



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 27 February 2009

**15370/2/08
REV 2**

**CRIMORG 185
COPEN 218
EJN 70
EUROJUST 93**

DECLASSIFICATION

of document:	ST 15370/1/08 REV 1 RESTREINT UE
dated:	2 December 2008
new classification:	none

Subject: 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

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The text of this document is identical to the previous version.

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REPORT ON THE NETHERLANDS

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1. INTRODUCTION

- 1.1. Following the adoption of the Joint Action of 5 December 1997, a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organised crime was established.
- 1.2. Following the discussion of a proposal introduced by the Luxembourg Presidency concerning the topic of the fourth round of mutual evaluations¹, the MDG of 11 July 2005 adopted the topic as proposed, namely "the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States". It was also agreed at the MDG of 11 July that the evaluation questionnaire was to be prepared by the UK Presidency.
- 1.3. Experts with substantial practical knowledge of the European Arrest Warrant were nominated by Member States pursuant to a written request to delegations made by the Chairman of the MDG on 9 September 2005².
- 1.4. At its meeting on 28 October 2005 the MDG approved the evaluation questionnaire for the fourth round of mutual evaluations. The objectives of the evaluation exercise and the questionnaire itself are set out in 14272/05 CRIMORG 131 COPEN 175 EJM 57 EUROJUST 77.
- 1.5. Also at its meeting on 28 October 2005 the MDG discussed and approved document 13824/05, the revised sequence for the mutual evaluation visits. The Netherlands is the nineteenth Member State to be evaluated during the fourth round of evaluations.
- 1.6. The experts charged with undertaking this evaluation were: Mr Stefan Benner (Prosecutor, Federal Ministry of Justice, Austria), Mr Jan MacLean (Senior counsellor, Permanent Representation of the Federal Republic of Germany to the European Union) and Mr Loïc Guérin, Deputy Head, Office of Mutual Assistance in criminal matters, Direction des affaires criminelles et des grâces, France). Two observers were also present: Ms Anne Delahaie (Eurojust) and Ms Caroline Morgan (European Commission), together with the General Secretariat of the Council.

¹ 9602/05 - Orientation debate on a proposed Mutual Evaluation exercise.

² 6206/06/REV1 - Timetable for 2006 and designation of experts.

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- 1.7. This report was prepared by the experts team with the assistance of the Council Secretariat, based upon their findings arising from the evaluation visit of 10-13 March 2008, and upon the detailed and helpful responses of the Netherlands to the evaluation questionnaire.
- 1.8. The report makes reference to differing processes in respect of arrest and prosecution cases only insofar as there is a divergence of practice between the two procedures.
- 1.9. The experts team's overarching purpose was to evaluate the distinct practical processes operated and encountered by the Netherlands both in its role as issuing and executing Member State, to assess relevant training provisions and the views of the defence, before moving on to conclude and to make such recommendations as they felt were appropriate to enhance the means by which the EAW and its corresponding surrender provisions may be further streamlined and improved.

2. THE AUTHORITIES AND THE LEGAL BASIS

2.1. THE AUTHORITIES

The Netherlands Prosecution Service is part of the judiciary, although it functions under the responsibility of the Minister for Justice. It has a monopoly over prosecutions, and employs the expediency principle¹ in this connection. Furthermore, it makes use of its hierarchical structure to pursue a co-ordinated policy. The total number of prosecutors stands at around 500.

The prosecution service is organised in two layers, corresponding to courts of first instance and courts of appeal. There is also a national prosecution office located in Rotterdam, responsible for investigating and prosecuting serious (organised) and nation-wide or international crime.

The prosecution office attached to the Supreme Court is not part of the prosecution service; it forms an independent office with special tasks and powers².

¹ The expediency principle enables the prosecution service to waive (further) prosecution for reasons of public interest.

² The prosecution office at the Supreme Court consists of the Prosecutor-General and the advocates-general. The main statutory tasks of the Prosecutor-General are:

- to prosecute Members of Parliament, ministers and deputy ministers for criminal offences committed in the exercise of their function;
- to advise the Supreme Court on all cases dealt with, and to give his legal opinion on disputed legal questions;
- to appeal in cassation in the interest of the proper application of criminal law.

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There is no hierarchical relationship between prosecution services of the courts of first instance and the prosecution services of the courts of appeal. All are subordinated to the Board of Prosecutors-General. The Board has its office in The Hague, and is composed of three to five Prosecutors-General; the chairman is appointed by the Crown.

The Board directs the prosecution service as one organisation. It may give instructions to the members of the prosecution service of both a general policy nature and a specific nature. Prosecutors are legally bound by these instructions. Therefore, the highest authority over investigation and prosecution rests with the Board. The Board ultimately supervises the implementation of a proper prosecution policy by the prosecution service, and a proper investigation policy by the police. The Board meets on a regular basis with the Minister for Justice.

The Minister for Justice is accountable for the policy of the prosecution service and can be held to account in Parliament for intervening, or failing to intervene, in this policy. He is vested with the power to give general or specific instructions on the exercise of tasks and powers of the prosecution service. The Minister for Justice is hence involved in the formulation of prosecution policy at large, and may be involved in the decision making in individual cases as well. As for the latter, before the Minister can issue an instruction, the Board of Prosecutors-General has to be consulted. The instruction must be reasoned and issued in written form. A ministerial instruction not to prosecute or not to investigate a criminal offence has to be notified to Parliament, together with the view of the Board¹. The Minister cannot give orders to the Prosecutor-General and the advocates-general of the Supreme Court.

The Netherlands courts dealing with criminal offences are organised in a three-tier system: district courts (19), courts of appeal (5), and the Supreme Court.

¹ The Minister of Justice rarely exercises his power to issue instructions. In most cases, consultation with the Board of Prosecutors-General will have the effect that the Board will issue such an instruction.

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As regards EAW-related matters, courts do not intervene in the process leading to the issue of an EAW. The Amsterdam District Court has exclusive competence to decide on the execution of EAWs in standard procedures (without the requested person consenting to surrender) where the case is referred to the court¹. There is no appeal against the decision of the Amsterdam District Court in this kind of procedures. However, the Supreme Court may be asked to give a ruling on the interpretation of the law, following a request to that effect lodged on his own motion by the Procurator-General at the Supreme Court. Such a ruling will not affect the specific case at hand, but will determine the legal context for future cases².

Six regional centres, IRCs, coordinate the flow of international requests for mutual assistance and rogatory letters that are intended to or originate from NL. The IRCs are made up of members of the police and representatives of the public prosecution service. There is one national IRC: the LIRC.

The International Legal Assistance Centre (LIRC) is included in the Department of International Police Cooperation (DINPOL), within the Netherlands Police Agency³. It integrates the activities of Interpol, Europol, the SIRENE bureau, the Netherlands liaison officers abroad and contacts with foreign liaison officers.

2.2 LEGAL BASIS

Act of 29 April 2004, Official Gazette 195, ("Overleveringswet" (Surrender Act)) implementing the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States of the European Union, as amended by the Act of 22 December 2005 (hereinafter referred to as "the OLW" or as "implementing law").

¹ See chapter 4.6 below.

² See chapter 4.8 below.

³ The National Police Agency and the regional police forces (the country is divided into 25 police regions; each of these is under the administrative management of the mayor of the largest or most central town in the region) act under the ultimate supervision of the Minister of the Interior.

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This Act entered into force in the Netherlands on 12 May 2004^{1, 2}.

3. ORGANISATION AND PRACTICES - AS ISSUING MEMBER STATE

3.1. THE DECISION TO ISSUE

Any public prosecutor may issue an EAW³. No distinction is made between prosecution and conviction cases.

There is no special procedure for taking a decision to issue an EAW. Provided that prerequisites are met (i.e. a domestic arrest warrant or enforceable judgment has been issued and penalty thresholds are reached), the competent public prosecutor makes an independent decision on whether or not to issue an EAW based on the case details. Consideration is given to proportionality when taking such a decision, although, according to the information provided, there are no guidelines or agreed standards on this issue.

¹ According to the statement made by the Netherlands, "the Framework Decision and the law on surrender apply solely to the European territory of the Kingdom of the Netherlands. The application of the agreements mentioned in Article 31(1)(a) and (b) of the Framework Decision is therefore upheld in relation to extradition between the Netherlands Antilles or Aruba and the Member States of the European Union" (9002/04 - Completion of the implementation of the FD on the EAW).

² The Kingdom of the Netherlands made the following declaration to the Council of Europe 1957 European Convention on Extradition, in accordance with Article 28(3) thereof: "Declaration contained in a Note verbale from the Permanent Representation of the Netherlands, dated 31-08-2005, registered at the Secretariat General on 05-09-2005: On 13 June 2002, the Council of the European Union adopted a framework decision on the European arrest warrant and surrender procedures between Member States (no. 2002/584/JHA) ("the Framework Decision"). Article 31 of the Framework Decision provides that from 1 January 2004 the Framework Decision will replace the corresponding provisions of the relevant extradition conventions applicable in the field of extradition in relations between the Member States.

The Permanent Representation of the Kingdom of the Netherlands therefore has the honour to inform the Secretary General of the Council of Europe that pursuant to Article 28, paragraph 3, of the Convention on Extradition, the Convention shall no longer be applied in relations between the European part of the Kingdom of the Netherlands and the Member States of the European Union that are a Party to the Convention.

The Permanent Representation of the Kingdom of the Netherlands would emphasise that the above does not alter the application of the Convention in relations between:

- the Netherlands Antilles and Aruba and the Parties to the Convention, or
- the European part of the Kingdom and the Parties to the Convention that are not Member States of the European Union."

³ Article 44 of the OLW.

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3.2. VERIFYING THE POSSIBLE EXISTENCE OF MULTIPLE REQUESTS

There are two databases in the Netherlands that provide information on wanted persons, namely the OPS, where national warrants and Interpol requests (including those relating to EAW issued by non-SIScountries) are recorded, and the NSIS, which includes EAW alerts entered by SIScountries. These two systems are accessible to public prosecutors via the police (district police or DINPOL).

As a general rule EAWs issued by the Netherlands authorities are sent to the SIRENE bureau so that an alert can be entered in the SIS¹. In view of the fact that a Member State is permitted to issue only one alert per person, upon receipt of an EAW a check is made by the SIRENE bureau to verify whether the Netherlands has already entered an alert for the requested person. If so, the two issuing public prosecutors in consultation will determine which alert is to be maintained in the SIS. In doing so the authorities involved are not subject to fixed criteria.

3.3. COMPLETION OF THE FORMS/COURT PAPERS

Completion of the EAW is the sole responsibility of the competent public prosecutor. Information was provided to the effect that in some cases EAWs are submitted to the authorised IRC, which scrutinises them to check whether they contain all the necessary information; only if they do, is the EAW forwarded to the regional police desk for the purposes of entering an alert in the SIS. However, this was not described as a general practice followed by all District Public Prosecutors' Offices.

Prior to the entry into force of the OLW in 2004, a "Provisional Method of Operation for European arrest warrants and surrender procedures between the Member States of the European Union" (hereinafter referred to as "the Provisional Method of Operation") was drawn up, which is still in use. It includes detailed instructions in which a description is given of how to issue an EAW and how to use the EAW form, with explanatory notes on the different sections of it. During the evaluation visit some of the authorities interviewed expressed the view that the Provisional Method of Operation should be updated in light of the experience gained throughout the years in which the EAW has been operational.

¹ See chapter 3.5 below.

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No recurrent issue was reported in relation to the EAW form or any field of it in particular. In this respect, the experts team noted that, as stated in the Provisional Method of Operation, the Netherlands regulations for judgments in absentia do not match the Framework Decision on the EAW, the implementing law and the accompanying form in that, pursuant to the former, if the defendant was neither summoned in person nor otherwise informed in person of the date and place of the trial, but there is evidence that he became aware of the judgment in absentia and omitted to exercise a legal remedy within the stipulated time limit, he is no longer entitled to exercise any legal remedy. In such instances, following the Provisional Method of Operation, it should be indicated in box (d) of the form, under the heading "legal guarantees", that the person concerned is no longer entitled to exercise any legal remedy, stating the reasons. However, no problems in practice were reported by the authorities interviewed on this particular issue.

3.4. TRANSLATION OF THE EAW

EAWs are issued by NL authorities in Dutch. Following notification that the requested person has been arrested in another Member State, the EAW is translated and forwarded both in Dutch and in the language of the country where the arrest took place. However, in urgent cases the Dutch version may be forwarded immediately following the arrest, specifying that the translation in the language of the executing Member State will follow as soon as possible.

The issuing public prosecutor or the IRC concerned is responsible for the translation of the EAW.

3.5. TRANSMISSION OF THE EAW

Even in those cases in which the whereabouts of the requested person are known and the EAW is sent directly to the competent executing judicial authority, a SIS alert and, where appropriate, an INTERPOL diffusion, are issued following the procedure described below.

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The issuing public prosecutor sends a copy of the EAW to the regional police force info desk, which processes the entry of the corresponding alert in the SIS and transmits the EAW by fax to the SIRENE bureau for validation of the alert. In so doing, the SIRENE bureau contacts the issuing public prosecutor where necessary (e.g. some of the data required by the system is missing) in order for the latter to clarify, supplement or amend the EAW, as felt necessary. The SIRENE bureau also checks whether there is already an entry in respect of the person concerned¹. After these checks have been made, the SIRENE bureau prepares the A and M forms and transmits the information to Central SIS.

As stated above, transmission of the EAW generally takes place after the arrest of the sought person. The transmission of the EAW to the competent authority in the executing Member State is the responsibility of the issuing public prosecutor or the IRC concerned. In cases where the competent executing judicial authority is not known, use is made of the European Judicial Atlas, or contact is made with EJM or (rarely) Eurojust, or even the liaison officer of the country in question, to ascertain the correct executing judicial authority. This practice is generally felt to operate smoothly, although some failings (need for updating) have been encountered when using the EJM tools and the "Fiches Françaises".

The mode of transmission is determined by the executing authority. Usually a fax is sent first, followed by the original by courier. Also the executing judicial authority is contacted, either directly (phone, email) or, where possible, through the Netherlands liaison officer seconded to the executing Member State, as soon as the requested person is arrested.

As to problematic experiences in this field, in their replies to the questionnaire the Netherlands authorities stressed that the very short periods within which some Member States apply for the transmission of an EAW with a translation into their official language lead to high costs of translation and require a great effort by the issuing judicial authorities. Furthermore, these short periods can become a problem particularly for translations into less common languages. The Netherlands authorities raised the question concerning the need for a standardisation of time limits for the transmission of EAWs and flexibility concerning language versions. Problems were also reported in relation to the quality of the fax equipment used by executing authorities in some Member States.

¹ See chapter 3.2 above.

3.6. REQUESTS FOR FURTHER INFORMATION MADE BY EXECUTING MEMBER STATES

The Netherlands authorities reported instances where a discussion with the executing authorities had developed on the content of the EAW, in particular in relation to the description of the offence in box e) of the form¹, although, according to the information provided, such cases could generally be solved by providing additional information. Relevant requests were generally not considered excessive by the Netherlands authorities.

An exception was however one case with the UK concerning five EAWs for five persons suspected of having committed a hostage taking/robbery together. In this case, the UK executing judicial authority refused the request for surrender, as it was felt that the description of the role of the suspects was not specific enough. The case was described as follows:

Investigations carried out by the Netherlands authorities had shown that all the suspects had played a role in the hostage taking/robbery. But because the victims (the drivers taken hostage) were UK nationals who, following the first interview, had returned to England, specific details on who exactly had done what in the course of the criminal operation was not yet quite clear at the time when the EAWs were issued. All the information that had emerged from the investigation was individualised for the various persons sought as much as possible and then included in the EAWs after a general overview of the offences (joint perpetration).

In the opinion of the Netherlands authorities, the requirements set by the UK authorities for the description of the role of every perpetrator in the EAW were too high. They emphasised that the EAW was rewritten three times under recommendations of the UK authorities, and still surrender was rejected.

¹ As a matter of fact, one of the prosecutors interviewed noted that the degree of detail with which the factual circumstances are described depends to a great extent on the stage of the proceedings when the EAW is issued, with a view to avoiding a situation where the person sought or third parties benefit from the information disclosed.

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3.7. LEGAL REGIME GOVERNING THE RETURN OF OWN NATIONALS FOR THE ENFORCEMENT OF A SENTENCE

Article 45.1 of the implementing law provides for the automatic issue (by the issuing public prosecutor) of the guarantees referred to in Article 5 of the Framework Decision on the EAW.

Moreover, the second paragraph of that Article determines that such guarantees are binding for all authorities in the Netherlands. This provision is included to assure that not only the issuing authority is bound by that guarantee, but any other authority in the Netherlands as well.

The return transfer is carried out in accordance, where appropriate, with the provisions of the Transfer of Enforcement of Criminal Judgments Act. The process for the physical transfer is initiated after the individual has declared before the examining judge that he wishes to be transferred back to the Member State from where he was surrendered. Little to no practical experience with this situation was reported.

In the replies to the questionnaire attention was drawn to potential problems with transferring the execution of certain detention orders as defined by the Netherlands law, such as the measure of detention under a hospital order, applied to offenders who cannot or cannot entirely be held accountable for the offences they committed.

3.8. YOUTH SURRENDERS AND CORRESPONDING GUARANTEES

One single case was reported in which it proved impossible to arrange for the surrender of a minor from Belgium for the execution of a sentence for offences he committed when he was older than 12 but younger than 16. In this case the EAW was withdrawn by the Netherlands Public Prosecutor. The minor in question was then returned to the Netherlands on the basis of an “Agreement between Belgium and the Netherlands, with the aim of returning minors who have escaped the authority of their parent or guardian”, dating from 1913.

3.9. EVOLVING BEST PRACTICES

According to the information provided, the attention paid by the Netherlands issuing authorities to the proper description of the offence when completing the EAW form has increased, in the light also of the case with UK described in chapter 3.6.

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3.10. GENERAL COMMUNICATIONS WITH THE EXECUTING MEMBER STATE

The implementing law is expressly intended to enhance direct contacts between the Netherlands issuing authorities and the executing judicial authorities abroad¹. The experts interviewed during the evaluation visit confirmed that police channels are scarcely used by the Netherlands judicial authorities for contacts with their partners in other Member States.

3.11. THE MECHANICS OF THE SURRENDER (INCLUDING TEMPORARY SURRENDER) OF REQUESTED PERSONS/TIMELIMITS/GUARANTEES

On receiving (usually via SIRENE) notification of the executing authority's decision to surrender the requested person, the IRC or the District Public Prosecutor's Office informs the police investigative team and the issuing Public Prosecutor. The latter is responsible for arranging (directly or via the SIRENE bureau) the actual surrender to the Netherlands with the executing authority (place and time of surrender and means of transport). No national institution is charged with the coordination of the surrender of requested persons to the Netherlands.

In general, the person sought is collected by a specially appointed Royal Military Constabulary (KMAR) team. The KMAR is a police organisation with military status, which provides assistance to regular police forces where requested, including escorting detainees transferred from abroad to the Netherlands. The police itself may also escort a surrendered person.

Surrenders from Belgium take place at joint border posts. Surrenders from Germany take place at joint border points and via air transportation to an airport in the Netherlands. Surrenders from other countries which do not border on the Netherlands are done at an airport of the executing Member State. In that case the IRC administrative-legal employee requests KMAR at Schiphol airport to arrange for a flight and escort, then puts out the information on the flight details through SIRENE to the country in question and, following approval from that country, reports back to KMAR.

¹ Article 46.1 OLW: "The issuing judicial public prosecutor shall be authorized to maintain direct contact with the executing judicial authority". Article 47 OLW: "The issuing public prosecutor shall be authorized, with a view to the processing and execution of the European arrest warrant issued by him, to provide the executing judicial authority with further information on request, or of his own volition. Where applicable, he shall also be authorized to agree terms in writing if the requested person is provisionally made available".

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Upon arrival in the Netherlands, the issuing public prosecutor must ensure that the person sought is arrested on the basis of the Netherlands criminal code of procedure and that transport and a place in a prison or detention centre have been arranged for him.

No serious problems in relation to this matter were identified by the Netherlands authorities. However, instances were reported involving a late response from abroad as a result of which booked flights were missed and high costs were incurred.

3.12. MECHANICS OF THE SURRENDER IN RESPECT OF REQUESTED PROPERTY/TIMELIMITS/GUARANTEES

No problem in connection with these matters was reported by the Netherlands authorities.

3.13. CONFLICT OF EAWS/EXTRADITION REQUESTS/ONWARD SURRENDER

At the time of the evaluation visit no issues had been recorded in connection with these matters.

3.14. EXPENSES

At the time of the evaluation visit no issues had been recorded in respect of the payment of expenses associated with EAW procedures.

3.15. MISCELLANEOUS COMMENTS

Replacement of pre-existing alerts with EAWs

The Netherlands authorities explained that when the OLW came into force, Article 95 SUO alerts were not replaced with EAWs¹. Meanwhile, some District Public Prosecutor's offices have systematically replaced their alerts. According to the information provided, approximately 20% of existing alerts are based on International Arrest Warrants (extradition alerts), while the remaining 80% are more recent and follow from the issue of EAWs.

¹ However, the Provisional Method of Operation states (page 33, second paragraph): "...New EAWs will have to be issued for existing alerts issued pursuant to Article 95 of the Schengen Execution Agreement in the Schengen Information System (SIS), and at the same time new forms containing Supplementary Information (so-called A and M forms) will have to be transmitted to the SIRENE offices of the participating countries...".

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The Netherlands authorities emphasised that no problem had been recorded in relation to this issue to date, since practice had shown that an EAW might be quickly issued after information was received that the requested person had been arrested based on an "extradition alert".

Article 32 of the Framework Decision

Article 74 of the OLW lays down that this law shall replace the extradition conventions in force between the Netherlands and the Member States of the European Union. The Netherlands authorities explained that this provision does not allow for an exception in relation to Member States which have made a statement in conformity with Article 32 of the Framework Decision on the EAW, since at the time of the negotiations the latter had stated that they would also accept an EAW in those cases, although subject to the grounds for refusal existing under the law governing extradition.

In that connection, the Netherlands authorities reported that in a number of cases an Article 95 alert was followed by a notification that the Member State in question had made a statement in accordance with Article 32 of the Framework Decision, and that the EAW could not be honoured. In practice, this did not lead to any problems, since the European Convention on Extradition was used; in some instances a request for extradition was added to the EAW to resolve the problem.

However, the Netherlands authorities stressed that some Member States which made a statement at a later date expressly demanded a request for extradition. This could lead to situations difficult to solve pursuant to the OLW.

Accessory offences

According to the Provisional Method, offences that do not meet the penalty thresholds may also be included in EAWs issued by the Netherlands authorities, provided that clear indication is given that the Netherlands cannot offer any reciprocity for this accessory surrender.

According to the information provided during the interviews, it is not the general practice of prosecutors to add accessory offences when issuing an EAW. Only two cases were reported where the person requested had also been surrendered for this kind of offence.

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4. ORGANISATION AND PRACTICES - AS EXECUTING MEMBER STATE

During the calendar year 2006, the Netherlands received 498 EAWs and surrendered 287 persons based on an EAW. Of the persons surrendered, 73 consented to surrender and 214 did not. The Netherlands judicial authorities refused to execute 72 EAWs.

4.1. RECEIPT PROCEDURES

The District Public Prosecutor's Office in Amsterdam (hereinafter referred to as DPPA) is the only authority competent for the receipt and handling of EAWs¹.

Forwarding a signed EAW by fax or e-mail (provided that the origin is verifiable) is accepted for the purpose of the arrest of the requested person and the EAW to be dealt with by the DPPA².

However, the original EAW or a signed copy in conformity with the original EAW (i.e. a copy of the EAW with the signature of the issuing authority and signed by an official who is competent within the court or the public prosecutor's office to state that the document is a copy of the original EAW) must have been received by the Amsterdam District Court before it delivers its decision³.

The Netherlands accepts EAWs in Dutch, in English, or in the national language of the issuing authority accompanied with a translation into English. Translations do not need to comply with any additional certification or authenticity requirement.

The Netherlands authorities explained that they made a deliberate choice not to demand translations into Dutch, based on their previous experience in extradition cases, which showed that the quality of translations into Dutch was often very poor. They noted, however, that translations into English sometimes appeared to be also well below standard (in particular EAWs from France, Spain and Italy).

¹ Pursuant to Article 20.1 OLW, "A European arrest warrant not sent to the public prosecutor shall be forwarded to him immediately". According to Article 1 OLW, in this Act the term "public prosecutor" means the public prosecutor at Amsterdam District Court and, where referred to as such, any public prosecutor.

² See chapter 4.5 below.

³ See chapter 4.7 below.

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4.2. INVESTIGATIONS CONCERNING THE LOCATION OF THE REQUESTED PERSON

When an EAW-based search is received via INTERPOL or there is an Article 95 alert, as a rule, KLPD/SIRENE checks the LIST (National Information System), an integrated search system that comprises several registers¹, to find out whether there is any indication that the requested person may be located in the Netherlands. A number of national databases not integrated into the LIST are also checked².

If the alert provides specific information regarding the stay of the requested person in the Netherlands, in addition to the standard verification as referred to above, KLPD/SIRENE contacts the DPPA, which in turn contacts the IRC in whose region the person sought is expected to reside to verify such information.

When the whereabouts of the requested person have been established, KLPD/SIRENE transmits the alert to the local competent IRC to trace the person. A copy is sent to the DPPA. Any requests from the DPPA for active tracing of persons will always be addressed to the competent IRC, since responsibility for tracing and arresting sought persons is vested in the local authorities.

In urgent cases (i.e. cases concerning very serious crimes that call for immediate action and where arrest cannot be postponed), when the place where the person sought is presumably known, the local police service is informed immediately by KLPD/SIRENE of the alert with an investigation indication. The EAW public prosecutor at the DPPA on duty is also informed.

If an EAW is sent directly to the DPPA, consultation of the population register, detention register and criminal record takes place there, while KLPD/SIRENE checks the other systems that contain information on convictions and prior convictions. If a place of residence is found, the IRC in whose region the person sought is alleged to stay is contacted for further investigation and to ensure that the person is arrested. If the EAW contains verifiable information on a particular address where the person sought is alleged to stay, the IRC in the region in question is contacted immediately by the DPPA.

¹ Namely the following: OPS (National register of wanted persons and objects; it includes EAW alerts from non-SIScountries), NSIS (International register of wanted persons and objects; it includes EAW alerts from SIScountries), HKS (criminal police records) and CRB (Driving Licence register).

² VROS (Subject-index criminal investigations), VIPS (Detention system), GBA (Municipal address registration system) and RDW (Car registration administration).

4.3. FORM OF THE WARRANT AND REVIEW PROCEDURES

Pursuant to Article 20.2 of the OLW, only EAWs that meet the formal requirements of Article 2 of that Act¹ may be dealt with by the DPPA. Also, Article 23.1 of the implementing law allows the DPPA to refuse surrender without a court hearing, if he is of the opinion that surrender cannot be allowed on the basis of the EAW received². Therefore, every EAW is checked following receipt by the DPPA to establish that it meets the formal requirements, the information provided is complete and material conditions to allow surrender are met.

The DPPA refers the case to the ADC except if it is obvious that surrender will be rejected³. The ADC applies the same requirements and conditions as set out in the abovementioned provisions in processing the EAW. In addition, at the time of the evaluation visit it was the practice of the ADC to require the full text of the issuing Member State's applicable provisions (with translation). Consequently, the DPPA systematically asked for it⁴.

A specific issue arose during the evaluation visit in connection with the offences list set out in Article 2(2) of the Framework Decision. According to the information provided, the DPPA checks, on the basis of the factual description in box e), if the issuing judicial authority was correct under its national law in classifying the offence for which surrender is requested as an offence from the list as referred to in Article 2(2) of the Framework Decision. The Netherlands authorities explained that this is a marginal check, used only to assess if the punishable acts can reasonably be regarded as an offence in the ticked category, based on the fact that sometimes the EAW is not accurate. If necessary, the issuing authority is asked to provide additional information. The Netherlands authorities reported that while not all categories on the list are known as such or have been named as such under Netherlands law (racketeering and sabotage), the list had not led to any problems in practice.

¹ This provision is in line with Article 8 of the Framework Decision on the EAW.

² See chapter 4.6 below.

³ See chapter 4.6 below.

⁴ According to the information provided by the Netherlands authorities during the preparation of the report, the Supreme Court ruled on 8 July 2008 that this requirement does neither follow from the framework decision nor from the OLW. Furthermore the Supreme Court declared that requesting the texts of the issuing Member State's applicable provisions would hamper seriously the envisaged simplification of the surrender procedure.

4.4. REQUESTS AND RESPONSES TO REQUESTS FOR FURTHER INFORMATION/CLARIFICATION

The OLW imposes an obligation on the DPPA to offer the issuing authority an opportunity to complete or improve the EAW, or to provide additional information, if it is considered that the EAW does not meet the formal requirements or that particulars supplementary to the EAW are necessary relating to the material conditions that must be met to allow surrender¹.

When the case has reached the court phase, if the ADC decides that further questions must be addressed to the issuing authorities, the hearing is suspended and the DPPA must refer the questions asked by the court to the issuing authority and see to it that they are answered. After the answers have been received, the EAW hearing is resumed. Incidentally the hearing will not be suspended in those cases where the DPPA previously asked for the required additional information and did not receive an answer (or this was not sufficient).

The questions are always put in writing and usually sent by fax and/or email. In addition, the announcement or explanation to the additional questions is also often given by phone. If necessary, the liaison officers or magistrates in the issuing Member State, or Eurojust are called to assist.

Requests for additional/supplementary information/clarification are drawn up in Dutch, English, French or German. For the additional information to be provided, the Netherlands operates the same language regime as for EAWs.

A deadline may be set for the receipt of the information requested. The DPPA will most certainly set a deadline where the date for the hearing by the ADC has already been set and where the request for additional information originates from the ADC.

¹ Article 20 (3) and (4).

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As to the common grounds for these requests, in addition to the systematic request for the full text of the issuing Member State's applicable legal provisions, the Netherlands authorities reported instances in connection with the provision of the guarantees referred to in Article 5(1) and 5(3) of the Framework Decision, as well as of information on circumstances that might be taken into consideration in deciding whether or not waiving the refusal of surrender on the ground that the offence was committed in whole or in part in the Netherlands territory¹. According to the information provided, further/additional information is also frequently requested by both the DPPA and the ADC in order to get a thorough description of the circumstances in which the offence was committed (place, time and role or involvement of the requested person).

4.5. ARREST PROCEDURES

Two situations can be differentiated here:

Provisional arrest on the basis of an SIS alert or an Interpol alert.

The requested person may be arrested following an order of the local competent public prosecutor or deputy public prosecutor based on an EAW/SIS alert or an EAW-based INTERPOL diffusion. In cases of urgency², any investigating officer shall be authorised to arrest the requested person, but is bound to ensure that he is brought before the local competent public prosecutor or the deputy public prosecutor without delay³.

Having heard the person, the public prosecutor or the deputy public prosecutor may order that he be held in police custody for three days; this period may be extended once for three more days. If the requested person is arrested and held in custody outside Amsterdam district, he shall be handed over to the DPPA within those periods⁴.

¹ This possibility is envisaged in Article 13.2 of the OLW. See chapter 4.7 below.

² Article 17.2 of the OLW reads: "If the public prosecutor or deputy... cannot be expected to be present...".

³ Following the provisional arrest of the person sought, KPLN/SIRENE faxes the SIS/INTERPOL alert to the DPPA, which further deals with it.

⁴ Pursuant to the implementing law, there is no need for such a transfer if the requested person consents to surrender before the local public prosecutor, the DPPA decides to place him at the issuing judicial authority's disposal, and the actual surrender can take place within the (extended) time limit for remand in police custody. In practice this applies in cases with Belgium and Germany where the requested person is located in an area at the border with these countries. As to consent to surrender see chapter 4.6 below.

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The DPPA may set the requested person free at any time; otherwise the latter must be brought before the examining judge at the Court of Amsterdam. The examining judge, after hearing, if possible¹, the requested person, may, at the request of the DPPA, order his detention pending the decision on the execution of the EAW. However, pursuant to Article 19 of the OLV, the requested person shall be set free if no EAW, with a translation where necessary, has been received within 20 days of the detention order; extension of this term is not possible. The requested person shall also be set free if so ordered by the ADC, the examining judge or the DPPA, ex officio or at the request of the requested person or his counsel.

Arrest on the basis of an EAW

Pursuant to Article 21 of the OLV, the requested person may be arrested without further formalities on the basis of an EAW which meets the formal requirements laid down in Article 2 of the same Act². Within 24 hours the requested person must be brought before the public prosecutor or the deputy public prosecutor in the district of his arrest, who may order him to be remanded in custody for three days. In these cases the implementing law does not provide for the option of extending remand in police custody; this means that if the requested person is arrested and placed in custody outside Amsterdam district, he has to be transferred to the DPPA within that precise period³.

Having heard the requested person, the DPPA may order him to remain in custody until the court has decided on his imprisonment. The custody order may be lifted at any time, either by the ADC or by the DPPA, ex officio or at the request of the person concerned or his counsel.

In those cases where the requested person has already been provisionally arrested on the basis of a SIS/INTERPOL alert, the provisional arrest shall be converted to (formal) arrest as from the date on which an EAW that meets the formal requirements is received. In this case, the requested person shall be notified of the conversion and informed that detention will continue until the court decides on the execution of the EAW.

¹ According to the information provided, pursuant to the Netherlands general procedural rules, it is not absolutely necessary to hear the person before taking such a decision.

² See chapter 4.3 above.

³ It has to be noted, however, that according to the Provisional Method of Operation, in the light of the established case law that any flaws in the extradition detention are not fatal, and of the possibility to immediately re-arrest the sought person, if the 3-day time limit is exceeded, the requested person should not be released but the DPPA should be consulted on how to proceed.

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As stated above, the person remanded in surrender detention/custody may at any time of the procedure apply to the ADC for his release, whether subject to conditions or otherwise. Pursuant to Article 64 of the OLW, conditions¹ shall only be attached to prevent absconding.

The Netherlands judicial authorities made it clear that in EAW cases these issues are decided based exclusively on the existence of a risk of absconding, whereas in domestic cases additional grounds apply. Furthermore, some of the authorities interviewed confirmed that there are no criteria prescribed by the Netherlands law to assess whether such a risk exists, thus decisions are taken on a case-by-case basis. According to the information provided, it is an established practice that requests to set a person free are taken after examining the circumstances of the person and of the case. The following circumstances are assessed, among others:

- the nationality of the requested person, since the risk of flight is considered to be lesser in the case of a Netherlands national, due to the fact that he, when flying from the Netherlands, will lose his "special status", as referred to in Article 5(3) of the Framework Decision (this does not apply, however, if the requested person has more than only the Netherlands nationality);
- whether the requested person has a fixed address or a permanent job, or is living with his family in the Netherlands;
- the place of the arrest (e.g. arrest at home or at an airport);
- the use or possession of false travelling or identity documents;
- whether the requested person is holder of a bank account outside the Netherlands;
- the nature and seriousness of the offence underlying the EAW.

The Netherlands authorities reported that, throughout the application of the OLW, cases have occurred where persons sought who had been released under certain conditions and whose surrender had been authorised by the ADC could not subsequently be arrested within the 10-day time limit prescribed for surrender. A number could be arrested later, but some remained at large. The latter category is estimated to comprise in total some 28 cases².

¹ They may comprise the following: the obligation to comply with all notifications issued by the police and judicial authorities, the obligation to remain at a permanent address, the prohibition to leave Netherlands territory, the surrender of the passport and/or other available travel documents, the obligation to report periodically to a police station, and, in some cases, payment of bail.

² According to the information provided, in two cases the person sought, after he failed to appear at the ADC to hear the decision on surrender, reported to the issuing judicial authorities in Germany of his own accord.

4.6. SURRENDER DECISION/ GUARANTEE REQUIREMENTS AND GUARANTEES PROVIDED

The procedure leading to the surrender decision varies depending on whether or not the requested person consents to surrender.

- Abbreviated procedure.

At the time of the (provisional) arrest, the requested person is already informed by the police of the possibility of agreeing to surrender. He may give his consent at any moment before a judicial authority until the day before the hearing of the person by the ADC¹.

Before making such a declaration, the requested person must be informed of its possible consequences, and, specifically, that it implies an automatic waiving of entitlement to the speciality rule². The requested person has the right to be assisted by an interpreter and a legal counsel; if he appears without any counsel, the judicial authority before which the consent is to be given may draw his attention to this. The consent will become legally effective only if it is put on record, and once given cannot be revoked.

In consent cases the DPPA is exclusively competent to decide on surrender³. The decision to place the requested person at the disposal of the issuing judicial authority shall follow within 10 days of the consent having been given, unless the surrender cannot take place in accordance with one of Articles 6.2 and 9-11, there are criminal proceedings under way in the Netherlands against the requested person, or a Netherlands judge has delivered a criminal judgment against him which is still enforceable, in whole or in part⁴. This covers practically all the instances in which the EAW has to be refused pursuant to the OLW, with the sole exception of those covered by Article 13 of the OLW (territoriality).

¹ Article 39.2 of the OLW.

² Article 39.4 of the OLW.

³ Pursuant to Article 39.5 of the OLW, "The examining judge before whom the declaration is made shall immediately send the record of it to the public prosecutor".

⁴ Article 40 of the OLW.

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- Standard procedure.

If the DPPA is already of the opinion that in a particular case an EAW cannot lead to surrender, either because, after requesting additional information, it remains incomplete, or a ground for refusal applies, he may refuse to execute the EAW without submitting the case to the court¹. In such cases, the issuing authority must be notified accordingly². The public prosecutors interviewed at the DPPA explained that they exercise this power only when it is absolutely clear that a ground for non execution as defined by the OLW applies, otherwise the case is brought to court.

In all other instances, no later than the third day after receipt of the EAW, the DPPA shall refer the case to the ADC³, which shall hold a hearing. Attendance at this hearing by the public prosecutor is mandatory. The requested person is obliged to appear only when so ordered by the court⁴. He may be assisted at the hearing by his legal counsel and, where appropriate, by an interpreter; if it appears that the requested person does not yet have a legal counsel, the presiding judge shall request the legal aid office to appoint one. At this hearing, the court shall rule on the detention of the requested person.

The ADC delivers the decision on surrender within sixty days of the requested person's arrest (or the conversion of the provisional arrest into arrest) in a separate hearing. If the consent of another Member State or a third state is required, that time limit takes effect on the day that consent is obtained.

¹ Article 23.1 of the OLW.

² No specific information was available on the number of cases where the EAW had been withdrawn by the issuing authority following contacts by the DPPA.

³ Article 23.2 of the OLW reads: "In all other cases, no later than the third day after receipt of the European arrest warrant, he (the DPPA) shall make a written request for the court to deal with the arrest warrant. For this purpose he shall pass to the court the European arrest warrant with translation and any supplementary information received from the issuing judicial authority".

⁴ In the Netherlands the general rule is that any defendant or person sought for surrender/extradition is not obliged to appear at the court hearing. However, the court itself may always decide on a case-by-case basis that the person sought should appear at the hearing where it considers it necessary.

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In line with Article 17(4) of the Framework Decision, the implementing law provides that the ADC may exceptionally extend the term of sixty days by a maximum of thirty days. In addition, if a verdict has not been given within the latter period, the ADC may extend the term indefinitely, while setting conditions for simultaneous suspension of the detention of the requested person¹.

According to the information provided in the replies to the questionnaire, due to the increase in the number of incoming EAWs² the ADC has not been able to comply with the 60-day limit in a significant number of cases since 2006. It is also reflected in the replies that from the introduction of the EAW in the Netherlands in 2004, the average duration of these cases has steadily increased³. Moreover, according to the information available⁴, in 2006 the 90-day time limit was not respected in 22 cases⁵. The Netherlands authorities recognised that, although additional days for surrender hearings were added to the schedule in 2007⁶, this "backlog" remained an issue⁷.

¹ Article 22.4 of the OLW.

² The number of EAWs which the DPPA received in 2004 (7.5 months) was: 113, in 2005: 434, in 2006: 498, and in the first half of 2007: 233. The number of EAWs processed by the ADC was in 2004: 76, in 2005: 252, in 2006: 324, and in the first half of 2007: 178.

³ 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.

⁴ 11371/5/07 - Replies to the questionnaire on quantitative information on the practical operation of the European arrest warrant - Year 2006.

⁵ Four cases were reported in that connection involving offences for which the requested person could also be prosecuted in the Netherlands, where the person sought filed a complaint to a court of appeal, asking for his prosecution in the Netherlands to be ordered. Initially the ADC decided that in such cases a decision on surrender could not be taken pending the complaint procedure, with the result that the EAW process was delayed for months. Meanwhile the court of appeal had declared the complainant's claim inadmissible, since this procedure complaining about the decision by the public prosecutor to terminate (further) prosecution of a suspect is designed in the Code of Criminal Procedure to serve interested parties, particularly victims of crime, not suspects. This finally led the ADC to adopt the criterion that such complaint procedures should no longer postpone its decision on surrender.

⁶ In 2006 the capacity for surrender hearings before the ADC was increased from 5 to 6 sessions per month. For 2008 it has been agreed with the ADC that it is to be increased further to 7 sessions per month.

⁷ The Netherlands authorities explained that in 2008 a permanent expansion of the days for surrender hearings is envisaged, in response to the increase in the number of EAWs.

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This information was confirmed during the evaluation visit. The public prosecutors interviewed at the DPPA stressed that the remedy to this situation should be linked to the increase not only of the trial capacity of the ADC, but also of the human resources available at the DPPA¹. They explained that, in light of these circumstances, they had started to prioritise their assignments.

The judges at the ADC interviewed indicated that, generally speaking, the court had been able to deal with those cases where the requested person remained in detention within the 90-day time limit, and that use was made in few cases of the possibility to extend this term indefinitely.

The Netherlands authorities explained that the national member to Eurojust had been informed of the problem of the lack of capacity at the ADC and it was agreed that under these circumstances it was not appropriate to make a report for each case separately. Therefore, Eurojust is now informed on a regular basis of those cases in which the term was exceeded. Cases where the term may be exceeded or where it has already been exceeded for reasons other than the court schedule for hearings (e.g. because the issuing judicial authority has not responded to a request for additional information), are reported on a case-by-case basis to the national member to Eurojust, where his assistance and that of his colleague from the issuing Member State is requested.

GUARANTEES REQUIRED AND GUARANTEES PROVIDED

The Netherlands demands guarantees in the following two instances:

- In prosecution cases, if the EAW concerns a national or a person considered to be equal to a national², a guarantee is required that he will be able to serve in the Netherlands the custodial sentence or detention order imposed on him in the issuing Member State (return guarantee)³. This comprises the guarantee that the application by the Netherlands of the procedure set out in Article 11 of the 1983 European Convention on the transfer of sentenced persons (conversion of the sentence) following the return of the surrendered person will not prevent the return.

¹ According to the information provided, 4 public prosecutors (who all work part time on EAW cases, this leads to a total capacity of 2,5 prosecutors) and 6 assistant prosecutors (all of them full time) deal with EAW-related matters within the DPPA.

² See chapter 4.9 below.

³ Article 6.1 of the OLW.

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The DPPA shall notify the Ministry of Justice of any surrender in which a guarantee for return has been issued¹. The Ministry of Justice ensures that this guarantee is fulfilled.

- Guarantee to have a retrial in those cases envisaged in Article 5(1) of the Framework Decision (judgment *in absentia*).²

In principle the implementing law operates at a higher standard than that of the Framework Decision, by excluding this guarantee only in cases where the person concerned has been summoned in person or otherwise “*personally*” notified of the date and place of the hearing. In this respect, the public prosecutors interviewed at the DPPA indicated that when the first option in box (d) of the form is ticked, usually no additional information is required from the issuing authority, unless there are serious doubts that the person was aware of the date and place of the hearing. The ADC regularly checks if, and to what extent, the person sought has actually taken cognisance of the notification that was not issued to him in person, but otherwise.

As to the scope of this guarantee, the Netherlands authorities explained that the indication that the person sought is entitled to appeal is often found insufficient by the ADC, and therefore the issuing authority is asked to give its express commitment, with an explanation, to guarantee a new trial. Instances with Belgium were reported in that connection³.

The expert team was told that, due to basic trust in the other Member States' issuing authorities, compliance with this guarantee was not monitored by the Netherlands authorities.

¹ Article 6.4 of the OLW.

² Article 12 of the OLW.

³ The Netherlands authorities reported that additional problems had arisen from the fact that domestic law was being interpreted differently by the various Belgian judicial authorities competent to issue this guarantee. They also reported that in January 2007, a bilateral meeting between the Netherlands and Belgium took place in Eurojust, in the course of which it was agreed that the Belgian authorities would draw up a circular to promote a uniform interpretation of the law. According to the information provided by the Netherlands authorities during the preparation of the report, this circular was drawn up but did not lead to a uniform approach by the Belgian prosecutors. More bilateral contacts on this issue followed. In a meeting of Procureurs généraux from Belgium and the Netherlands, information was provided that an amendment to the Belgian law, which would end the diversity of approaches, is expected to come into effect in the beginning of 2009).

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Since the implementing law prescribes that the text of the guarantee must be included verbatim in the decision on surrender¹, the ADC is cautious as regards the wording and the precise terms of the guarantees.

4.7. REFUSALS TO SURRENDER

All grounds for non-execution envisaged as optional in the Framework Decision are implemented as mandatory in the OLW². However, exceptions are possible in relation to the prohibition of surrender on the ground of non-execution laid down in Article 4(2) of the Framework Decision, in cases where the Minister of Justice, on the advice of the public prosecutor's office and prior to the decision on surrender, orders the prosecution to be suspended³. Exceptions are also possible in relation to the ground for refusal envisaged in Article 4(3) (first part -executing judicial authorities decide not to prosecute) of the Framework Decision, in cases where prosecution is suspended in the Netherlands, either because the Netherlands criminal law appears inapplicable or because trial abroad is preferred⁴. Furthermore, at the DPPA request, a refusal to surrender based on the grounds envisaged in Article 4(7)(a) and (b) of the Framework Decision shall be waived, unless the court rules otherwise⁵.

The ground for non-execution envisaged in Article 4(1) of the Framework Decision has not been implemented, since the Netherlands legislation does not provide for amnesties.

As already mentioned, in 2006 the Netherlands judicial authorities refused execution of 72 EAWs. The following tables summarise the application of the grounds for non-execution according to the information provided:

¹ Article 28.5 of the OLW: "A verdict as per this Article shall state... the verbatim texts of the guarantees given by the issuing judicial authority as per Articles 6.1 and 12". According to the information provided, this provision is intended to avoid any uncertainty for the requested person or the issuing authorities about the conditions under which the surrender is granted.

² Article 9.1.

³ Article 9.2 of the OLW.

⁴ Article 9.3 of the OLW.

⁵ Article 13.2 of the OLW reads: "...unless, in the opinion of the court, the public prosecutor could not reasonably make such a request".

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REFUSAL BY THE DPPA	
Incompleteness of the EAW	2
Acts not punishable under the Netherlands law	5
Existence of domestic proceedings for the same act	2
The Netherlands nationals (execution cases)	9
Territoriality, “where previous extradition request had been refused”	1
Judgment in absentia, where the issuing authority did not provide a guarantee	1
The Netherlands nationals (prosecution cases), where the issuing authority did not provide a guarantee	3
Person sought not found in the Netherlands	1
Identity of the requested person unclear	1
Previous extradition request refused	2
Previous extradition request granted for the same offence	1
EAW concurred with a pending extradition request for the same offence	1
Human rights clause (undue delay and lack of an effective remedy)	1
Offence carried less than 12 months imprisonment	3

REFUSAL BY THE ADC	
Incompleteness of the EAW	7
Acts not punishable under the Netherlands law	1
Lapse of time	2
The Netherlands nationals (execution cases)	1
Territoriality (although the DPPA had expressly requested the surrender)	4
Judgment in absentia, where the guarantee provided was considered insufficient	2
Human rights clause (undue delay and lack of an effective remedy)	2
EAW withdrawn by the issuing judicial authority	16
Person sought did not appear in court and it was not known whether he was in NL	2
Delay in forwarding the EAW to the court	1

A number of questions were raised by the experts team in relation to the functioning in practice of certain specific grounds for refusal as laid down in the implementing law.

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Scope of the EAW

In prosecution cases, the OLW requires¹, for offences not included in the list, that the act is punishable under the Netherlands law by a maximum custodial sentence of at least twelve months. As to conviction cases, the Netherlands implementing law requires² not only that the sentence passed against the requested person is of at least 4 months but also that the related offence is punishable, by virtue of the law of both the issuing Member State and the Netherlands, by a custodial sentence of at least 12 months³. The experts team noted that this regime is not in line with Article 2(1) and 2(4) of the Framework Decision. The Netherlands authorities confirmed that they are not considering amending their legislation in this respect.

In that connection during the evaluation visit the question was put as to how Article 7.1.b. of the OLW was to be interpreted, since in the view of the experts its wording is not clear enough when saying that surrender shall be allowed for "*serving of a custodial sentence of four or more months*", in the sense that it could provide a basis for considering that the 4-month period refers not to the duration of the sentence imposed but to the time to be actually served. The Netherlands authorities confirmed that it is their practice to agree to the surrender whenever the already mentioned conditions regarding the duration of the sentence imposed and the sentence applicable are met, irrespective of the remaining sentence to be served.

Breach of fundamental rights

Pursuant to Article 11 of the OLW, surrender must be refused where “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 on Human Rights. The Netherlands authorities stressed that the wording of this provision is meant to ensure that very strict standards apply for this ground for refusal to be taken into consideration. Three cases were reported in 2006 (see tables above), based on alleged violation of Article 6 ECHR (undue delays together with inexistence of effective remedy)⁴.

¹ Article 7.1.a.2.

² Article 7.1.b.

³ This was already stressed by the European Commission in its first report on the implementation of the Framework Decision. The system adopted by NL was considered contrary to the Framework Decision, in that under the latter there is no longer a link between the length of the actual and potential punishment.

⁴ According to the information provided this ground for non execution has not been applied by the ADC since 2006.

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Irrefutable and immediate proof of innocence

According to the implementing law, if the requested person pleads not guilty, the court shall examine this plea. If the court finds that there can be no suspicion that the requested person is guilty of the acts for which his surrender is requested, surrender shall be refused. If surrender is granted despite this plea, the court's findings hereof shall be stated in the decision on surrender¹.

This issue was already stressed by the European Commission in its first report on the implementation of the Framework Decision. The Commission was of the view that the possibility to refuse an EAW on this ground is contrary to the Framework Decision, since it requires an examination of the substantive case, and is also contrary to the principle of mutual trust between Member States. In its comments to that report, NL alleged that this ground for refusal was included in the OLW in order to prevent a requested person being surrendered if it is immediately obvious that he could not have committed the offence. The Netherlands also argued that extradition practice showed that this defence was only upheld in exceptional cases, adding “where it happens, the Netherlands public prosecutor will, moreover, upon questioning the requested person, immediately contact the issuing judicial authority in order to inform it, thereby providing the issuing judicial authority with an opportunity to withdraw the EAW, thus obviating the need for refusal”².

In replying to the questions posed by the evaluation team on this matter, the Netherlands authorities noted that very high standards apply, in the sense that *irrefutable and immediate* proof of innocence *at* the hearing is required from the person concerned for this ground for refusal to be considered. They stressed that only in one case had this defence been successful throughout the time the EAW had been operational.

¹ Articles 26.4, 28.2 and 28.6 of the OLW.

² 7751/05 - Member States' comments to the Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, page 31.

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- Incompleteness of the EAW

In their replies to the questionnaire, the Netherlands authorities stressed that in some cases surrender was refused because the information about the place and time of the offence and the degree of involvement of the requested person was considered insufficient, even after receipt of additional information. In that connection it was noted that cases in which the ADC (partially) refused the surrender usually involved participation in a criminal organisation.

The Netherlands authorities rejected any attempt to present such an approach as an indirect check on the existence of evidence against the requested person, while emphasising that a clear description of the circumstances in which the offence was committed forms the basis for the proper application of the speciality rule.

- The Netherlands nationals: see chapter 4.9 below.

4.8. APPEAL PROCEDURES AND THEIR IMPACT ON TIME LIMITS

The decision of the ADC is final; neither the requested person nor the DPPA has a right to appeal.

The Prosecutor-General may lodge an appeal with the Supreme Court on purely legal issues, in the interest of the proper administration of law. Such an appeal does not suspend in any way the surrender of the persons requested on the basis of an EAW pending the appeal. In such instances, the decision of the Supreme Court has no effect on cases already tried by the ADC.

The decision of the DPPA refusing to execute an EAW without referring it to the court¹ is not subject to review.

¹ See "Standard procedure" in chapter 4.6 above.

4.9. OWN NATIONALS AND YOUTH ARREST AND SURRENDER ISSUES¹

Own nationals²

The Netherlands opted for regulations applying both Article 4(6) and Article 5(3) of the Framework Decision. Such provisions apply to the Netherlands nationals and long-term residents as defined in the implementing law³.

The European Commission already stressed in its first report on the implementation of the Framework Decision that the Netherlands would not surrender any national for the prosecution of an offence that is not such under the Netherlands law, on the grounds that there is no possibility under the relevant treaties and domestic law to transfer a person where the requirement of double criminality has not been met⁴.

As to conviction cases, pursuant to Article 6.3 of the implementing law, the sentence imposed in the issuing Member State shall be converted in line with the procedure established in Article 11 of the 1983 Convention on the transfer of sentenced persons⁵. The issuing State can base its request on the 1983 Convention or on any other applicable convention on execution of sentences that may apply. The requested person is not arrested and the issuing Member State is informed of the need to request the execution of the sentence.

¹ As to own national arrest issues, see chapter 4.5 above.

² According to the information provided in 11371/07 and 10330/08 - Replies to the questionnaire on quantitative information on the practical operation of the European arrest warrant, on the basis of an EAW the Netherlands surrendered 83 nationals and 96 nationals and 5 persons who were considered as equivalent to nationals in 2006 and 2007 respectively.

³ Article 6.5 : "... an alien with a residence permit for an indefinite time, where he can be prosecuted in the Netherlands for the acts underlying the EAW, provided that he is expected not to forfeit his right of residence as a result of a sentence or order imposed on him after surrender".

⁴ This stems from Article 6.1 of the OLW, according to which surrender of a Netherlands national for the purposes of conducting a criminal prosecution may be allowed if it is guaranteed that, if he is given a custodial sentence in the issuing Member State "*for acts for which surrender can be allowed*", he will be able to serve that sentence in the Netherlands.

⁵ This was also criticised by the European Commission: "the practical result is that, contrary to the Framework Decision's provision, execution of the sentence is subject to the double criminality principle for nationals and permanent residents".

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The regime described above for conviction cases applies whenever the judgment is final. This includes, as regards sentences rendered in absentia, those instances where the person concerned was summoned or informed in person of the date and the place of the hearing, or had a real opportunity to exercise a legal remedy against the judgment, otherwise the Netherlands national will be surrendered only for the purpose of prosecution, provided that a retrial guarantee and a return guarantee pursuant to Article 11 and 6.1 of the OLW respectively are given.

A number of questions relating to these matters were discussed during the evaluation visit. The Netherlands authorities reiterated their arguments in relation to the European Commission's critical comments in the sense that, in fact, the Netherlands' position on refusal to surrender and/or to execute sentences passed against the Netherlands nationals or persons deemed equivalent to nationals in the absence of double criminality only concerns offences other than those listed in Article 2.2 of the Framework Decision, since the latter are generally considered to come under criminal law in NL. They also argued that the Framework Decision contains no provision specifying how nationals who have been surrendered subject to a return guarantee are sent back to the executing Member State, or concerning the transfer of the execution of the sentence.

Regarding prosecution cases, as already mentioned, the return guarantee must specifically include the issuing Member State's guarantee that the application by the Netherlands of the procedure envisaged in Article 11 of the 1983 Convention following the return of the surrendered person will not prevent the return.

The experts were advised that the return guarantee is perceived by NL as a "guarantee between authorities" in the sense that it is understood that it only operates upon the consent of the surrendered person to be sent back to the Netherlands. The Netherlands authorities noted that, according to their records, a number of the Netherlands nationals who had been surrendered did not ask for consular assistance after being sent to the issuing Member State (in some cases the reason for that might be that the individual had more than one nationality). The officials interviewed observed that quite often the issuing authorities do not inform of the completion of the prosecution against the Netherlands nationals surrendered by the Netherlands. It was also stressed that the time between the end of the trial and the time the issuing Member State initiates the preparation for return varies, and that the length of time until the actual return causes frequently complaints. The Netherlands authorities explained that, as a result of all these factors, measures have been taken for monitoring the return of nationals more closely.

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The Netherlands authorities provided the experts team with statistical information showing that a significant number of own nationals surrendered following an EAW were released or conditionally released shortly after the surrender, or spent more than one year (some even more than three years) in pre-trial detention after the surrender¹. The Netherlands authorities expressed great concern at such situations, and observed that they might wipe out support in the Netherlands society for the Framework Decision. They observed that in several cases, the use of less drastic means of mutual legal assistance might have been of equal assistance to the issuing authority.

The Netherlands authorities reported that in the ADC the issue had been raised as to whether in conviction cases it is in conformity with the EU law to apply to own nationals different rules than to EU-citizens from another MS who are residing on the territory of the executing MS².

Youth surrenders³

At the time of the evaluation visit no issues had been reported.

4.10. ACCESSORY SURRENDER

The implementing law does not contain a relevant provision on accessory surrender. This results in the ADC partially refusing to execute EAWs that include offences which do not meet the requirements laid down in Article 2(1) of the Framework Decision.

4.11. SPECIALITY

No specific issues in connection with this matter were reported.

¹ For instance, in Belgium in 50% of the cases the surrendered Dutch national was released shortly after the surrender without a verdict or conditionally released without any follow up.

² The Rechtbank Amsterdam lodged on 21 March 2008 a request for a preliminary ruling (case C-123/08, Wolzenburg). This issue had been already subject of a request for a preliminary ruling from the Oberlandesgericht Stuttgart (Germany), lodged on 18 February 2008 (case C-66/08 Kozlowski).

³ According to Article 10 of the OLW, surrender shall be refused if the requested person had not reached the age of 12 at the time when the offence was committed.

4.12. ONWARD SURRENDER/EXTRADITION

At the time of the visit no difficulty arising from onward surrender had been recorded. The Netherlands authorities reported no experience of cases involving onward extradition.

4.13. TEMPORARY/CONDITIONAL SURRENDER¹

Surrender is not allowed if and as long as the person requested is subject to criminal prosecution in the Netherlands, or a criminal judgment delivered by a Netherlands judge is still enforceable in whole or in part. However, the Minister for Justice, on the advice of the DPPA, may rule that the requested person be temporarily placed at the disposal of the issuing authority and set the conditions for that².

The Netherlands authorities explained that the reason for assigning this role to the Minister for Justice³ is linked to the institutional structure of the Netherlands public prosecution service, which prevents the DPPA, as EAW executing authority, from taking any decision that has a direct bearing on criminal proceedings conducted by another public prosecutor.

In practice, the DPPA consults with the issuing judicial authority and the public prosecutor charged with the Netherlands criminal proceedings, during the preparation of the court hearing on the EAW. During these consultations, the possibility of conditional surrender and the conditions to be imposed on the issuing Member State are discussed (i.e. a formal specific request from the issuing judicial is not required). If necessary for the progress of the prosecution of the offence on which the EAW is based, and if the conditional surrender does not obstruct the Netherlands criminal prosecution or the execution of a Netherlands sentence, the Minister of Justice is advised to accede to the temporary surrender of the requested person. The Minister for Justice sets the conditions, which DPPA then agrees with the issuing judicial authority. Afterwards the temporary surrender may take place.

¹ According to the information provided, since 2004 there have been 38 cases in which a person sought was conditionally surrendered. In at least 30 of these cases the person sought was a Netherlands national.

² Article 36(1) and (2) of the OLW.

³ Article 24(2) of the Framework Decision reads: "... The *executing judicial authority* may temporarily surrender the requested person to the issuing Member State under conditions to be determined by mutual agreement between the executing and the issuing judicial authorities...".

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Instances were reported¹ where problems arose after the issuing judicial authority indicated that the detention condition had lapsed following the conditional surrender. As a consequence of that, the Netherlands now expressly imposes the condition that the person concerned must remain detained for the duration of the temporary surrender, insofar as desirable or possible according to the issuing judicial authority².

4.14. MECHANICS OF SURRENDER (INCLUDING TEMPORARY AND CONDITIONAL SURRENDER) OF REQUESTED PERSONS

The DPPA, in consultation with the issuing judicial authority (directly or via SIRENE), sets the place and date at and on which the surrender is to take place³.

Where necessary for actual surrender, the public prosecutor may order the detention of the requested person for a maximum of three days. If surrender cannot take place within this three-day period, the public prosecutor may extend the detention once only for a further three days. After that, only the court may extend the period of detention for a maximum of ten days, at the public prosecutor's request. These periods do not run during the time for which the person concerned has evaded further execution proceedings.

¹ With Germany and Belgium.

² According to the information provided, while the specific conditions are adjusted to the circumstances of the case, the Netherlands Minister for Justice, in addition to detention during temporary surrender, usually requires the following:

- the conditional surrender covers only his prosecution for offences for which the conditional surrender is permitted (speciality rule);
- the duration of the detention to which the surrendered person in the issuing Member State is subject between the time of his departure and his (possible) return to the Netherlands is deducted from the sentence imposed in the issuing Member State;
- should the surrendered person escape from detention after the conditional surrender or should he be released, the issuing Member State shall have prime responsibility for capturing him;
- the surrendered person will be given the opportunity at all times to attend the criminal proceedings in the Netherlands. The Netherlands authorities will inform the issuing judicial authority well in advance of the Netherlands criminal proceedings of the date of the criminal proceedings to ensure that the presence of the surrendered person can be arranged in time;
- as soon as the investigation in the issuing Member State no longer requires the presence of the surrendered person, he will be returned to the Netherlands in order for the Netherlands prosecution or execution of the sentence to be continued, unless decided otherwise by the Netherlands authorities.

³ In cases of an abbreviated procedure with Belgium and Germany, where the requirements already mentioned in chapter 4.5 above are met, it is the local public prosecutor who arranges the transfer.

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According to the information provided, the ten-day limit for surrender following the court decision was usually observed in cases where the person sought was in detention¹ and in all cases where the person sought was detained immediately after the ADC issued its decision.

The Netherlands authorities also reported 47 cases in 2006 where the surrender took place after the 10-day time limit due to the fact that the requested person had evaded arrest in cases in which he had been conditionally released under the surrender procedure.

Another type of case was reported which might lead to the time limits for surrender being exceeded in relation to the possibility for the requested person to initiate interim injunction proceedings².

According to the information provided, there were 5 such cases in 2005 and 2 in 2006. The Netherlands authorities explained that in the first half of 2007 the Ministry of Justice and the DPPA decided to ensure that interim injunction proceedings take place within the ten-day limit wherever possible.

In the replies to the quantitative questionnaire (2006) on the practical operation of the European Arrest Warrant³, 18 cases were reported in which the person had to be released in accordance with Article 23(5) of the Framework Decision. In subsequent correspondence, the Netherlands authorities explained that this figure was based on wrong information, since this provision has almost never been applied.

¹ The average length of the period from the judgment to the physical surrender was in 2004: 13 days, in 2005: 8 days, in 2006: 9 days and in the first half of 2007: 9 days.

² Under Netherlands law any decision not taken by a court and for which the law provides no special provisions for instituting a specific remedy, may be the subject of interim injunction proceedings in an urgent procedure before a civil court. This applies to decisions taken by the DPPA (e.g. when the person sought cites humanitarian reasons for postponing the physical surrender) or the Minister for Justice (namely when the person sought wishes to oppose his conditional surrender) concerning physical surrender. The judge in interim injunction proceedings is only authorised to make a marginal assessment of the case, namely if the contested decision could reasonably have been taken.

³ 11371/5/07.

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4.15. SURRENDER OF REQUESTED PROPERTY

A specific request by the issuing authority is required, except for personal items carried by the requested person himself.

Seizure of property other than that found in the possession of the requested person (e.g., searches) does not fall within the scope of the EAW and is dealt with in accordance with the provisions applicable to mutual legal assistance.

4.16. CONFLICT OF EAWs/EXTRADITION REQUESTS

The implementing law provisions on conflicts of EAWs are in line with the Framework Decision. The circumstances listed in the latter as being of special interest when deciding on which of the concurrent EAWs shall be executed are supplemented in the OLW¹ with the following two conditions: the degree to which the nationality of the person may hinder subsequent surrender, and the possibility that, once the requested person has moved to the territory of one of the Member States concerned, the judicial authorities of that Member State may then place him at the disposal of the issuing judicial authority of another Member State.

4.17. EXPENSES

At the time of the evaluation visit no issues had been recorded in respect of the payment of expenses associated with EAW procedures.

4.18. MISCELLANEOUS COMMENTS

Prohibitive validity flags

A prior check of incoming SIS alerts for the existence of limitations arising from domestic law is made by SIRENE officials. As a result of such a check, the SIRENE bureau may add a restrictive validity flag to the alert. This may cover dual criminality (e.g. alimony, which is considered to be a civil case under NL law). This action is performed by SIRENE officers on the basis of their own knowledge (they claimed to have legal knowledge) and experience (consideration being given to the type of case).

¹ Article 26(3).

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The SIRENE bureau systematically flags alerts referring to the execution of sentences passed against the Netherlands nationals.

After flagging, the DPPA is informed.

5. TRAINING PROVISIONS

Training for judges and prosecutors

Staff working at DPPA receive intensive training and are coached by an experienced colleague and mentor in everyday EAW practice. For ADC staff, too, training is mostly given internally, with practical coaching by experienced colleagues and with the support of a police official specialised in this field. No refresher training is organised internally at the DPPA or the ADC; topical developments are followed in the everyday execution activities and communicated internally. There is a specific database with all the verdicts of the ADC.

As to language training, staff at DPPA are given an opportunity to take language courses with certified private language institutes paid for by the employer. Language proficiency is one of the criteria for the recruitment of DPPA staff. A good command of German and English is required; most of the staff members also have a command of French.

It was stated that public prosecutors from DPPA and judges from ADC had taken part in numerous international meetings organised by EU Presidencies, the European Judicial Network, Eurojust and the Asser Institute. Public prosecutors from DPPA have participated in COPEN EAW experts group meetings in Brussels, as well as in activities organised in the framework of Twinning projects with Romania and Bulgaria.

The SSR, the national training institute for members of the judiciary (public prosecutors, judges), organises a course on international criminal cooperation three times a year for public prosecutors and the administrative staff of public prosecutors' offices. Explanations of the OLW are included in the programme. This course is mandatory for public prosecutors.

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Every year the SSR also provides a more in-depth course on international criminal cooperation, "topical developments in international criminal law", for staff involved more intensively with international cooperation, such as staff at IRCs, staff at DPPA and staff working in the field of more serious, cross-border crime. This course is accessible to all members of the judiciary. Two of these courses were organised in cooperation with training institutes in Germany and Belgium, with participants including the Netherlands, German and Belgian public prosecutors and examining judges. The EAW forms part of this training.

As already mentioned, a Provisional Method of Operation was drawn up, which provides guidance for the issue of EAWs¹, and on certain issues concerning incoming EAWs (namely transfer of requested persons and coordination between the local prosecutors and the DPPA).

Training for DINPOL staff

DINPOL staff receive initial in-house 3-week SIRENE training, which includes the OLW. The objective of this training is to ensure the right prioritisation, interpretation and handling of notifications regarding SIS alerts, including EAWs, both at national and international levels. Staff working at DINPOL must be able to communicate in at least two foreign languages, including English; additional language training courses are available for staff members.

Training for lawyers

According to the information provided, mandatory training (4 hours) on extradition and EAW-related matters is required for a lawyer to be registered in the list used by the Legal Aid Service in the district of Amsterdam for the appointment of defence counsels in EAW procedures. However, lawyers other than those included in such a list may also appear at the ADC in EAW cases when the case is generated in another district (i.e. the requested person is (provisionally) arrested in another district).

¹ See chapter 3.3 above.

6. DEFENCE PERSPECTIVES

Where the requested person does not have a defence counsel, he is assigned one from those registered with the Legal Aid Service following a rota scheme. Legal assistance within the framework of EAW procedures covers all legal assistance required from the moment of the hearing on custody before the public prosecutor up to the physical surrender. If the requested person cannot afford a lawyer, legal assistance by the assigned defence counsel will be paid for by the State.

An interpreter will be arranged for the requested person, free of charge, whenever required or needed. This means that an interpreter will be present at the police station if so required following the arrest of the person, when his case is brought before the public prosecutor or examining judge, when making a statement to the effect that he agrees to the simplified procedure, and at every session of the ADC attended by the person sought. In addition, the police make use of the possibility of a telephone conference, which enables the interpreter to assist the requested person via a telephone link.

The expert team had the opportunity to meet a number of lawyers who were registered in the above-mentioned specialists list used by the Legal Aid Service in the district of Amsterdam. No difficult issues in relation to the procedural rights of individuals and possibilities of defence within the limits of the EAW procedure were reported. The performance of judicial authorities dealing with EAW cases was also assessed positively.

The lawyers interviewed complained, however, that not all ADC judgments were being published (as they were in the past). Difficulties were also reported in relation to the fact that these judgments are cited by the defendant's name when used by the ADC as a ground for its verdict, whereas such a name is omitted when they are published¹.

¹ According to the information provided during the drafting of the report, in the Netherlands no systematic publication of all judgments (civil, criminal or administrative) exists. A selection is made by the courts themselves based on the criterion that the judgment to be published is considered to be relevant because it shows developments in jurisprudence. Prior to publication of any judgment, personal details are removed with a view to protecting the privacy of individuals.

As to EAW matters, when the OLW came into force in 2004, all decisions of the ADC were published. After some two years the ADC had established a certain jurisprudence and, since then, it follows the general practice on publishing judgments as described above.

As to how the Framework Decision has been transposed in the Netherlands, the majority of the lawyers interviewed were critical about the fact that no appeal is possible in this kind of procedure. They also considered it useful to break the automatic link between consent to surrender and renunciation of entitlement to the speciality rule. Their main criticism, however, related to how the EAW is used by some Member States, meaning that sometimes EAWs are used for non-serious offences, or disregard other forms of assistance more appropriate to the circumstances of the case, which, in their view, may undermine citizens' confidence in judicial cooperation. There was also criticism of the difficulties experienced by the lawyer assisting the requested person in the executing country in contacting the issuing judicial authority directly.

7. CONCLUSIONS

The experts team would like to stress the efficient and informative manner in which the evaluation visit was planned and conducted by the Netherlands authorities. A comprehensive agenda was prepared, which provided the team with an opportunity to meet all the relevant actors. The quality and detailed nature of the information supplied were remarkable. The team also appreciates the professionalism of the experts interviewed and their readiness to provide answers to any questions, as well as the frankness of the discussions. All these factors together enabled the team to fulfil the objectives of the evaluation visit and acquire a thorough overview of the operation of the EAW in the Netherlands.

7.1. GENERAL CONCLUSIONS

7.1.1. The Netherlands implementing law is mostly in line with the Framework Decision.

Divergences can be observed, however, with a potential impact on EAW procedures (this is the case, for instance, with the provisions on the scope of the EAW in conviction cases).

7.1.2. The experts team was left with the impression that the Netherlands has set up a well organised and efficient working system: procedures put in place are adequate for the purposes of the Framework Decision, professionals involved in the process are highly qualified, and generally speaking resources at their disposal are appropriate. The recommendations laid down below aim at further improving the already good working system put in place.

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7.1.3. The Netherlands practitioners assess positively and are aware of the advantages of the EAW compared with the extradition system. They are highly critical, however, of what they deem the disproportionate use occasionally made of this instrument when applied to non-serious offences, or when used where other forms of assistance would have been more appropriate to the circumstances of the case.

7.1.4. Enhancing mutual trust, e.g. by promoting exchanges with judicial authorities in other Member States, is considered a must by practitioners involved in processing EAWs for the purposes of improving the operation of the system as a whole.

7.1.5. The experts team shares the Netherlands authorities' view that it would be advisable to promote further regular use of the EAW experts group operating under COPEN, to discuss problems that may hamper the operation of the EAW in practice and find solutions to such problems.

7.2. CONCLUSIONS IN RESPECT OF THE NETHERLANDS' ACTIVITIES AS AN ISSUING MEMBER STATE

7.2.1. Issues

7.2.1.1. Update of the Provisional Method of Operation

The Provisional Method of Operation, which provides guidance for the use and completion of the EAW form, was edited prior to the entry into force of the implementing law. During the interviews it emerged that these guidelines had become outdated in light of the practical experience gained in the years following the implementation of the EAW.

7.2.1.2. Quality control

The quality of outgoing EAWs varies. This may be explained by the fact that every public prosecutor is competent to issue an EAW, but not all public prosecutors have the necessary experience in this field. In addition, the completion of the EAW form is the sole responsibility of the issuing public prosecutor, and therefore there is no quality check by third parties¹. Information was provided that specific District Public Prosecutor's Offices submit their EAWs to the competent IRC for scrutiny before circulating them, but this was not described as a general practice.

¹ The SIRENE bureau checks whether the content of the EAW and of the alert processed by the regional police force info desk correspond (see chapter 3.5 above) and adapts the latter to the parameters of the system.

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The experts team is of the opinion that, in addition to the necessary update of the guidelines for issuing EAWs, action should be taken on this particular issue, either by providing extra EAW training for all public prosecutors or by promoting the assisting role of IRCs in this respect.

7.2.1.3. Replacement of the pre-existing alerts

According to the information provided, pre-existing Article 95 SUO alerts and alerts based on International Arrest Warrants remain valid, representing approximately 20% of the existing alerts.

The experts team notes that, although no problems have been recorded to date, by maintaining this practice the Netherlands runs the risk that its alerts are not followed up by other Member States.

7.3. CONCLUSIONS IN RESPECT OF THE NETHERLANDS' ACTIVITIES AS AN EXECUTING MEMBER STATE

7.3.1. Issues

7.3.1.1. Scope of the EAW

The transposition of Articles 2(1) and 2(4) of the Framework Decision into the Netherlands law is questionable, since additional requirements are imposed. Namely, in prosecution cases the OLW requires that the offence underlying the EAW is punishable under the Netherlands law by a custodial sentence of a maximum period of at least one year. In conviction cases, the OLW requires that the acts on which the sentence is based are punishable under the law of both the issuing Member State and the Netherlands by a custodial sentence of at least 12 months. Therefore, surrender for an offence that, according to the Netherlands law, carries a maximum sentence of less than one year is excluded. The experts team notes that this regime is not in line with the Framework Decision.

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7.3.1.2. Refusal of surrender of the Netherlands nationals and equally treated residents in conviction cases

EAWs issued for the execution of a sentence passed against a Netherlands national or an equally treated resident are always refused by the Netherlands authorities. Instead, the Netherlands offers to execute the sentence on the basis of the 1983 Convention on transfer of sentenced persons. This means in practice that the Netherlands nationals and the like wanted for the execution of a sentence are systematically flagged in the SIS, the EAW is not executed, and a specific request pursuant to the abovementioned Convention is required from the issuing Member State. Finally, the Netherlands applies the double criminality standard and insists on the conversion of the foreign sentence, which can lead to a considerable reduction of the foreign sentence (e.g. in drugs cases), even if the act underlying the EAW is a listed offence.

The way in which the Netherlands deals with this issue is problematic in relations with other Member States. The experts team is of the view that the Netherlands practice is discriminatory against non- Netherlands nationals and contrary to the spirit of the Framework Decision.

7.3.1.3. Copy of the issuing State's relevant legislation

At the time of the evaluation visit it was the practice of the Netherlands executing authorities to ask the issuing authorities to provide a copy (with translation) of the full text of the relevant domestic legislation.

Although this was not required by the implementing law, the ADC kept asking for it on the basis of the explanatory report to the bill, where the question was raised in connection with the issue of the dual criminality requirement. The judges interviewed at the ADC explained that they felt bound by the interpretation of the legislator (authentic interpretation), and that having at their disposal the foreign legal texts was useful indeed in relation to certain categories listed in Article 2(2) of the Framework Decision that do not exist as such in the Netherlands law (e.g. fraud). In contrast, the public prosecutors from the DPPA were of the view that this information was not necessary. However, they continued requesting it since they were aware that the ADC would otherwise refuse to execute the EAW¹.

¹ As to the changes introduced by the Supreme Court's ruling of 8 July 2008, see footnote in chapter 4.3.

7.3.1.4. Irrefutable and immediate proof of innocence

The experts team is of the view that the possibility of refusing the execution of an EAW on the ground that there is no suspicion of guilt (see point 4.7 above) is, at least from a formal point of view, contrary to the Framework Decision, since it requires an examination of the substantive case, and is also contrary to the principle of mutual trust between Member States.

Notice has been taken that very high standards apply, in the sense that direct evidence at the hearing is required from the person concerned for this ground for non-execution to be considered and restricts its application.

7.3.1.5. Breach of fundamental rights

This ground for non-execution goes, strictly speaking, beyond the provisions of the Framework Decision since it is not included in Articles 3 and 4 of the Framework Decision. The experts team is familiar with recital 12 of the Framework Decision but considers that this recital should not have been elevated to a ground for non-recognition, in view also of the fact that all Member States are signatories to and hence are bound by the Convention on Human Rights and Fundamental Freedoms. The experts are of the view that this ground for non-recognition is the expression of a lack of confidence in the criminal law systems of the other Member States.

The experts team notes by the way that this ground for non-recognition has even been applied in one case by the DPPA, without referring it to the ADC.

7.3.1.6. Prohibitive validity flags

The NL SIRENE bureau adds restrictive validity flags to incoming SIS alerts where limitations arise from national legislation. Such a practice may also cover instances where the underlying act is not considered an offence under the Netherlands law. This action is performed by SIRENE officers on their own initiative, with the DPPA being informed afterwards.

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Further to comments at the SIRENE office, it appeared that nowadays there is no consistent policy for flagging cases. This could be clarified by establishing guidelines, e.g. in the new agreement between the DPPA and the SIRENE office on which, according to the information provided, negotiations have started when preparations were being made for the evaluation visit.

7.3.1.7. Consent to surrender and renunciation of entitlement to the speciality rule

The abbreviated procedure (with consent) is not used very often : according to the information provided, only 73 out of the 287 persons surrendered by the Netherlands in 2006 consented to surrender. Based on opinions expressed during the interviews¹, the experts team is of the opinion that this kind of procedure could be promoted if the requested person were given the opportunity to waive the right to a formal surrender procedure, while keeping the entitlement to the speciality rule. The abbreviated procedure would hence be used more often and delays in execution could be reduced.

7.3.1.8. Detention for the purposes of surrender

Pursuant to the case-law on extradition cases, only where there is a risk of absconding do the Netherlands authorities order the detention of the requested person pending the surrender procedure. There are no instructions or guidelines for assessing this risk; decisions on this issue are taken on a case-by-case basis.

During the interviews the opinion was expressed that this approach might not be sufficient to deal appropriately with every individual case², and consideration should be given to the admissibility of additional grounds for detaining the requested person in EAW procedures, such as the risk that the person sought may dispose of evidence or continue his criminal activity outside the Netherlands.

¹ Some public prosecutors from the DPPA, when asked about possible improvements in the system, specifically pointed to the abbreviated procedure, expressing doubts about the convenience of establishing an automatic link between consent to surrender and renunciation of the speciality rule. The defence lawyers interviewed were of the explicit opinion that the separation of consent to surrender and waiver of the speciality rule would increase the number of simplified surrenders significantly.

² It should be noted that, with regard to cases in which the requested person has been conditionally released during the surrender procedure, the Netherlands authorities reported 47 cases in 2006 where the requested person was surrendered after the 10-day time limit due to the fact that he had evaded arrest following the decision on surrender (see chapter 4.14), and 28 cases throughout the application of the OLW where the requested person remained at large (see chapter 4.5).

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7.3.1.9. Original of the EAW

In general the ADC is flexible and works on the basis of a copy of the EAW sent by fax or e-mail. However, the Court requires the original EAW or a signed copy in conformity with the original EAW¹ at the time of the hearing of the person in court.

The experts team takes the view that consideration should be given to a general waiver on "originals", in the light of Article 10(4) of the Framework Decision.

7.3.1.10. No review of the decision on the execution of the EAW

As to the decision on the execution of EAWs, the Netherlands adopted a single-layer system. The Amsterdam District Court is solely competent to decide on this matter. Neither the requested person nor the prosecutor has the right to appeal.

DPPA decisions in standard procedures not to bring the case to court are not subject to review either, although they represented approximately 46% of cases (33 out of 72) in which the execution of the EAW was refused by the Netherlands in 2006.

The advantage of this practice is that a decision of the ADC/DPPA is immediately final², but the disadvantage is that no "quality control" is exercised. In order to "spar" with outside people and "test" their judicial practice, the judges of the District Court organise once or twice a year a meeting with academics from the University of Amsterdam. This practice, however, is not satisfactory and is no substitute for a corrective review procedure.

Judges interviewed indicated that they would favour the introduction of an appeal procedure in EAW matters. A number of the lawyers interviewed were of the same view. The expert team suggested the Netherlands authorities to consider introducing a judicial review procedure in EAW matters; in reply the Netherlands authorities indicated that they had already discussed this possibility but had concluded that such review procedure would not be feasible in the current system.

¹ For what is meant by "a signed copy in conformity with the original EAW" see chapter 4.1. above.

² See chapter 4.8.

7.3.1.11. Trial capacity and delays

The trial capacity in the Amsterdam District Court for EAW cases seems not to be sufficient. This, combined with the constant increase in the number of incoming EAWs, has resulted in these cases lasting longer. Although the ADC tried to remedy this situation by scheduling additional days for surrender hearings in 2006 and 2007, the trend has not varied according to the information provided¹.

The judges interviewed at the ADC were of the opinion that the official trial capacity (11-13 judges at 50%) would suffice if this capacity were actually available in practice, which is not, however, the case (for various reasons: workload in normal criminal cases, change of job with temporary vacancy, maternity leave, etc.).

7.3.1.12. Mandatory release of the requested person

Pursuant to the implementing law, if the ADC has not been able to give its verdict within 90 days of the arrest, the requested person must be set free, which does not in itself follow from the Framework Decision. The experts team shares the view that exceptions to the general rule might be admitted by giving due consideration to the circumstances of the case.

7.3.2. Good practices

7.3.2.1. Specialisation.

By virtue of centralising proceedings with NL acting as executing Member State in the DPPA and the ADC, these bodies have developed a high degree of specialisation and consistency. In this respect the lawyers' very positive assessment of the performance by DPPA public prosecutors and ADC judges constitutes a clear indicator.

¹ See chapter 4.6.

7.3.2.2. International experience of executing judicial authorities

Public prosecutors from DPPA and judges from ADC often participate in international seminars and, as trainers, in activities organised in the framework of the EU Twinning programmes. They are also invited to participate, as members of the Netherlands delegation, in meetings of the working groups of the Council. In that connection, the experts team notes the organisation, in cooperation with training institutes in Germany and Belgium, of training courses for staff dealing with international cooperation related matters, which are open to judicial authorities of the three countries as well.

7.3.2.3. Flexibility in handling incoming EAWs (language regime, means of receipt, further contacts)

The Netherlands authorities are flexible as regards availability of original EAWs: fax and e-mail are accepted for the purposes of arresting the requested person and for all the preparatory work prior to the decision on surrender. The Netherlands accepts EAWs in Dutch, in English, and in the official language of the issuing State with a translation into English. The same regime applies to the information forwarded by the issuing authority on its own initiative or at the request of the DPPA. There are frequent direct contacts with issuing authorities by phone or e-mail in parallel with written correspondence, as well as involvement of liaison officers in other Member States and foreign liaison officers in the Netherlands when problems arise during execution of an EAW.

7.3.2.4. Legal Aid

The experts commend the system put in place in the Netherlands for the payment of "pro-deo" defence lawyers intervening in EAW cases¹, which encourages high quality defence. They also note the Amsterdam District Legal Aid Service's practice of creating a specialists list for the appointment of defence counsels in this kind of procedures.

¹ EUR 1500 per case, 1-27 hours, EUR 100 each extra hour.

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7.3.2.5. Integrated search system (LIST)

The team was positively impressed by the system the Netherlands authorities have put in place to check whether the subject of every SIS alert and EAW-based Interpol alert may be located in the Netherlands. The LIST is an integrated search system that allows to check simultaneously several registers in one single operation. Additionally, the profile of the person sought is run through a number of national databases not integrated into the LIST¹.

7.3.2.6. Abbreviated procedure in border cases

Pursuant to the implementing law, in those cases where the requested person consents to immediate surrender before the local public prosecutor, he may be put at the disposal of the issuing authority without prior transfer to the DPPA, provided that the actual surrender can take place within the time limits for remand in police custody (3 + 3 days). Practical experience has shown, however, that this condition can be met only in cases where the person is requested by Belgium or Germany and the arrest takes place in a border area.

Despite the limited scope of this "fast-track" procedure in practice, the team noted that it shortens the surrender time significantly. Thus, according to the information provided by the Netherlands authorities, in 2006 in the border regions the physical surrender to the neighbouring Member States took on average one day as from the statement consenting to surrender.

7.3.2.7. Possibility to suspend prosecution in the Netherlands

Although Article 4(2) of the Framework Decision has been transposed as a mandatory ground for non-execution, pursuant to the OLW, prosecution in the Netherlands may be suspended by the Minister of Justice on the advice of the public prosecutor's office prior to the decision on surrender², by this way allowing the surrender of the requested person where other grounds for refusal do not apply.

¹ See chapter 4.2 above.

² See chapter 4.7 above.

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7.3.2.8. Platform for international cooperation

A "platform" has been set up that brings together representatives of the Ministry of Justice, the IRCs, public prosecutors and police officers, as well as lecturers from the SSR, to discuss international cooperation related matters. Legal developments are discussed in this group, as well as concrete cases, with the purpose of exchanging practical experiences and identifying possible solutions to problems that might arise. This group meets four times a year.

8. RECOMMENDATIONS

8.1. RECOMMENDATIONS TO THE NETHERLANDS

AS ISSUING MEMBER STATE

Recommendation 1. Update the existing guidelines on the use and completion of the EAW form (Provisional Method of Operation) in the light of practice and the experience gained (see 7.2.1.1).

Recommendation 2. Provide public prosecutors with appropriate training and promote the assisting role of the IRCs with a view to improving the quality of outgoing EAWs (see 7.2.1.2).

Recommendation 3. Screen all the existing SIS alerts and take the necessary steps to ensure that all those based on International arrest warrants are replaced by SIS alerts based on EAWs (see 7.2.1.3).

AS EXECUTING MEMBER STATE

Recommendation 4. Amend the implementing law so that it conforms to the Framework Decision as regards scope in both prosecution and conviction cases (see 7.3.1.1).

Recommendation 5. Adapt the implementing legislation to facilitate the enforcement in NL of sentences passed against the Netherlands nationals, in line with the letter ("undertake to execute") and spirit of the Framework Decision (see 7.3.1.2).

Recommendation 6. Correct the practice of systematically asking for a copy (with translation) of the full text of the issuing Member State's legislation applicable to the case underlying the EAW (see 7.3.1.3)¹.

¹ According to the information provided, action already taken pursuant to the Supreme Court's ruling of 8 July 2008.

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Recommendation 7. Produce precise written guidelines to assist the SIRENE bureau officers when checking incoming SIS alerts, with a view to ensuring a consistent policy for flagging cases (see 7.3.1.4).

Recommendation 8. Repeal Article 11 of the implementing law (see 7.3.1.5).

Recommendation 9. Consider amending the implementing legislation so that there is no automatic link between consent to surrender and renunciation of the entitlement to the speciality rule, as a means of promoting the use of the abbreviated procedure (see 7.3.1.7).

Recommendation 10. Supplement the criteria applicable to detention in EAW procedures so that detention pending surrender may be ordered on grounds other than the risk of absconding with a view not to hampering the proceedings underlying the EAW (see 7.3.1.8).

Recommendation 11. Abandon the current practice of requiring the original of the EAW or a copy of the EAW with the signature of the issuing authority and signed by an official who is competent within the court or the public prosecutor's office to state that the document is a copy of the original EAW, as a prerequisite for a court decision on surrender (see 7.3.1.9).

Recommendation 12. Introduce some mechanism for the review of the public prosecutor's decision to refuse an EAW (see 7.3.1.10).

Recommendation 13. Enlarge or reorganise, as felt necessary, the trial capacity of the Amsterdam District Court with a view to ensuring that EAW cases are dealt with within the time limits of the Framework Decision (see 7.3.1.11).

Recommendation 14. Amend the implementing law so that the fact that a decision on surrender has not been issued within the prescribed 90-day time limit does not entail the suspension of the detention pending surrender, and exceptions to the general rule are admissible based on the circumstances of the case (see 7.3.1.12).

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8.2 RECOMMENDATIONS TO CERTAIN OTHER MEMBER STATES

Recommendation 15. In cases where, pursuant to Article 5(3) of the Framework Decision, the surrender of the person is subject to a return guarantee, take the necessary steps to ensure, when acting as issuing State, that the executing authority is informed in due course of the outcome of the proceedings underlying the EAW (even if the person is acquitted) and of any delays to it, as well as of the release of the surrendered person from custody on grounds other than the finalisation of the proceedings (see 4.9).

Recommendation 16. Adopt a more flexible approach as to language requirements, so that EAWs in languages other than the official language of the executing Member State (e.g. the most commonly used as working languages within the European institutions) are accepted (see 3.5).

Recommendation 17. Abandon the practice of requiring the original EAW and, in line with the Framework Decision, accept EAWs transmitted by any secure means capable of producing written records and allowing their authenticity to be established (see 3.5).

Recommendation 18. Check regularly the information provided in the EAW Atlas and the Fiches Françaises and, where appropriate, update it (see 3.5).

Recommendation 19. Promote the exchange of police officers, prosecutors and judges especially with those Member States with which there is a significant flow of EAWs and/or problems with processing EAWs arise more frequently (see 7.1.4).

8.3 RECOMMENDATIONS TO THE EUROPEAN UNION

Recommendation 20. Continue the ongoing discussions on the benefits of instituting a proportionality test for the issue of EAWs, including the question of the appropriateness of issuing an EAW in the light of the possibility, especially in prosecution cases, of achieving the objective sought by other less troublesome means for both the individual and the executing authority (see 4.9).

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Recommendation 21. Discuss at the appropriate level the further development of methods of mutual assistance based on the principle of mutual recognition with a view to enhancing cooperation among Member States, which, at the same time, could serve as alternatives to the EAW (see 4.9).

Recommendation 22. Discuss the benefits of moving towards standardisation of the time limits for the provision of language-compliant EAWs (see 3.5).

Recommendation 23. Make further efforts to put in place programmes specifically aimed at promoting meetings and joint activities of national authorities involved in EAW processes, in order to enable them to discuss problems arising in such processes, exchange views and develop a network of personal contacts, with a view to helping them in handling EAWs more efficiently and enhancing mutual trust (see 7.1.4).

Recommendation 24. Promote further use of the EAW experts group operating under COPEN by organising more frequent, regular meetings, where appropriate with the participation of practitioners who are dealing with EAWs on a daily basis (see 7.1.5).

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ANNEX A

PROGRAMME OF VISITS

Tuesday 11 March 2008

The Hague, Ministry of Justice

08.45 Arrival at the Ministry of Justice
09.00-09.15 Welcome by the Director-General for Legislation, International Affairs and Immigration, Mr. Rob Visser
09.30-11.30 Interview with experts from the Ministry of Justice concerning the implementation of the FD EAW in the Surrender Act and the background to the organisational implementation in the Netherlands court system.
11.30-12.00 Short introduction to the role of the Sirene office
12.00-13.30 Lunch
13.30-17.00 Interviews with public prosecutors and their assistants from the National Public Prosecutor's Office and the Public Prosecutor's Office at the district court in the Hague
17.00-17.30 Remaining issues relating to the Netherlands as issuing State
19.00 Dinner delegation with representatives from Ministry of Justice in the Hague

Wednesday 12 March

Amsterdam, Public Prosecutor's Office at the District Court of Amsterdam and the District Court Amsterdam

08.00-09.30 Transfer as a group by train from Hotel Mercure to Amsterdam South station
09.30-10.00 Arrival and coffee
10.00-12.00 Interview Public Prosecutors and their assistants from the Public Prosecutor's Office at the District Court in Amsterdam, specialised in handling all incoming EAW.
12.00-13.00 Attending a surrender hearing at the District Court
13.00-14.00 Lunch
14.00-16.00 Interview judges of the District Court who hear surrender cases
16.30-17.30 Interview defence lawyers
17.30-18.00 Remaining issues relating to The Netherlands as executing State
18.00-21.00 Evening programme in Amsterdam
21.00-22.00 Transfer by bus / car back to Hotel Mercure The Hague

Thursday 13 March

Zoetermeer (morning), Sirene office, The Hague (afternoon), Ministry of Justice

08.45 Transfer Hotel Mercure – Zoetermeer by bus/car
09.30-11.30 Visit the Sirene office and interview members of the SIRENE office, dealing with SIS alerts for the purpose of surrender
11.30-12.15 Transfer Zoetermeer - The Hague
12.30-13.30 Lunch at Ministry of Justice
13.30-14.30 Discussion on issues relating to surrender of the Netherlands nationals with experts of the Ministry of Justice
14.30-15.30 Any remaining issue
15.30-17.00 Visit to the Mauritshuis museum (5 minutes walk)
17.00 Travel by train from the Hague Central station to Schiphol airport

LIST OF PERSONS INTERVIEWED

Ministry of Justice The Hague

Mrs. Marjorie Bonn
Mr. Stephan Berndsens
Mrs. Marieke van der Burg
Mr. Martin Gijzel
Mr. Robbert de Groot

Public Prosecutor's Office The Hague

Mr. Giel Franssen
Mr. Derek Lugtenberg
Mrs. Lisette Vos

National Public Prosecutor's Office Rotterdam

Mr. Willem Hemstede
Mrs. Els Siebel

Sirene Office

Mr. Henk Ketellapper

Public Prosecutor's Office Amsterdam

Mrs. Liane Ang
Mrs. Hanneke Festen
Mr. Geert Koppers

District Court Amsterdam

Mrs. Judith Boeree
Mrs. Elisabeth Bonga-Sigmond

Defence lawyers Amsterdam

Mr. M.L. van Gessel
Mr. W.R. Jonk
Mrs. J. Kuijper
Mr. R. Malewicz
Mr. D.E. Wiersum



LIST OF ABBREVIATIONS/GLOSSARY OF TERMS

ACRONYM ABBREVIATION TERM	ENGLISH EXPLANATION
(L)IRC	(National) Centre for international criminal cooperation
ADC	Amsterdam District Court
DINPOL	International Police Cooperation Service
DPPA	District Public Prosecutor's Office/ Public prosecutor in Amsterdam
EAW	European arrest warrant
HKS	Recognition system
KLPD/DIN	National Police Services Agency/International Networks Agency
KMAR	Royal Military Constabulary
LIST	National Information System
NSIS	National Schengen Information System
OLW	Surrender Act
OPS	Person Alert System
Provisional Method of Operation	Provisional method of operation EAW and procedure for surrender between the Member States of the European Union
SIS	Schengen Information System
SSR	Training and Study Centre for the Judiciary
SUO	Schengen implementation agreement
