

## Executive Summary: The Netherlands

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### Executive Summary

#### Issuing Procedures

- In the Netherlands, the investigate judge is competent to issue an EAW. The Dutch prosecutor may demand that the investigative judge will issue an EAW. The investigative judge will then determine whether an EAW should be issued. In his judgement he will rely *inter alia* on the concept-EAW as provided by the prosecutor.
- The Dutch prosecutor is not competent to issue an EAW, since the Minister of Justice and Security may issue general and specific instructions regarding the exercise of powers and tasks of the Dutch prosecution office.
- Defences concerning the issuing of an EAW by the Netherlands can only be lodged during the Dutch criminal procedure. If the issuing of an EAW is deemed to be illegitimate by the court, the EAW is vitiated by a procedural defect. In such a case the court can either decide to solely note that there has been an irreparable defect, without it having any legal consequences, or reduce the length of the sentence proportionate to the gravity of the procedural defect, or bar the prosecution if, as a result of the procedural defect, the criminal procedure does no longer meet the requirement of the right to a fair trial.

#### Executing Procedures

- The Dutch Surrender Law has foreseen in an explicit human rights refusal ground in article 11. Surrender may be refused when there are 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.

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- With regards to detention facilities, the District Court applies the two-level test of Aranyosi and Caldaru to determine whether the execution of the EAW would lead to a (possible) violation of article 4 EU Charter. 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 condition. 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.
- An EAW may be refused in case of in absentia judgements, where the requirements of the two-fold test have not been met, namely judiciary has 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. This ground is an optional refusal ground. The judiciary may take into account other circumstances, such as a lack of diligence with the requested person as well.
- The District Court trusts that the judiciaries of the issuing state will safeguard other fundamental rights, such as the right to information or the right to a lawyer, in the criminal proceedings of the issuing Member State.
- With regards to fair trial rights and Rule of Law deficiencies, 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) 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. The LM, and L and P judgement emphasise the importance of entering into a dialogue with the issuing authority. However, in Dutch practice such a dialogue has been an uncomfortable, and often laborious, and largely fruitless acquisition.
- Breaches of requested person's right to family life, are deemed proportional in light of the interest involved with the execution of the EAW.
- The District Court assumes – based on the principle of mutual trust – that the issuing authority will issue an EAW when it meets the conditions of the EAW and the principle of proportionality. Only under extraordinary circumstances, the surrender of the requested person could be deemed disproportionate, depending on the seriousness of the offence, and/or damages caused by the offence.

### Key interpretation and implementation challenges

- Research into the Dutch surrender procedure has shown that parts of Framework Decision 2002/584/JHA have not been implemented correctly in the Dutch Surrender Law. Examples are the competence of the Dutch prosecutor to issue EAW, the optional refusal ground in case of in absentia judgement, and the continuation of detention awaiting surrender after 90 days. 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.

- 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 possible human rights violation outweighs judicial cooperation based on mutual trust. It must concern 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 or Rule of Law considerations in light of fair trial rights.
- Analysis of case law of the District Court of Amsterdam shows that judges are often confronted with politically loaded questions. 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.