Amsterdam, judgement of 1 October 2020, ECLI:NL:RBAMS:2020:6090; Rb. Amsterdam, judgement of 29 March 2019, ECLI:NL:RBAMS:2019:2390; Rb. Amsterdam, judgement of 8 August 2017, ECLI:NL:RBAMS:2017:5781.

⁴² E.g. Rb. Amsterdam, judgement of 18 January 2018, ECLI:NL:RBAMS:2018:222; cf. the situation in Hungary, which is still in this phase e.g. Rb. Amsterdam, judgement of 17 October 2019, ECLI:NL:RBAMS:2019:7758; Rb. Amsterdam, judgement of 6 January 2021, ECLI:NL:RBAMS:2021:20.

⁴³ Rb. Amsterdam, judgement of 18 January 2018, ECLI:NL:RBAMS:2018:222, Rb. Amsterdam, judgement of 8 February 2018, ECLI:NL:RBAMS:2018:657; Rb. Amsterdam, judgement of 27 March 2018, ECLI:NL:RBAMS:2018:1757; Rb. Amsterdam, judgement of 27 March 2018, ECLI:NL:RBAMS:2018:2134.

⁴⁴ CJEU, judgement of 25 July 2018, *LM*, C-216/18 PPU, ECLI:EU:C:2018:586.

⁴⁵ E.g. Rb. Amsterdam, judgement of 27 March 2018, ECLI:NL:RBAMS:2018:2134.

whether there are compelling and factual grounds that the requested person runs a real risk that his fundamental right to a fair trial will be compromised.⁴⁶

The *LM* judgement emphasises the role of the requested person to bring forward compelling and factual grounds that he runs a real risk that his right to a fair trial will be compromised (step 3). In many of the judgments of the District Court given after the *LM* judgement, the defence fails to bring forward sufficient compelling and factual grounds.⁴⁷ In addition, *LM* highlights the importance to remain in dialogue with the judiciary of the requesting Member State. However, in practice the dialogue between the District Court and the Polish judiciary was “an uncomfortable, and often laborious, and largely fruitless acquisition” (Filius & Ouwerkerk, 2020). It therefore submitted new preliminary questions to the CJEU in June and September 2020, questioning in particular whether the second step of *LM* should still be answered if the courts of the issuing Member States no longer meet the requirements of effective or actual judicial protection since new legislation no longer guarantees the independence of those courts.⁴⁸ All pending Polish EAW were postponed while awaiting the CJEU judgement (Rechtbank Amsterdam, 2020).

The CJEU determined that the execution of an EAW cannot structurally be refused, because systemic or generalized deficiencies with regards to the independence of the issuing Member State’s judiciary, however serious, exist.⁴⁹ With the *L and P* judgement the Court confirmed the three-step-test as set out in *LM* and the importance of entering into a dialogue with the issuing authority (Filius & Ouwerkerk, 2020).

In the case which concerned the execution-EAW,⁵⁰ the application of the *LM* test led the District Court to the conclusion that the EAW could be executed. With regard to the final step, the court found no compelling or factual grounds that the right to a fair trial of the requested person had been breached, and none had been provided by the defence (Ouwerkerk & Filius, 2021).⁵¹

Contrary to the execution-EAW, the District Court determined that with regards to the prosecution-EAW⁵² execution should be refused.⁵³ Ouwerkerk & Filius (2021) identify three interlinked reasons for this judgment. First, the District Court finds three methods – disciplinary proceedings, the commencement of the law on the judiciary 2019 which influences the independence of the judiciary, the way in which judges are appointed by the KRS, which is not sufficiently independent from the other state executive powers – by which the independence of the judiciaries can be compromised and that those methods are in fact used in practice, resulting in a ‘chilling effect’. Second, two of the judiciaries of the court who would judge the case of the requested person have been subject of a disciplinary procedure. Third – and last – the case of the requested person has come to the attention of other authorities than just the judicial authorities, such as the national

⁴⁶ E.g. Rb. Amsterdam, judgement of 26 November 2018, ECLI:NL:RBAMS:2018:8508.

⁴⁷ E.g. Rb. Amsterdam, judgement of 16 April 2019, ECLI:NL:RBAMS:2019:2799; Rb. Amsterdam, judgement of 25 April 2019, ECLI:NL:RBAMS:2019:3007; Rb. Amsterdam, judgement of 23 July 2019, ECLI:NL:RBAMS:2019:7277.

⁴⁸ Rb. Amsterdam, Judgement of 31 July 2020, ECLI:NL:RBAMS:2020:3776 and Rb. Amsterdam, judgement of 3 September 2020, ECLI:NL:RBAMS:2020:4328.

⁴⁹ CJEU, judgement of 17 December 2020, *L & P*, C-345-20 and C-412/20, ECLI:EU:C:2020:1033.

⁵⁰ Rb. Amsterdam, judgement of 3 September 2020, ECLI:NL:RBAMS:2020:4328 (C-412/20).

⁵¹ Rb. Amsterdam, judgement of 27 January 2021, ECLI:NL:RBAMS:2021:179.

⁵² Rb. Amsterdam, Judgement of 31 July 2020, ECLI:NL:RBAMS:2020:3776 (C-345/20).

⁵³ Rb. Amsterdam, Judgement of 10 February 2021, ECLI:NL:RBAMS:2021:420.

prosecutor, and has been covered in the media as well. According to the District Court, this leads to a concrete risk that the chilling effect will have implications for the individual case of the requested person. To date, the judgement of 10 February is the sole case in which surrender to Poland was refused.⁵⁴

II.1.4. Family life

Defences with regard to the right to family life (article 7 EU Charter) have been fruitless. Even though the District Court recognises that the execution of an EAW can restrict the requested person's right to family life, the restriction is deemed proportional in light of the interest involved with the execution of the EAW (Marguery, 2018, p. 221).⁵⁵

II.2. Pre-trial detention

Before the legislative change of 2021,⁵⁶ article 22 (4) OLW prescribed that pre-trial detention needed to be suspended in case the District Court was unable to deliver a verdict on the execution of the EAW within 90 days.⁵⁷ This mandatory suspension of pre-trial detention bears the risk of absconding. For that reason, appropriate measures (e.g. duty to report to the police or a probation officer, hand in passport, or electronic monitoring) were imposed in order to prevent abscondment. If the measures are not upheld by the requested person, the suspension of pre-trial detention could be reversed (Glerum, 2020b).⁵⁸ The general and unconditional obligation of article 22 (4) OLW (old) is, however, incompatible with Framework Decision 2002/584/JHA in case of a very serious risk of absconding, which cannot be reduced to an acceptable level by the imposition of appropriate measures.⁵⁹ Consequently, in light of Framework Decision 2002/584/JHA article 22 lid 4 OLW (old) has to be interpreted that it allows the requested person to be kept in pre-trial detention beyond that 90-day period in case of a very serious risk of abscondment, which cannot be reduced to an acceptable level by the imposition of appropriate measures.⁶⁰ With the legislative change of the *Overleveringswet*, the general obligation to suspend pre-trial detention after 90 days has been revoked.⁶¹

⁵⁴ Cf. Rb. Amsterdam, judgement of 4 March 2021, ECLI:NL:RBAMS:2021:855, which had a similar body of facts, but the surrender of the requested person was allowed.

⁵⁵ E.g. Rb. Amsterdam, judgement of 22 May 2020, ECLI:NL:RBAMS:2020:2672; Rb. Amsterdam, judgement of 26 October 2020, ECLI:NL:RBAMS:2020:5060; Rb. Amsterdam, judgement of 12 November 2019, ECLI:NL:RBAMS:2019:8577.

⁵⁶ In 2021, the Framework Decision 2002/584/JHA was re-implemented in the *Overleveringswet*, due to differences between the Framework Decision and the Dutch law on the EAW. See *Kamerstukken II 2019/2020*, file number 35535.

⁵⁷ The period of 60 days can be extended by 30 days in case of extraordinary circumstances, according to article 22 (3) OLW (old); *Stb.* 2006, 24.

⁵⁸ Rb. Amsterdam, judgement of 1 February 2008, ECLI:NL:RBAMS:2008:BC4391.

⁵⁹ CJEU, judgement of 12 February 2019, *TC*, C-492/18, ECLI:EU:C:2019:108. In this case the preliminary question of the District Court of Amsterdam of whether continuation of detention of more than 90 days, pending surrender of a requested person who represents a flight risk contravenes Article 6 of the Charter. See also *Kamerstukken II 2019/2020*, 35535, no. 3.

⁶⁰ Hof Amsterdam, judgement of 5 March 2019, ECLI:NL:GHAMS:2019:729 (Court of Appeal Amsterdam)

⁶¹ See article 24 OLW; *Kamerstukken II 2019/2020*, 35535, no. 3.

II.3. EAW and proportionality

It is the responsibility of the issuing judicial authority to determine whether the conditions to issue an EAW have been fulfilled and whether, in light of the specific circumstances of the case, issuing an EAW is proportional.⁶²

With regard to EAW issued by other EU Member States, the District Court assumes that the Framework Decision is based on the principle of ‘system proportionality’ (*‘stelsevenredigheid’*).⁶³ Such principle implies that the Framework Decision does not go beyond what is necessary to meet its aims, namely to replace the extradition procedure with a simplified surrender procedure between judicial authorities of the European Union. Nevertheless, the District Court of Amsterdam decided that under specific circumstances the surrender of a requested person could be disproportionate for the person concerned. Such can only be the case in extraordinary circumstances (Glerum, 2020a).⁶⁴ When determining whether there are extraordinary circumstances, the court will also take into account the seriousness of the offence, and/or the damages caused by the offence (Glerum, 2020a).

II.4. Case-readiness

Case-readiness is not a condition that has to be met in order to execute an EAW. The *Overleveringswet* only requires that the EAW is issued for the purpose of criminal investigations (*‘strafrechtelijk onderzoek’*; see article 7(1) OLW), which is broader than the term case-readiness. Consequently, there have not been any notable cases in which case-readiness played a role.

⁶² Commission Notice – Handbook on how to issue and execute a European arrest warrant, C-2017, 335/01. CJEU, judgement of 27 May 2019, *OG and PI*, C-508/18 and C-82/19, ECLI:EU:C2019:456.

⁶³ E.g. Rb. Amsterdam, judgement of 30 December 2008, ECLI:NL:RBAMS:2008:BG9037.

⁶⁴ Rb. Amsterdam, judgement of 30 December 2008, ECLI:NL:RBAMS:2008:BG9037.

Section III – Mutual Trust and cooperation through the EAW: key interpretation and implementation challenges, and solutions adopted in the Netherlands

The previous sections have shown some controversies with regards to the interpretation and implementation of Framework Decision 2002/584/JHA. The sections also shed light on the solutions adopted in the Netherlands to deal with certain problems arising in the judicial cooperation with other Member States. This final section will discuss the identified key controversies concerning the interpretation and implementation of Framework Decision 2002/584/JHA, namely the incorrect implementation of the framework decision and the fair balance between mutual trust and safeguarding fundamental rights, and solutions adopted to these problems.

III.1. Problems arising from incorrect implementation of the Framework Decision

The previous sections have shown that parts of Framework Decision 2002/584/JHA have not been implemented correctly in the *Overleveringswet*. In some cases, problems arose from the incorrect implementation of the Framework Decision. One of the key examples is the competence of the Dutch prosecutor to issue EAW before the legislative change of 2019. After the judgement of *OG* and *PI*, a fast-track procedure was needed in order to repair the *Overleveringswet*. Another example can be found in the national obligation to suspend pre-trial detention after a period of 90 days. This obligation was found incompatible with the Framework Decision by the CJEU. Such problems could have been prevented by the EU legislator during the implementation process. For example, by providing clear guidelines to Member States on the meaning and interpretation of certain components (e.g. ‘issuing judicial authority’) of the Framework Decision. The preliminary procedure at the CJEU has been an important tool for the District Court, in order to clarify and interpret the Framework Decision, and to solve problems arising from the incorrect implementation of the Framework Decision at the national level. Key examples, are the cases involving the interpretation of ‘issuing authority’, the optional refusal ground of article 4a, and the continuation of detention awaiting surrender after 90 days.

III.2. Fair balance between mutual trust and safeguarding fundamental rights

Another difference between the *Overleveringswet* and the Framework Decision is the explicit human rights refusal ground of article 11. Breaches of fundamental rights may give reason to refuse the execution of an EAW under Dutch law. However, the CJEU established that specific verifications are necessary to prevent the risk that the execution of an EAW would result into a human rights violation. Nevertheless, the basis for a human rights refusal grounds may conflict with the principle of mutual trust. After all, mutual trust *stricto sensu* between Member States does not exist, if there is a need to verify whether human rights of the requested person are sufficiently safeguarded in the issuing State. Thus, the CJEU has outlined the limits of trust in surrender proceedings, and clarified that trust is not blind. In the Netherlands, the District Court of Amsterdam has acknowledged that parties to the ECHR should prevent execution of an EAW that runs the risk of a violation of the fundamental rights of the requested person, even when the issuing state is a party to the ECHR and obligations to surrender the person on the basis of the principle of mutual trust exist (Marguery, 2018, p. 210;

Van Eijken & Verhoeven, 2020).⁶⁵ Moreover, the selection of case law has shown the importance of such a human rights assessment, in order to safeguard the fundamental rights of the requested person.

Thus, in the Netherlands, the protection of the fundamental rights of the requested person may in certain cases outbalance the principle of mutual trust. It must be noted that not every human rights violation outweighs judicial cooperation based on mutual trust. It concerns human rights violations, which cannot be repaired or addressed in the criminal procedure of the issuing Member State, such as infringements of article 4 EU Charter due to detention facilities and Rule of Law considerations in light of fair trial rights. In case of the infringement of other procedural rights, such as the right to a lawyer and the right to information, mutual trust outweighs the protection of these fundamental rights. In other words, the District Court trusts the judiciaries of the issuing state to safeguard fundamental rights during the criminal proceedings.⁶⁶ Also with regards to the conditions to issue an EAW, including the proportionality principle, the Dutch District Court in principle trusts the decision of the judicial authority of the issuing Member State to issue an EAW. Any questions concerning the legitimacy of the issuance of the EAW, can therefore be raised in the criminal proceedings in the issuing Member State.

Analysis of case law of the District Court of Amsterdam shows that judges are often confronted with politically loaded questions.⁶⁷ A primary example is the state of the Rule of Law in Poland, which raises concerns with regards to the independence and impartiality of their judicial authorities. The three-step-test of the *LM* judgement obligates the District Court to remain in dialogue with the Polish judiciary and, in addition, to judge their EU colleagues and how they operate. This process has therefore been characterized as “an uncomfortable, and often laborious, and largely fruitless acquisition” (Filius & Ouwerkerk, 2020). Another example are the cases in which the detention facilities do not meet the requirements of article 4 EU Charter. Especially the cases in which the District Court concludes that the detention system as a whole runs a real risk of violating article 4 EU Charter could be seen as politically loaded judgements by *inter alia* governments of Member States. Even more, when problems with regards to detention facilities are related to migration crises, economic crises, pandemics *etcetera*.

⁶⁵ Rb. Amsterdam, judgement of 22 October 2010, ECLI:NL:RBAMS:2010:BO1448; Rb. Amsterdam, judgement of 22 February 2011, ECLI:NL:RBAMS:2011:BP5390.

⁶⁶ E.g. Rb. Amsterdam, judgement of 1 October 2020, ECLI:NL:RBAMS:2020:6090; Rb. Amsterdam, judgement of 29 March 2019, ECLI:NL:RBAMS:2019:2390; Rb. Amsterdam, judgement of 8 August 2017, ECLI:NL:RBAMS:2017:5781.

⁶⁷ See in this context the PhD research of Elise Filius (Leiden University) on the judicial interference in politically loaded cases in European asylum law and criminal law ('De rechterlijke bemoeienis in politiek beladen zaken in het Europees asiel- en strafrecht'). She identifies different parameters in order to determine whether a question is politically sensitive, such as the question is directly related to the scope of EU powers and/or specific EU institutions, the question concerns the scope and/or division of powers between the judiciary and the administration at a national level, and the judicial interpretation of the rules of the EU instrument has important implications for national policies.

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