



MutualRecognition2.0

RESEARCH PROJECT

COUNTRY REPORT THE NETHERLANDS

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Finalised on 30 April 2025

DISCLAIMER

To do list:

- sorting out the lay out

I. Preliminary matters

I.1 The authors

The country report for the Netherlands was written by Vincent Glerum and Hans Kijlstra.

Professor dr Vincent Glerum is a senior legal advisor specialising in European criminal law and the European arrest warrant (EAW) at the District Court of Amsterdam (*rechtbank Amsterdam*), the Dutch executing judicial authority for the EAW, and is a professor of international and European criminal law at the University of Groningen. He has over twenty-one years of experience in dealing with judicial cooperation in criminal matters, in particular with the EAW. In 2013, he received his doctoral degree from the Free University (*Vrije Universiteit, Amsterdam*) on the basis of a thesis on refusal grounds in extradition law and EAW law.¹ Vincent Glerum has published numerous articles and case-law commentaries on the subjects of extradition and the EAW. He is the author of an article-by-article commentary on the Law on Surrender, is the co-author of chapters on extradition and the EAW in a handbook on international and European criminal law² and is a member of the editorial board of a collection of commentaries on sources of international and European criminal law which is available both online and as hardcopy.³

Mr Hans Kijlstra was a judge at the District Court of Amsterdam since 2002, but is now semi-retired. Before joining the judiciary he worked as a legal officer and manager for the government. Until 2011 he was an administrative judge and a managing judge. Since 2011 Hans Kijlstra sat as a judge in the criminal law division of the court. He set up the specialised chamber for human trafficking and chaired it for three years. He was chairman of the Extradition and Surrender Chamber at the District Court of Amsterdam for several years. From 2017 up to March 2020, as an international observer he took part in the process of transitional

¹ Glerum, *De weigeringsgronden bij uitlevering en overlevering. Een vergelijking en kritische evaluatie in het licht van het beginsel van wederzijdse erkenning* (Wolf Legal Publishers, 2013).

² Glerum & Rozemond, "Uitlevering" in Van Elst & Van Sliedregt (Eds.), *Handboek Internationaal Strafrecht. Internationaal en Europees strafrecht vanuit Nederlands perspectief*, 3rd ed. (Wolters Kluwer, 2022), pp. 189-276; Glerum & Rozemond, "Overlevering" in Van Elst & Van Sliedregt (Eds.), *Handboek Internationaal Strafrecht. Internationaal en Europees strafrecht vanuit Nederlands perspectief*, 3rd ed. (Wolters Kluwer, 2022), pp. 277-420.

³ Glerum, Ouwerkerk & Yanev (Eds.), *TEKST & COMMENTAAR Internationaal strafrecht en strafrechtelijke samenwerking*, 10th ed. (Wolters Kluwer, 2023).

re-evaluation (vetting) of judges and prosecutors in Albania. At present, he sits as a substitute judge in the Extradition and Surrender Chamber.

Together, Vincent Glerum and Hans Kijlstra initiated three research projects funded by the European Commission and participated in the research and in writing the research report:

- a project on the EAW and judgements *in absentia*, *InabsentiEAW* (2017-2019);⁴
- a project on improving the EAW in general, *ImprovEAW* (2020-2022);⁵
- the present project.⁶

I.2 Methodology

The report is based on:

1. case-law research. The authors utilised the databases of the judiciary (e-archive (access restricted to the judiciary/support staff) and the website of the judiciary (www.rechtspraak.nl, public access);
2. (limited) case-file research;
3. legal literature;
4. semi-structured interviews⁷ with practitioners from the following categories:

⁴ K.H. Brodersen, V. Glerum & A. Klip, *The European Arrest Warrant and In Absentia Judgments*, Maastricht Law Series 12 (Eleven Publishers, 2022). Website: <https://www.inabsentieaw.eu/> (last accessed on 30 March 2025).

⁵ R. Barbosa, V. Glerum, H. Kijlstra, A. Klip & C. Peristeridou, *Improving the European Arrest Warrant*, Maastricht Law Series 27 (Eleven Publishers, 2023). Website: <https://improveaw.eu/> (last accessed on 30 March 2025).

⁶ Website: <https://mutualrecognitionnextlevel.eu/> (last accessed on 30 March 2025).

⁷ List of interviewees:

Academic 1	associate professor, University of Groningen
Academic 2	professor, University of Leyden
Eurojust	officials attached to the Operations Department and officials attached to national desks
Examining Magistrate 1	District Court Midden-Nederland
Examining Magistrate 2	District Court Amsterdam
Examining Magistrate 3	District Court Amsterdam
Judge 1	senior judge in the District Court Amsterdam
Judge 2	senior judge in the District Court Amsterdam
Judge 3	senior judge in the District Court Amsterdam
Judge 4	senior judge in District Court Amsterdam
Judge 5	judge in the Court of Appeal Hof Arnhem-Leeuwarden
Legal counsel 1	lawyer practicing in Amsterdam
Legal counsel 2	lawyer practising in Hoofddorp
Legal support staff 1	senior judicial secretary at the Court of Appeal Hof Arnhem-Leeuwarden

- judges and legal support staff;
- examining magistrates;
- public prosecutors;
- officials from the Ministry of Justice and Security;
- officials attached to Eurojust;
- lawyers;
- academics.

Prior to each interview, the interviewee was provided with a memo detailing the outlines, scope and objective of the project and a list of general questions that would be addressed during the interview.

5. *ex officio* knowledge.

Ministry of Justice and Security	officials <i>attached to Afdeling Internationale Overdracht Strafvonnissen</i> (IOS; Department of Transfer of Judgments in Criminal Matters) of the <i>Dienst Justitiële Inrichtingen</i> (DJI; Custodial Institutions Agency)
Ministry of Justice and Security	legislative lawyers
Ministry of Justice and Security	officials attached to the <i>Centraal Justitieel Incassobureau</i> (CJIB; Central Judicial Collection Office)
Public Prosecutor 1	national public prosecutor's office
Public Prosecutor 2	public prosecutor's office Noord-Holland
Public Prosecutor 3	national public prosecutor's office
Public Prosecutor 4	national public prosecutor's office
Public Prosecutor 5	national public prosecutor's office
Public Prosecutor 6	national public prosecutor's office
Public Prosecutor 7	national public prosecutor's office

On 24 October 2024, a meeting was held with the interviewees to discuss the draft report and in order to afford them the opportunity to check whether references to their statements in the interviews were correct.

I.5 Index for the country reports

Guide to the reader

The text of this country report is an amalgam of the Annotated Index⁸ and the research findings. The Annotated Index is meant as a tool to ensure the uniformity of the four country reports. The text of the Annotated Index (including footnotes) is printed in red (10 pt) and the research findings (including footnotes) are printed in black (12 pt).

Introduction

Content

The annotated index will be used to draft the Country Reports. For reasons of accessibility, the annotated index will be preceded by the non-annotated index.

The index consists of five Chapters:

1. The instruments and national law;
2. The application of the instruments: investigation/prosecution;
3. The application of the instruments: enforcement;
4. Anticipating the application of instruments: sentencing;
5. Miscellaneous: whereabouts unknown and *in absentia*.

MR2.0 Methodology

The research to be conducted by the NARs consists of three elements:

- I. European/national law and national case-law (essentially concerning issues of transposition, competent national authorities, and the scope of European/national instruments);
- II. Considerations that (can) play a role when the competent national authority decides whether or not to request a specific form of judicial cooperation;

⁸ Available at <https://mutualrecognitionnextlevel.eu/sites/mutualrecognition/files/2023-11/MR2.0%20Annotated%20Index%20Country%20Report.pdf> (last accessed on 30 March 2025).

- III. Whether the competent national authorities apply the instruments in an ‘effective and coherent’ manner (within the meaning of *MR2.0: some preliminary explorations*).⁹

Ad I

This element of the research is partly descriptive, and partly analytical (the latter with regard to the scope of European/national instruments).

The NARs will draw upon their own knowledge as national experts¹⁰ and supplement it, if need be, by case-law and legal literature research.

Ad II

This element of the research is descriptive.

Case-file research does not seem to be the most adequate means of research to get those considerations out into the open. The most direct source of information on such considerations are the competent national authorities themselves. Therefore, qualitative interviews with representative members of the competent national authorities are the best method of getting a clear picture of what these considerations are. For pragmatic reasons, it is only possible to interview a relatively small number of representative practitioners. In order to ensure that the findings – and any conclusions based on them (see Ad III) – are sufficiently valid, the selection of practitioners is of particular importance. Moreover, the NARs are encouraged to include not only practitioners who are members of the competent national authorities but also other practitioners (such as defence lawyers), and academics. The NARs are furthermore encouraged to refer to any cases they are aware of, to national case-law (e.g. judicial decisions on appeal against decisions of the competent authority whether or not to request judicial cooperation) or to literature, wherever possible, in order to corroborate or refute, as the case may be, the considerations mentioned by the interviewees. In addition, in the stage of drawing up the research report the findings from the other Member States could also be used as corroboration/refutation.

Ad III

This element is of an analytical and a more normative nature.

The NARs will analyse the considerations that play a role when their MS’ authorities decide whether or not to request judicial cooperation (see Ad II) and will determine whether those authorities apply the instruments in an ‘effective and coherent’ manner.

In doing so, they will also identify:

- any defects that stand in the way of ‘effective and coherent’ application, *e.g.* defects in:

⁹ To be effective and coherent in the application of mutual recognition instruments in an individual case, available instruments should not be overlooked (**comprehensiveness**), decisions to apply an instrument should not be contradictory (**consistency**), as long as there remains an option this option should be used (**completeness**) and, finally, this has all to be done with the lowest costs (in the broad sense of the word, i.e. in terms of money, time and impact on the requested person) (**proportionality**). See *MR2.0: some preliminary explorations*.

¹⁰ And, where necessary, the knowledge of other experts.

- EU/CoE legislation;
- National legislation;
- National practice;
- any best practices that facilitate 'effective and coherent' application.

Output

The research will result in:

- a country report in which the outcome of the first two elements of the research as described above will be laid down and which will be part of the final research report;
- a separate memorandum which contains the outcome of the third element and which will be used for drafting the overall analysis based on all country reports.

In the country reports, The NARs will follow the general rules on citation and the specific points of style of the Common Market Law Review.¹¹ However, by way of derogation from these points of style, paragraphs should be numbered.

¹¹ <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-publiekrecht/europees-recht/houserul2020.pdf>.

1. THE INSTRUMENTS AND NATIONAL LAW

1.1. Transposition of EU instruments

1.2. Ratification of conventions

1.3. Competent (judicial) authorities and central authorities

- 1.3.1. Competent (judicial) authorities
- 1.3.2. Central authorities
- 1.3.3. Coordination

2. THE INSTRUMENTS AND INVESTIGATION/PROSECUTION

2.1. Applicability of the instruments according to EU law⁵

- 2.1.1. Pre-trial stage
 - 2.1.1.1. Substage 1 (no detention on remand possible)⁶
 - (a) Person concerned present in issuing MS
 - (b) Person concerned present in another MS
 - 2.1.1.2. Substage 2 (detention on remand possible)
 - (a) Person concerned present in issuing MS
 - (i) detention on remand possible but not ordered
 - (ii) person in detention on remand
 - (b) Person concerned present in another MS
 - (i) detention on remand possible but not ordered
 - (ii) detention on remand ordered
- 2.1.2. Trial Stage
 - (a) Person concerned present in issuing MS
 - (i) detention on remand possible but not ordered
 - (ii) person concerned in detention on remand
 - (b) Person concerned is present in another MS
 - (i) detention on remand possible but not ordered
 - (ii) detention on remand ordered

2.2. Applicability and application of the instruments at the pre-trial stage according to national law

- 2.2.1. Substage 1 (no detention on remand possible)
 - (a) Person concerned present in issuing MS
 - (b) Person concerned is present in another MS
- 2.2.2. Substage 2 (detention on remand possible)
 - (a) Person concerned present in issuing MS
 - (i) detention on remand possible but not ordered
 - (ii) person concerned in detention on remand

⁴ *Legenda*: black is unannotated index; red is annotation.

⁵ 'Applicability' concerns the scope of the instruments with regard to the various stages of investigation/prosecution. In other words, whether those stages are covered by the scope of the instruments or not. 'Application' (see 2.2 and 2.3) concerns the actual use of those instruments in order to achieve a specific objective.

⁶ The distinction between (a) and (b) concerns situations in which the need for cooperation can arise. Some of the instruments are applicable according to the presence of the requested person either in the issuing MS and/or in the

executing MS.

- (b) Person concerned is present in another MS
 - (i) detention on remand possible but not ordered
 - (ii) detention on remand ordered

2.3. Applicability and application of the instruments at the trial stage according to national law

- (a) Person concerned present in issuing MS
 - (i) detention on remand possible but not ordered
 - (ii) person concerned in detention on remand
- (b) Person concerned is present in another MS
 - (i) detention on remand possible but not ordered
 - (ii) detention on remand ordered

3. THE INSTRUMENTS AND SENTENCE ENFORCEMENT

3.1. Applicability of the instruments or conventions according to EU law

- (a) Person concerned is present in issuing MS
- (b) Person concerned is present in another MS

3.2. Applicability and application of the instruments according to national law

- (a) Person concerned is present in issuing MS
- (b) Person is present in another MS

4. ANTICIPATING THE APPLICATION OF INSTRUMENTS: SENTENCING

5. MISCELLANEOUS: WHEREABOUTS UNKNOWN AND *IN ABSENTIA*

Abbreviations

AG	Advocate General
Art.	Article
CJIB	<i>Centraal Justitieel Incassobureau</i> (Central Judicial Collection Office)
Charter	Charter of the fundamental rights of the European Union
CISA	Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders
Cf.	Compare
CJEU	Court of Justice of the European Union
CoE	Council of Europe
DJI	<i>Dienst Justitiële Inrichtingen</i> (Custodial Institutions Agency)
EAW	European arrest warrant
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
Ed(s).	Editor(s)
e.g.	<i>exempli gratia</i>
EIO	European Investigations Order
ESO	European Supervision Order
ETS	European Treaty Series
EU	European Union
FD	Framework Decision
i.e.	<i>id est</i>
JHA	Justice and Home Affairs
IOS	<i>Afdeling Internationale Overdracht Strafvonnissen</i> (Department of Transfer of Judgments in Criminal Matters)

MS	Member State
NAR	National Academic Researcher
No.	number(s)
O.J.	Official Journal of the European Union
OLG	<i>Oberlandesgericht</i> (Higher Regional Court)
p./pp.	page/pages
para	paragraph
PCIJ	Permanent Court of International Justice
PPU	<i>Procédure Préjudicielle d'Urgence</i> (urgent preliminary ruling procedure)
SIS	Schengen Information System
Stb.	<i>Staatsblad</i> (Official Journal of the Netherlands)
TEU	Treaty on the European Union
TFEU	Treaty on the functioning of the European Union
Trb.	<i>Tractatenblad</i> (Bulletin of Treaties)
T&C	<i>Tekst en Commentaar</i>
v.	<i>versus</i>
viz.	<i>videlicet</i> (to wit)

1. The instruments and national law

General introduction

This chapter deals with two general matters:

1. the transposition/ratification of the instruments by the MS of the NAR;
2. the (judicial) authorities/central authorities designated by that MS under the instruments/convention.

In the proposal, we stated that the ‘perspective adopted by this project is that of a criminal prosecution or enforcement proceedings with a transnational aspect. That transnational aspect is linked to the accused or the convicted person. The accused or convicted person is present in another Member State [than the issuing Member State] or is a national or a resident of another Member State’.¹² The latter circumstance presupposes that the person concerned is present in the issuing MS. Situations in which the whereabouts of the person concerned are unknown are addressed in Chapter 5.

Only those proceedings in which a subject has been identified fall within the scope of the project. That is to say, situations in which the competent authorities have reasons to believe that an offence was committed but do not yet know who the probable author of that offence was do not fall within the scope. At the same time, an enforcement proceeding is not conceivable without a convicted person whose identity is known.

The proposal also states that the project will focus on instruments that are capable of prejudicing the liberty (in a broad sense) of the suspect/accused/convicted person.¹³

This means that the perspective of a criminal prosecution or enforcement proceedings with a transnational aspect inherently concerns investigation/prosecution/enforcement proceedings with regard to an offence for which detention on remand¹⁴ is (ultimately) possible.¹⁵

Against this background, the project will examine two categories of instruments:

- instruments that involve deprivation of liberty of a suspect, accused or convicted person, and
- instruments that offer a (less intrusive) alternative to measures involving deprivation of liberty of a suspect, accused or convicted person.

In order to establish whether the effectiveness and coherence of the application of instruments involving deprivation of liberty can be improved, it is absolutely essential to include some instruments that do not impinge

¹² *Proposal (amended)*.

¹³ *Proposal (amended)*. With regard to investigation/prosecution we use ‘suspect’, ‘accused person’ or ‘suspect/accused person’.

¹⁴ We use the term ‘detention on remand’ and not ‘pre-trial detention’ because the latter term seems to exclude detention during the trial stage.

¹⁵ The focus on proceedings concerning an offence for which detention on remand is (ultimately) possible implies that it is possible to impose a sentence involving deprivation of liberty (*sensu stricto*) for that offence. After all, detention on remand would not be proportionate and would, therefore, be contrary to Article 5 of the ECHR/Article 6 of the Charter, if only a non-custodial sanction could be imposed for the offence.

Consequently, proceedings concerning an offence, which only carries a non-custodial sanction, are out of scope.

on the liberty of the person concerned. Some of these instruments could serve as a less intrusive but sufficiently effective – and therefore proportionate – alternative to instruments that do impinge on liberty. Since proportionality is an essential part of our definition of the concept of ‘effective and coherent application’¹⁶ these less intrusive instruments are therefore in scope even though they do not impinge on liberty. This is in line with the European Commission’s Recommendation 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions.¹⁷

With regard to the concept of ‘intrusiveness’ the following scale could give guidance.

Using an instrument without detention is less intrusive than using an instrument with detention. Involvement without physical presence in the requesting MS (e.g. through video-conferencing) is less intrusive than transferring the person concerned. Involvement on the basis of voluntary arrangements is less intrusive than employing coercive measures.

Included in the research are the following instruments:

- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (FD¹⁸ 2002/584/JHA);¹⁹
- Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (FD 2008/909/JHA);²⁰
- Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (FD 2008/947/JHA);²¹
- Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (FD 2009/829/JHA);²²
- Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (Directive 2014/41/EU);^{23,24}

¹⁶ See *MR2.0: some preliminary explorations*.

¹⁷ O.J. 2023, L 86/44. See recital (10): ‘Member States should use pre-trial detention only as a measure of last resort. Alternative measures to detention should be preferred (...)’.

¹⁸ ‘FD’ is a commonly used abbreviation of the words ‘Framework Decision’.

¹⁹ O.J. 2002, L 190/1, as amended by O.J. 2009, L 81/24.

²⁰ O.J. 2008, L 327/27, as amended by O.J. 2009, L 81/24.

²¹ O.J. 2008, L 337/102, as amended by O.J. 2009, L 81/24.

²² O.J. 2009, L 294/20.

²³ O.J. 2014, L 130/1.

²⁴ These first five instruments were mentioned in the call document: https://ec.europa.eu/info/funding-tenders/opportunities/docs/2021-2027/just/wp-call/2021-2022/call-fiche_just-2022-jcoo_en.pdf.

Regulation 2018/1805/EU is mentioned in the call document but not included in the proposal. That regulation only touches upon deprivation of liberty in an indirect way: once a freezing order or confiscation order is recognised by the executing MS, *subsequent* decisions by the competent authorities of the executing MS may include the imposition of a custodial sentence. However, the focus of the project is on the decisions taken by the issuing MS. Moreover, a freezing order or confiscation order cannot serve as an alternative to forms of judicial cooperation involving deprivation of liberty.

- Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union (EU Convention on Mutual Assistance in Criminal Matters);^{25,26}
- (CoE) European Convention on the Transfer of Proceedings in Criminal Matters;^{27,28}
- (CoE) European Convention on Mutual Assistance in Criminal Matters.^{29,30}

(The NARs are invited to identify and include other instruments insofar as they can contribute to effective and coherent judicial cooperation.)³¹

A number of these instruments concern decisions concerning deprivation of liberty *stricto sensu* (FD 2002/584/JHA and FD 2008/909/JHA) or *lato sensu* (restriction of liberty: FD 2008/947/JHA and 2009/829/JHA).

Directive 2014/41/EU does not interfere with the right to liberty of the person concerned, except for the temporary transfer of a person already held in custody for the purpose of investigating measures.³² However, this instrument offers (less intrusive) alternatives to surrender on the basis of a prosecution-EAW: temporary transfer to the issuing MS³³ to be interrogated as a suspect/accused person³⁴ and interrogating a suspect/accused person by videoconference.³⁵ Other investigative measures that can be requested by an EIO, such as search and seizure of evidence or hearing a witness, cannot function as an alternative and are, therefore, out of scope.

The three conventions do not as such impinge on the right to liberty of a suspect, accused or convicted person.³⁶ Like Directive 2014/41, they are included insofar as they offer *alternatives* to measures that do involve deprivation of liberty.

Not mentioned in the call document and equally not included in the proposal for more or less the same reasons: Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties. Regulation 2023/1543/EU on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings is not included in the research (this regulation will apply from 18 August 2026). The regulation is not directly related to measures concerning deprivation of liberty and a European Production Order /European Preservation Order cannot serve as an alternative to forms of judicial cooperation involving deprivation of liberty.

²⁵ O.J., 2000, C 197/3.

²⁶ Not included in the call document, but included in the *Proposal (amended)*.

²⁷ Strasbourg 15 May 1972, ETS No. 73.

²⁸ Not included in the call document, but included in the *Proposal (amended)*.

²⁹ Strasbourg 20 April 1959, ETS No. 30.

³⁰ Added during the first Research Team meeting.

³¹ With the exception of the European Convention on the Transfer of Proceedings in Criminal Matters, the instruments/conventions listed are instruments/conventions that are binding on all MS participating in the project. Bilateral agreements are not included. Including such agreements would hamper making a comparison between the four participating MS ('comparing apples with oranges'). However, if in the opinion of a NAR a bilateral agreement facilitates 'effective and coherent' application of the instruments and, therefore, constitutes a 'best practice', he or she is encouraged to mention this as such.

³² Case 584/19, *Staatsanwaltschaft Wien (Falsified transfer orders)*, EU:C:2020:1002, para 73.

³³ We will use the words 'issuing Member State' in a broad sense: the Member State that requests judicial cooperation or initiates judicial cooperation based on mutual recognition.

³⁴ Art. 22(1).

³⁵ Art. 24(1).

³⁶ The EU Convention on Mutual Assistance in Criminal Matters includes provisions on the temporary transfer of a person already held in custody for the purpose of investigative measures (Art. 9) and on hearing by

The EU Convention on Mutual Assistance in Criminal Matters is only included insofar as it contains provisions concerning sending to and serving documents on a suspect, accused person or convicted person who resides abroad.³⁷ Summoning a suspect to an interrogation, an accused person to his trial or a convicted person to report to prison to undergo a sentence may already suffice to attain the goal pursued, thus obviating the need for employing forms of judicial cooperation that involve deprivation of liberty.

The CoE European Convention on the Transfer of Proceedings in Criminal Matters is included, because transfer of proceedings can serve as an alternative to surrender on the basis of an EAW or to recognition and enforcement of a sentence.³⁸

The CoE European Convention on Mutual Assistance in Criminal Matters is only included insofar as it offers a mechanism to achieve the result of a transfer of proceedings, without complying with the formalities of the CoE European Convention on the Transfer of Proceedings in Criminal Matters.³⁹ Moreover, not all Member States have ratified the CoE European Convention on the Transfer of Proceedings in Criminal Matters.⁴⁰

The Protocol to the EU Convention on Mutual Assistance in Criminal Matters nor the Additional Protocols to the CoE Convention on Mutual Assistance in Criminal Matters are included. They do not contain forms of judicial cooperation that can serve as alternatives to measures involving deprivation of liberty.

It should be recalled that the provisions of the EU Convention on Mutual Assistance in Criminal Matters and the CoE European Convention on Mutual Assistance in Criminal Matters that are relevant to this project, were not replaced by the directive on the EIO (Directive 2014/41/EU).⁴¹

1.1 Transposition of EU instruments

Explain for each of these instruments whether your MS transposed them and, if so, whether in separate laws or as a part of the Code of Criminal Procedure.⁴²

videoconference (Art. 10), but these provisions are replaced by the corresponding provisions in Directive 2014/41/EU (Art. 34(1)).

³⁷ Art. 5.

³⁸ In certain circumstances, the CoE European Convention on the Transfer of Proceedings in Criminal Matters also applies when the person concerned has already been finally convicted. See *MR2.0: some preliminary explorations*.

³⁹ Art. 21(1) of the European Convention on Mutual Assistance in Criminal Matters : the 'laying of information' by one MS 'with a view to proceedings in the courts of another' MS.

⁴⁰ Germany and Poland are not bound by this convention.

⁴¹ See Art. 34(1): '(...) this Directive replaces, as from 22 May 2017, the corresponding provisions of the following conventions (...)'. The directive does not contain any provisions on sending to and serving documents on a suspect, accused person or convicted person who resides abroad, nor on the 'laying of information' by one MS 'with a view to proceedings in the courts of another' MS. That is so, because the directive is only concerned with obtaining evidence.

⁴² Incorrect transposition into national law *per se* is out of scope. Incorrect transposition is only relevant if it has an impact on the "effective and coherent" application of the instruments. If, e.g., the NAR is of the opinion that transposition of the optional grounds for refusal of Directive 2014/41/EU as mandatory grounds for refusal is in

On 5 April 2023, the European Commission submitted a proposal for a regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters, which was adopted by the Council of the European Union on 5 November 2024.⁴³

(a) FD 2002/584/JHA

The Netherlands transposed FD 2002/584/JHA. The Law on Surrender (*Overleveringswet*) was adopted on 29 April 2004 and entered into force on 12 May 2004,⁴⁴ almost four and a half months later than the ultimate date for transposition.⁴⁵

The Netherlands chose to transpose FD 2002/584/JHA as a separate law, not as part of the Code of Criminal Procedure. Transposition as part of the Criminal Code of Procedure would have been a far from obvious choice. At the time of transposition, the Code of Criminal Procedure contained provisions with regard to only two classic forms of cooperation in criminal matters (mutual legal assistance and transfer of proceedings). The form of cooperation that was ultimately replaced by the EAW, extradition, was and is governed by a separate law, the Law on Extradition (*Uitleveringswet*). The only choice the legislator saw, was the choice between transposing FD 2002/584/JHA as a part of the Law on Extradition or transposing it as a separate law. It was thought that combining extradition and surrender in one law would not lead to clear legislation. Moreover, FD 2002/584/JHA pertains to both executing and issuing EAWs whereas the national rules on extradition only pertain to extradition *by* the Netherlands ('*uitlevering*'; 'active extradition') not to extradition *to* the Netherlands ('*inlevering*'; 'passive extradition'). The regime of FD 2002/584/JHA therefore has a wider scope than the national rules on extradition.⁴⁶ Evidently, this was seen as an additional reason why one law for both extradition and surrender was not seen as suitable.

contravention of that directive and has a negative impact on the "effective and coherent application" of instruments, this is relevant and worthy of mention.

⁴³ Regulation (EU) 2024/3011 of the European Parliament and of the Council of 27 November 2024 on the transfer of proceedings in criminal matters, O.J. L 2024/3011.

⁴⁴ *Wet van 29 april 2004 tot implementatie van het kaderbesluit van de Raad van de Europese Unie betreffende het Europees aanhoudingsbevel en de procedures van overlevering tussen de lidstaten van de Europese Unie (Overleveringswet)*, *Stb.* 2004, 195.

⁴⁵ Art. 34(1) of FD 2002/584/JHA: 31 December 2003.

⁴⁶ *Kamerstukken II* 2002/03, 29042, nr. 3, p. 7.

Nevertheless, the legislator made the fateful choice to treat the Law on Extradition as a model for the transposition of FD 2002/584/JHA. This created lots of deviations from FD 2002/584/JHA,⁴⁷ gave rise to many preliminary references to the Court of Justice,⁴⁸ which in turn – but after long delays – gave rise to a much needed major overhaul of the Law on Surrender in 2021.⁴⁹ However, this legislative overhaul did not remedy all defects and even introduced some new ones.⁵⁰ Unsurprisingly, the European Commission initiated infringement proceedings against the Netherlands soon after the entry into force of the amendments to the Law on Surrender.⁵¹

In 2023, the Netherlands Court of Audit (*Algemene Rekenkamer*) published a (negative) report on compliance by the Netherlands with EU law.⁵² A case-study of the transposition of FD 2002/584/JHA was published as an annex to the report. The Netherlands Court of Audit concluded that after 20 years FD 2002/584/JHA was still not transposed fully and correctly by the Netherlands and that the Netherlands had waited a long time – sometimes several years – to give effect to judgments of the Court of Justice.⁵³

⁴⁷ See Glerum, *De weigeringsgronden bij uitlevering en overlevering. Een vergelijking en kritische evaluatie in het licht van het beginsel van wederzijdse erkenning* (Wolf Legal Publishers, 2013), *passim*.

⁴⁸ Several examples:

- Case C-463/15 PPU, *A.*, EU:C:2015:634 (on the interpretation of Art. 2(4) and 4(1) of FD 2002/584/JHA);
- Case C-123/08, *Wolzenburg*, EU:C:2009:530; Case C-579/15, *Poplawski*, EU:C:2017:503 and Case C-573/17, *Poplawski II*, EU:C:2019:530 (on the interpretation of Article 4(6) of FD 2002/584/JHA);
- Case C-492/18 PPU, *TC*, EU:C:2019:108 (on the interpretation of Art. 17 of FD 2002/584/JHA);
- Case C-665/20 PPU, *X (European arrest warrant – Ne bis in idem)*, EU:C:2021:339 (on the interpretation of Article 4(5) of FD 2002/584/JHA);
- Case C-492/22 PPU, *CJ (Decision to postpone surrender due to criminal prosecution)*, EU:C:2022:964 (on the interpretation of Art. 24(1) of FD 2002/584/JHA).

See on the Dutch preliminary references about FD 2002/584/JHA Glerum and Klomp, “Reflecties van de Internationale Rechtshulpkamer (2)”, *Trema* 2019/1. On the motives of referring courts for referring questions to the Court of Justice see Krommendijk, *National Courts and Preliminary References to the Court of Justice* (Elgar, 2021).

⁴⁹ Wet van 3 maart 2021 tot herimplementatie van onderdelen van het kaderbesluit van de Raad van de Europese Unie betreffende het Europees aanhoudingsbevel en de procedures van overlevering tussen de lidstaten van de Europese Unie (wijziging van de Overleveringswet), *Stb.* 2021, 125.

⁵⁰ See Glerum, “De Overleveringswet op de helling: de herimplementatie van Kaderbesluit 2002/584/JBZ”, (2021) *Nederlands Tijdschrift voor Strafrecht*, 274-296, *passim*.

⁵¹ INFR(2021)2004: Letter of formal notice, 9 June 2021; Reasoned opinion, 24 April 2024.

⁵² *EU-recht in de praktijk*, (Algemene Rekenkamer, 2023). For a general and critical overview of the transposition by the Netherlands of framework decisions concerning mutual recognition in criminal matters see Geelhoed en Post, “Nederlandse omzetting van de kaderbesluiten inzake wederzijdse erkenning in strafzaken. Tijd voor herziening van de pre-Lisbon instrumenten?”, (2024) *Boom Strafbblad*, 300-309.

⁵³ *Bijlage casusonderzoeken*, p. 33.

As a result of the infringement proceedings, in 2024 the Netherlands was forced to carry out a major legislative overhaul of the Law on Surrender yet again.⁵⁴ The proceedings are still active.⁵⁵

(b) FD 2008/909/JHA

FD 2008/909/JHA was transposed by the Netherlands by adopting – on 12 July 2012 – the Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences (*Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties* or *WETS* for short),⁵⁶ which entered into force on 1 November 2012.⁵⁷ As with the transposition of FD 2002/584/JHA, the Netherlands did not transpose FD 2008/909/JHA in time. The ultimate date for transposition was 5 December 2011.⁵⁸

Unlike FD 2002/584/JHA, the choice was not between transposing FD 2008/909/JHA as part of the Code of Criminal Procedure or transposing it as a separate law. The national rules on the transfer of the enforcement of foreign sentences were and are governed by a separate law, the Law on the Transfer of Enforcement of Judgments in Criminal Matters (*Wet overdracht strafvonnissen*). The legislator decided not to transpose FD 2008/909/JHA as part of that law.

⁵⁴ Wet van 17 juli 2024 tot wijziging van de Overleveringswet, de Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties en het Wetboek van Strafrecht ter herimplementatie van onderdelen van het kaderbesluit 2002/584/JBZ betreffende het Europees aanhoudingsbevel, van onderdelen van het kaderbesluit 2008/913/JBZ betreffende de bestrijding van bepaalde vormen en uitingen van racisme en vreemdelingenhaat, van onderdelen van de richtlijn (EU) 2013/48 betreffende het recht op toegang tot een advocaat in strafprocedures en in procedures ter uitvoering van een Europees aanhoudingsbevel en van onderdelen van de richtlijn (EU) 2017/1371 betreffende de strafrechtelijke bestrijding van fraude die de financiële belangen van de Unie schaadt (Wet herimplementatie Europees strafrecht), *Stb.* 2024, 207. The amendments to the Law of Surrender entered into force on 1 October 2024 (*Stb.* 2024, 221).

⁵⁵ See the online register of infringement proceedings: <https://ec.europa.eu/implementing-eu-law/search-infringement-decisions/> (last accessed on 26 April 2025).

⁵⁶ Wet van 12 juli 2012 tot implementatie van kaderbesluit 2008/909/JBZ van de Raad van de Europese Unie van 27 november 2008 inzake de toepassing van het beginsel van wederzijdse erkenning op strafvonnissen waarbij vrijheidsstraffen of tot vrijheidsbeneming strekkende maatregelen zijn opgelegd, met het oog op tenuitvoerlegging ervan in de Europese Unie (PbEU L 327), van kaderbesluit 2008/947/JBZ van de Raad van de Europese Unie van 27 november 2008 inzake de toepassing van het beginsel van de wederzijdse erkenning op vonnissen en proeftijdbeslissingen met het oog op het toezicht op proeftijdvoorwaarden en alternatieve straffen (PbEU L 337) en van kaderbesluit 2009/299/JBZ van de Raad van de Europese Unie van 26 februari 2009 tot wijziging van kaderbesluit 2002/584/JBZ, kaderbesluit 2005/214/JBZ, kaderbesluit 2006/783/JBZ, kaderbesluit 2008/909/JBZ en kaderbesluit 2008/947/JBZ en tot versterking van de procedurele rechten van personen, tot bevordering van de toepassing van het beginsel van wederzijdse erkenning op beslissingen gegeven ten aanzien van personen die niet verschenen zijn tijdens het proces (PbEU L 81) (Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties), *Stb.* 2012, 333.

⁵⁷ *Stb.* 2012, 373.

⁵⁸ Art. 29(1) of FD 2008/909/JHA.

Like combining extradition and surrender in one law, it was felt that one law for both enforcement of sentences concerning non-EU States and mutual recognition of sentences concerning EU Member States would not be conducive to clear legislation.⁵⁹

Of course, the Netherlands had already transposed FD 2005/214/JHA on financial penalties,⁶⁰ which resulted in the Law on Mutual Recognition and Enforcement of Sanctions in Criminal Matters (*Wet wederzijdse erkenning en tenuitvoerlegging strafrechtelijke sancties*).⁶¹ However, combining the rules on mutual recognition of financial penalties and those on mutual recognition of custodial sentences into one law would give rise to more or less the same objection. It would not lead to a clear set of rules and would, moreover, require a major overhaul of the existing law, thus creating an unclear situation for practitioners. Lastly, the authorities competent for financial penalties and those competent for custodial sentences were and are not the same. In this respect as well, combining the two regimes in one law would not yield any clear benefits.⁶²

Pursuant to Article 28(2) of FD 2008/909/JHA, ‘on the adoption’ of that framework decision each Member State could ‘make a declaration indicating that, in cases where the final judgment has been issued before the date it specifies, it will as an issuing and an executing State, continue to apply the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011’. The effect of such a declaration was that ‘the existing instruments on the transfer of sentenced persons applicable before 5 December 2011’ would continue to apply in such cases ‘in relation to all other Member States irrespective of whether or not they have made the same declaration’. FD 2008/909/JHA was adopted on 27 November 2008. The Netherlands made a declaration pursuant to Article 28(2) not on the adoption of the framework decision but on a later moment, to wit on 24 March 2009.⁶³ According to that declaration, ‘in cases where the final judgment has been issued within 3 years following the date on which the Framework Decision enters into force [*i.e.* 5 December 2008],⁶⁴ the Netherlands will, as an issuing and an executing State, continue to apply the legal instruments

⁵⁹ *Kamerstukken II* 2010/11, 32885, nr. 3, p. 5.

⁶⁰ Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, O.J. 2005, L 76/16.

⁶¹ Wet van 27 september 2007 tot implementatie van het kaderbesluit nr. 2005/214/JBZ van de Raad van de Europese Unie van 24 februari 2005 inzake de toepassing van het beginsel van wederzijdse erkenning op geldelijke sancties (PbEG L 76), *Stb.* 2007, 354.

⁶² *Kamerstukken II* 2010/11, 32885, nr. 3, pp. 5-6.

⁶³ O.J. 2009, L 265/41.

⁶⁴ See Art. 30 of FD 2008/909/JHA.

on the transfer of sentenced persons applicable prior to this Framework Decision'. This transitional regime was also laid down in national law (Article 5:2(3) of the Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences).

Until the *Van Vemde* judgment,⁶⁵ national courts and national authorities gave an incorrect interpretation to Article 28(2) and the declaration. According to that interpretation, if the judgment was rendered before 5 December 2011, the existing legal instruments on the transfer of sentenced persons applicable before that date would apply irrespective of when the judgment became final (before or after that date).⁶⁶ In *Van Vemde*, however, the CJEU held that Article 28(2) of FD 2008/909/JHA only applied to judgments that had become final *before* the date specified in the declaration,⁶⁷ thus narrowing the field of application of the transitional regime.

As the Dutch declaration was tardy – it was not made ‘on the adoption’ of the framework decision but at a later date –, it was not ‘capable of producing legal effects’.⁶⁸ The Netherlands withdrew the declaration with effect from 1 June 2018.⁶⁹ However, the national transitional provision was only deleted on 1 May 2019,⁷⁰ although according to EU law a withdrawal of a declaration results in the immediate application of the system of mutual recognition of custodial sentences established by FD 2008/909/JHA.⁷¹

(c) FD 2008/947/JHA

FD 2008/947/JHA was transposed at the same time and into the same national law as FD 2008/909/JHA. See *supra* under (b).⁷²

(d) FD 2009/829/JHA

⁶⁵ C-582/15, *Van Vemde*, EU:C:2017:37.

⁶⁶ See the opinion of AG Vegter, NL:PHR:2012:BY4289, which apparently was followed by the Supreme Court: NL:HR:2012:BY4289.

⁶⁷ C-582/15, *Van Vemde*, EU:C:2017:37, para 33.

⁶⁸ C-573/17, *Popławski II*, EU:C:2019:530, para 49.

⁶⁹ The Netherlands withdrew the declaration pending Case C-573/17 (*Popławski II*), a case in which, *inter alia*, the validity of that declaration was at issue, raising the suspicion that the Netherlands did so to escape censure by the CJEU: Dieben, “Overdracht en overname van de tenuitvoerlegging van buitenlandse strafrechtelijke beslissingen” in Van Elst and Van Sliedregt (Eds.), *Handboek Internationaal Strafrecht. Internationaal en Europees strafrecht vanuit Nederlands perspectief*, 3rd ed. (Wolters Kluwer, 2022), p. 573, footnote 205.

⁷⁰ Wet van 3 april 2019 tot wijziging van de Beginselenwetten, de Wet justitiële en strafvorderlijke gegevens, de Wet politiegegevens en enkele andere wetten in verband met het vervoer, het medisch klachtrecht en wijzigingen van technische aard, *Stb.* 2019, 141.

⁷¹ Cf. Case C-296/08 PPU, *Santesteban Goicoechea*, EU:C:2008:467, para 78.

⁷² This framework decision had to be transposed by 6 December 2021: Art. 25(1) of FD 2008/947/JHA.

The law to transpose FD 2009/829/JHA was adopted on 6 June 2013,⁷³ and entered into force on 1 November 2013.⁷⁴ As with the previous three framework decisions, the Netherlands was tardy in transposing FD 2008/909/JHA, exceeding the ultimate date for transposition – 1 December 2012 –⁷⁵ with eleven months.

In contrast to FD 2002/584/JHA, FD 2008/909/JHA and FD 2008/947/JHA, FD 2009/829/JHA was transposed by the Netherlands as part of the Code of Criminal Procedure. Title 7 of Book 5 (International and European cooperation in criminal matters) of the Code of Criminal Procedure contains the rules on mutual recognition and enforcement of warrants concerning detention on remand between the Member States of the European Union.

In Dutch law the alternative to detention on remand consists of conditionally suspending detention on remand. Since decisions on detention on remand and on conditional suspension of detention on remand pertain to a criminal prosecution, it was felt that the obvious place for the national transposition of FD 2009/829/JHA was the Code of Criminal Procedure.⁷⁶

Pursuant to Article 21(1) of FD 2009/829/JHA, surrender will follow in accordance with FD 2002/584/JHA, if the competent authority of the issuing Member State has issued an arrest warrant or any other enforceable judicial decision having the same effect. This concerns situations in which the person concerned does not comply with the supervision measures. Because FD 2009/829/JHA was intended to apply to ‘less serious offences’ as well (recital (13) of FD 2009/829/JHA), Article 21(2) in effect stipulates that the requirement for issuing a prosecution-EAW as laid down by Article 2(1) of FD 2002/584/JHA (to wit that the EAW pertains to ‘acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months’) does not apply. However, Member States may declare that they will apply Article 2(1) of FD 2002/584/JHA nonetheless (Article 21(3) of FD 2009/829/JHA). Such a declaration blocks surrender for acts that do not carry a maximum sentence of at least 12 months, which, in turn, might lead issuing authorities

⁷³ Wet van 5 juni 2013 tot implementatie van kaderbesluit 2009/829/JBZ van de Raad van de Europese Unie van 23 oktober 2009 inzake de toepassing tussen de lidstaten van de Europese Unie, van het beginsel van wederzijdse erkenning op beslissingen inzake toezichtmaatregelen als alternatief voor voorlopige hechtenis (PbEU L 294), *Stb.* 2013, 250.

⁷⁴ *Stb.* 2013, 309.

⁷⁵ Art. 27(1) of FD 2009/829/JHA.

⁷⁶ *Kamerstukken II* 2012/13, 33422, nr. 3, p. 9.

to abstain from issuing a European Supervision order (ESO) when the person concerned has his lawful and ordinary residence in a Member State that has applied Article 21(3) of FD 2009/829/JHA.⁷⁷ The Netherlands has made a declaration on the basis of Article 21(3) of FD 2009/829/JHA,⁷⁸ because of its opposition to using the EAW for minor offences.⁷⁹

(e) Directive 2014/41/EU

The Netherlands transposed Directive 2014/41/EU by law of 31 May 2017,⁸⁰ which entered into force on 17 June 2017.⁸¹ This time, the Netherlands exceeded the ultimate date for transposition – 22 May 2017 –⁸² by three weeks.

As the Code of Criminal Procedure already contained a book dedicated to international and European cooperation in criminal matters, it was obvious that the rules on the European Investigation Order would be included in that book (Book 5) in a separate title (Title 4).

Incorrect transposition of EU instruments

One pervasive issue of incorrect transposition by the Netherlands of the five instruments concerns transposing grounds for optional refusal into grounds for mandatory refusal. In the context of FD 2002/584/JHA, the Court of Justice has held that Member States may not transpose the grounds for optional refusal of Article 4 of FD 2002/584/JHA as grounds for mandatory refusal. This interpretation is based not only on the wording of Article 4 ('The executing judicial authority may refuse (...)') and its rubric ('Grounds for optional non-execution of the European arrest warrant') but also on its context. Pursuant to the principle of mutual recognition, surrender is the rule, whereas refusal is intended to be the exception which must be interpreted strictly.⁸³

⁷⁷ In this vein Neira-Pena, "The Reasons Behind the Failure of the European Supervision Order: The Defeat of Liberty Versus Security", (2020) European Papers, 1493-1509, at 1503-1504.

⁷⁸ Council document 15014/13, 18 October 2013, p. 13.

⁷⁹ *Kamerstukken II* 2012/13, 33422, nr. 3, p. 8.

⁸⁰ Wet van 31 mei 2017 tot wijziging van het Wetboek van Strafvordering ter implementatie van de richtlijn 2014/41/EU van het Europees Parlement en de Raad van 3 april 2014 betreffende het Europees onderzoeksbevel in strafzaken (implementatie richtlijn Europees onderzoeksbevel), *Stb.* 2017, 231.

⁸¹ *Stb.* 2017, 262.

⁸² Art. 36(1) of Directive 2014/41/EU.

⁸³ Case C-665/20 PPU, *X (European arrest warrant – Ne bis in idem)*, EU:C:2021:339, para 43-44.

The same arguments would seem to apply, *mutatis mutandis*, to the grounds for optional refusal contained in FD 2008/909/JHA, FD 2008/947/JHA, FD 2009/829/JHA and Directive 2014/41/EU. The Netherlands transposed (most of) those grounds as grounds for mandatory refusal. The *travaux préparatoires* do not shed any light on the reasons of doing this. In one particular instance, the legislator seems to have realised that transposing grounds for optional refusal as grounds for mandatory refusal is not in conformity with EU law. The original proposal for transposing Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders⁸⁴ into Dutch law provided for mandatory grounds for refusal, whereas the regulation only contains grounds for optional refusal. The Council of State (*Raad van State*) pointed to the case-law of the Court of Justice on Article 4 of FD 2002/584/JHA and urged the government to explain why it had chosen to transpose the grounds for refusal as grounds for mandatory refusal. As a result, the government amended the proposal to provide for grounds for optional refusal only.⁸⁵ In the explanatory memorandum, the government stated that EU case-law dictates that national authorities have a margin of discretion as to the application of grounds for optional refusal.⁸⁶ The proposal was adopted by Parliament. It follows that both the government and Parliament, at least at that time, had a broad view of the scope of the Court of Justice's case-law on Article 4: this case-law also applies to other framework decisions, directives and regulations containing grounds for optional refusal. This broad view is shared in legal literature.⁸⁷ Nevertheless, none of the laws transposing FD 2008/909/JHA, FD 2008/947/JHA, FD 2009/829/JHA and Directive 2014/41/EU was amended to reflect that broad view. With regard to FD 2002/584/JHA, the infringement proceedings against the Netherlands forced the legislator to amend the Law on Surrender (see *supra*, under (a)).

⁸⁴ Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, O.J. 2018, L 330/1.

⁸⁵ *Kamerstukken II* 2019/20, 35402, nr. 4, p. 2-3 and p. 4.

⁸⁶ *Kamerstukken II* 2019/20, 35402, nr. 3, p. 25.

⁸⁷ See Dieben, "Overdracht en overname van de tenuitvoerlegging van buitenlandse strafrechtelijke beslissingen", in Van Elst and Van Sliedregt (Eds.), *Handboek Internationaal Stafrecht. Internationaal en Europees strafrecht vanuit Nederlands perspectief*, 3rd ed. (Wolters Kluwer, 2022), pp. 525-608, at 580-581 and 583, concerning, respectively, the transposition of Art. 9 of FD 2008/909/JHA and of Art. 15 of FD 2008/947/JHA. See with regard to Art. 9(1)(d) of FD 2008/909/JHA Case C-641/23 (*Dubers*) and with regard to Art. 9(1)(i) of FD 2008/909/JHA Case C-447/24 (*Hölder mann*), which are pending before the Court of Justice. In both cases, the question relates to whether Member States may transpose optional grounds for refusal as mandatory grounds. In the *Dubers* case AG J. Richard de la Tour is of the opinion that Member States may not transpose Art. 9(1)(d) of FD 2008/909/JHA as a mandatory ground for refusal: Case C-641/23, *Dubers*, EU:C:2025:251, para 51.

The issue of incorrect transposition of optional grounds for refusal is not *directly* relevant for the Netherlands as *issuing* Member State. However, this issue can have an impact on the other Member States that participate in this project when they act as issuing Member State.

Another issue of incorrect transposition concerns the transitional regime of FD 2008/909/JHA. In contrast to the previous one, this issue was directly relevant for the Netherlands as issuing Member State and had an impact on the effectiveness of that framework decision. Until the *Van Vemde* judgment, the Netherlands would not forward certificates with regard to judgments that were rendered before 5 December 2011, and from *Van Vemde* until 1 May 2019, the Netherlands would not forward certificates with regard to judgments that had become final before 5 December 2011. Instead, the Netherlands had to rely on the Convention on the Transfer of Sentenced Persons⁸⁸ or on the European Convention on the International Validity of Criminal Judgments.⁸⁹

1.2 Ratification of conventions

Explain for each of those instruments whether your MS ratified them. If not, explain why not. If so, explain whether your MS implemented them into national law and, if so, whether in separate laws or as a part of the Code of Criminal Procedure; also list any reservations and declarations your MS made that could have an impact on coherence.

Pursuant to unwritten Dutch constitutional law, international rules that are binding on the Netherlands have force of law in the Netherlands.⁹⁰ Accordingly, conventions that are ratified by the Netherlands – and therefore are binding on the Netherlands – do not need to be transposed into national law. Provisions of a convention that may be binding on all persons by virtue of their content (*‘die naar haar inhoud een ieder kunnen verbinden’*; see *infra*) only have force of law once the convention is published (Article 93 of the Constitution). All conventions mentioned in paragraph 1.2 were ratified by the Netherlands and were published in the *Tractatenblad* (*Trb.*; Bulletin of Treaties).

As far as cooperation in criminal matters is concerned, national law provides a framework for applying conventions on that topic. That legal framework is general in nature in that it applies

⁸⁸ Strasbourg, 21 March 1983, ETS No. 112.

⁸⁹ The Hague, 28 May 1970, ETS No. 070.

⁹⁰ Besselink, “Internationaal recht en nationaal recht” in Horbach, Lefeber and Ribbelink (Eds.), *Handboek Internationaal Recht* (TMC Asser Press, 2007), pp. 48-80, at 63-64; Fleuren, in: *T&C Grondwet en Statuut*, art. 93, aant. 1.

to requests for cooperation that are based on a convention and to requests that are not. It designates the competent authorities, details the procedure to be followed and, for incoming requests, lists the conditions for cooperation.

In case of conflict between a provision of a convention that is binding on all persons (*‘een ieder verbindende bepalingen’*) and a national legal provision, the former category of provisions prevails (Article 94 of the Constitution).⁹¹ To be binding on all persons within the meaning of Article 94, the provision of a convention must have direct effect. If neither the text of a provision nor the *travaux préparatoires* show that it was intended to confer direct effect on a provision, the content of the provision is decisive: if the provision is unconditional and sufficiently precise to be applied in the national legal order, it has direct effect and, therefore, is binding on all persons.⁹²

(f) EU Convention on Mutual Assistance in Criminal Matters

The Netherlands ratified the EU Convention on Mutual Assistance in Criminal Matters on 2 April 2004.⁹³ The Protocol established by the Council in accordance with Article 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union⁹⁴ is not discussed here because it is out of scope.

As stated before, no transposition into national law was needed. The Code of Criminal Procedure already contained the national legal framework needed for carrying out requests for mutual legal assistance (see *infra* under (h)).

(g) European Convention on the Transfer of Proceedings in Criminal Matters

The Netherlands ratified the European Convention on the Transfer of Proceedings in Criminal Matters on 19 July 1985.⁹⁵

⁹¹ ‘Statutory regulations in force within the Kingdom shall not be applied if such application is in conflict with provisions of treaties or of decisions of international organisations that are binding on all persons’.

⁹² Supreme Court, NL:HR:2014:2928, para 3.5.1-3.5.3.

⁹³ *Trb.* 2004, 211.

⁹⁴ Luxembourg, 16 October 2001, O.J. 2001, C 326/2.

⁹⁵ *Trb.* 1985, 65.

Prior to the ratification, the Code of Criminal Procedure was amended to introduce rules on requesting and carrying out requests for transfer of proceedings, either based on a treaty or not. Currently, the rules are to be found in Title 3 (Transfer of proceedings) of Book 5 (International and European cooperation in criminal matters) of the Code of Criminal Procedure.

On 27 November 2024 the EU adopted a regulation on the transfer of proceedings in criminal matters.⁹⁶ This regulation will replace, between Member States (with the exception of Denmark), both the European Convention on the Transfer of Proceedings in Criminal Matters and Article 21 of the European Convention on Mutual Assistance in Criminal Matters (see *infra*, paragraph 1.2(h))⁹⁷ and will apply from 1 February 2027.⁹⁸

(h) European Convention on Mutual Assistance in Criminal Matters

The Netherlands ratified the European Convention on Mutual Assistance in Criminal Matters on 14 February 1969.⁹⁹ The additional protocols to this convention are not discussed here as they are out of scope.

Prior to the ratification, the Code of Criminal Procedure was amended to introduce rules on carrying out requests for mutual legal assistance, either based on a treaty or not. The rules are presently to be found in Title 1 (International mutual legal assistance in criminal matters) of Book 5 (International and European cooperation in criminal matters) of the Code of Criminal Procedure.

The Netherlands continues to apply¹⁰⁰ the bilateral Convention between the Kingdom of the Netherlands and the Federal Republic of Germany supplementing and facilitating the application of the European Convention on Mutual Assistance in Criminal Matters.¹⁰¹ Article

⁹⁶ Regulation (EU) 2024/3011 of the European Parliament and of the Council of 27 November 2024 on the transfer of proceedings in criminal matters, O.J. 2024, L 2024/3011.

⁹⁷ Art. 33(1). Cf. Case C-296/08 PPU, *Santesteban Goicoechea*, EU:C:2008:467, para 53 (with regard to Art. 31(1) of FD 2002/584/JHA).

⁹⁸ Art. 36.

⁹⁹ *Trb.* 1969, 63.

¹⁰⁰ The Netherlands made a declaration under Art. 34(4) of Directive 2014/41/EU to that effect: letter of 12 July 2017, No. 2099596.

¹⁰¹ Wittem, 30 August 1979, *Stb.* 1979, 143.

XI of that convention supplements Article 21 of the European Convention on Mutual Assistance in Criminal Matters. The Netherlands does not have similar bilateral conventions with any of the other Member States involved in this project.

Reservations to the conventions

The Netherlands made reservations to all of the conventions but these reservations do not have an impact on effectiveness and coherence, that is to say these reservations do not relate to the subject of the project.¹⁰²

1.3 Competent (judicial) authorities and central authorities

1.3.1 Competent (judicial) authorities

Describe which (judicial) authorities are competent under each of those instruments.

Concerning FD 2009/829/JHA and FD 2008/947/JHA: explain how the condition of equivalence¹⁰³ is met (Art. 3(2) of FD 2008/947/JHA; Article 6(2) of FD 2009/829/JHA) if the designated competent authority is not a 'judicial' authority. Also, if the designated competent authority is not a 'judicial' authority, explain the reasons for the choice.

Explain how the right to an effective remedy before a tribunal (Article 47(1) of the Charter) is guaranteed, if the competent authority is not a court.

(a) FD 2002/584/JHA

The competent judicial authorities to issue EAWs are the examining magistrates¹⁰⁴ (*rechters-commissarissen*) in the District Courts (Article 44 of the Law on Surrender (*Overleveringswet*)).¹⁰⁵ They do so only upon request by a public prosecutor.¹⁰⁶

¹⁰² The reservations are listed in the *Trb.*:

- EU Convention on Mutual Assistance in Criminal Matters: *Trb.* 2004, 211 and *Trb.* 2021, 99;
- European Convention on the Transfer of Proceedings in Criminal Matters: *Trb.* 1985, 65 and *Trb.* 1992, 89;
- European Convention on Mutual Assistance in Criminal Matters: *Trb.* 1969, 63, *Trb.* 1993, 131 and *Trb.* 2021, 59,

and, as far as the Council of Europe conventions are concerned, are mentioned on the website of the Treaty Office of the Council of Europe (<https://www.coe.int/en/web/conventions/>).

¹⁰³ See *MR2.0: some preliminary explorations*.

¹⁰⁴ The examining magistrate is a judge in a District Court.

¹⁰⁵ Council document 14979/19, 10 December 2019, p. 2.

¹⁰⁶ Requests to issue an execution-EAW are submitted through the Fugitive Active Search Team of the National Office of the Public Prosecution Service (LP-FAST): Glerum and Kijlstra, "Practice in the Netherlands", in

The requests fall within one of two categories of cases. The first category concerns cases in which there was prior involvement by an examining magistrate, *e.g.* because an examining magistrate granted a request for a telephone tap. In those cases, the request to issue an EAW will be dealt with by the examining magistrate having had prior involvement in the case. The second category consists of all other cases. In those cases, the request will be dealt with by the examining magistrate who happens to be on call at that moment.¹⁰⁷

In practice, the public prosecutor (or one of his assistants) completes the EAW form and requests the competent examining magistrate to issue the EAW. The examining magistrate is provided with the public prosecutor's request, the completed form and, in prosecution-cases, an *affidavit* stating the reasons why the person concerned is suspected of having committed the offence(s). Sometimes a national arrest warrant is also sent to the examining magistrate. The examining magistrate is not provided with the case-file nor (in execution-cases) with the final judgment.¹⁰⁸ Of course, in the first category of cases the examining magistrate will have *ex officio* knowledge of the case, having had prior involvement in it.¹⁰⁹

The examining magistrate checks whether the form is completed correctly, (in prosecution-cases) whether there are sufficient grounds to suspect the person concerned and whether the seriousness of the offence is such that issuing an EAW would be justified (*i.e.* whether the EAW pertains to a minor offence, such as shoplifting).¹¹⁰

The Law on Surrender does not contain any provision that directs the examining magistrate to assess the proportionality of issuing an EAW (including less intrusive alternatives). The 9th round of mutual evaluations report on the Netherlands states that the 'principle of proportionality is taken into account when issuing an EAW. The severity of the crime determines whether an EAW is issued. In addition, the expected penalty and alternatives that can achieve the same goal but are less restrictive, such as the European Investigation Order

Barbosa *et al*, *European Arrest Warrant Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23 (Eleven, 2022), pp. 93-236, at 123-124; *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, 13190/1/22 REV 1, 2 December 2022, p. 23. See also paragraph 3.2 ('**Enforcement: competent authorities in the Netherlands**', '*Judicial cooperation regarding the enforcement of sentences*').

¹⁰⁷ Interview with examining magistrate 3.

¹⁰⁸ Glerum and Kijlstra, "Practice in the Netherlands", in Barbosa *et al*, *European Arrest Warrant Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23 (Eleven, 2022), pp. 93-236, at 123-124. See also *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, 13190/1/22 REV 1, 2 December 2022, pp. 22-23.

¹⁰⁹ Interview with examining magistrate 3.

¹¹⁰ Glerum and Kijlstra, "Practice in the Netherlands", in Barbosa *et al*, *European Arrest Warrant Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23 (Eleven, 2022), pp. 93-236, at 126.

(EIO), are considered before the transfer procedure (*sic*) begins'.¹¹¹ The report does not state which authority takes those less restrictive alternatives into consideration, the requesting public prosecutor and/or the issuing examining magistrate. Furthermore, the report is somewhat contradictory: on the one hand the severity of the offence is 'determinative', on the other hand less restrictive alternatives are considered. Prior research found that those examining magistrates who were interviewed in the course of the *ImprovEAW project*¹¹² did not take into account less intrusive alternatives on the assumption that the public prosecutor had already made the assessment that only an EAW would suffice.¹¹³ In the present project, the results of the interviews are more diffuse. One examining magistrate stated that the public prosecutor makes the choice between a prosecution-EAW and an EIO,¹¹⁴ thereby corroborating the previous research. Another examining magistrate said that, since EAWs are only requested and issued for (very) serious offences, the question whether an EIO would suffice is moot. Two other examining magistrates asserted that they do assess whether a less intrusive alternative might suffice.¹¹⁵ Although there is no reason to doubt the sincerity of that assertion, it has to be pointed out that the public prosecutor's request contains no information about the possibility of employing such alternatives. Barring *ex officio* knowledge, this circumstance would seem to complicate – to say the least – any assessment by the examining magistrate of such alternatives. The explanations given by the examining magistrates seem to accentuate the gravity of the offence,¹¹⁶ which is in line with the statement in the report that 'the severity of the crime is determinative'. In essence, the examining magistrates seem to say that, since EAWs are only requested and issued for (very) serious offences, less intrusive alternatives are much less likely to be appropriate anyhow.¹¹⁷

¹¹¹ *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, 13190/1/22 REV 1, 2 December 2022, p. 23.

¹¹² See paragraph I.1.

¹¹³ Glerum and Kijlstra, "Practice in the Netherlands", in Barbosa *et al*, *European Arrest Warrant Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23 (Eleven, 2022), pp. 93-236, at 126-127.

¹¹⁴ Interview with examining magistrate 1. Public prosecutors 4 and 7 stated that they assess whether a less intrusive alternative such as an EIO might suffice when deciding whether to request the issuing of an EAW: statement at the national meeting on 24 October 2024.

¹¹⁵ Interview with examining magistrate 3. The other examining magistrate stated this in an e-mail addressed to the authors. Following the interview with magistrate 3 the authors submitted a number of questions to the weekly meeting of the Amsterdam examining magistrates, among which the question whether examining magistrates assess proportionality (including lesser intrusive alternatives). They responded in the affirmative.

¹¹⁶ Examining magistrates 1 and 2 also stated that EAWs are only issued for (very) serious offences: cases carrying a maximum sentence of at least twelve years or intensive and long term drug trafficking (interview with examining magistrate 1) and serious "undermining" criminality (interview with examining magistrate 2).

¹¹⁷ Examining magistrate 3 pointed to the low number of EAWs issued by the examining magistrates in Amsterdam: only 34 in 2024. Examining magistrate 1 also stated that the number of EAWs issued is low and lower than expected when the power to issue EAWs was conferred on the examining magistrates.

Until quite recently, the model for the examining magistrate's decision whether to grant the request to issue an EAW did not refer to an assessment of proportionality. As a result of the interview carried out in this project, the issue of assessing of proportionality was discussed by the Amsterdam examining magistrates internally. This led to an amendment of the model decision to grant a request to issue an EAW which now includes a standard passage on proportionality.¹¹⁸

The decision whether to issue an EAW is taken without a hearing on the basis of the aforementioned documents. Requests to issue an EAW are almost never refused,¹¹⁹ although it is mentioned that requests are sometimes withdrawn by the public prosecutor as a result of an examining magistrates' request for clarification of for further information.¹²⁰

Prior to the *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)* judgment,¹²¹ each public prosecutor attached to a District Court was competent to issue an EAW. Pursuant to Article 127 of the Law on the Organisation of the Judiciary (*Wet op de rechterlijke organisatie*), the Minister of Justice and Security may give specific instructions to the Public Prosecution Service (*Openbaar Ministerie*) concerning its tasks and powers. Therefore, the Minister of Justice and Security could give specific instructions concerning issuing or not issuing of an EAW to a public prosecutor. Even though, reportedly, in practice the power to give specific instructions was and is never used,¹²² the mere fact that national law allowed the Minister of Justice and Security to give specific instructions concerning EAWs was enough to disqualify Dutch public prosecutors as issuing judicial authorities¹²³ (and as executing judicial authorities).¹²⁴

¹¹⁸ Interview with examining magistrate 3.

¹¹⁹ Glerum and Kijlstra, "Practice in the Netherlands", in Barbosa *et al*, *European Arrest Warrant Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23 (Eleven, 2022), pp. 93-236, at 123-125 and 126-127; interview with examining magistrate 2.

¹²⁰ Interview with examining magistrate 3. This examining magistrate mentioned an example in which apparently the police had submitted a request to issue an EAW without intervention by the public prosecutor. When the public prosecutor was asked for clarification, the request was withdrawn. Examining magistrate 2 stated that she had never asked for clarification or for further information.

¹²¹ Joined cases C-508/18 & C-82/19 PPU, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456.

¹²² European Commission, 2020 *Rule of Law Report, Country Chapter on the rule of law situation in the Netherlands*, pp. 4-5.

¹²³ Joined cases C-508/18 & C-82/19 PPU, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456, para 73 ('(...) That independence requires that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive'). See also Case C-510/19, *Openbaar Ministerie (Forgery of documents)*, EU:C:2020:953, para 67.

¹²⁴ Case C-510/19, *Openbaar Ministerie (Forgery of documents)*, EU:C:2020:953. See on this judgment Glerum, "Van stenen, monniken en kappen: het begrip 'uitvoerende rechterlijke autoriteit', het arrest *Openbaar Ministerie (Valsheid in geschrifte)* en de gevolgen voor de Nederlandse overleveringsprocedure", (2021) SEW, 232-246.

It seems that it was never a realistic option to exclude EAW matters from the minister's power to give specific instructions or to do away with the power to give specific instructions altogether just in order to save the position of Dutch public prosecutors as issuing judicial authorities. In Dutch law, the power to give instructions to the Public Prosecution Service is closely tied to the requirement of democratic control over the Public Prosecution Service. The Minister of Justice and Security is politically accountable to Parliament for the policy of the Public Prosecution Service in general and its actions in individual cases. Because he has the power to give (specific) instructions to the Public Prosecution Service, Parliament can call him to account for intervening or for failing to intervene in the policy or actions of the Public Prosecution Service. The political accountability of the Minister of Justice and Security for the Public Prosecution Service is considered to be a core element of the Rule of Law.¹²⁵ Tinkering with the Minister of Justice and Security's powers just to solve a problem with regard to EAWs could have far-reaching effects. Moreover, even if the Minister of Justice and Security no longer had the power to give specific instructions to public prosecutors concerning EAWs, a legal remedy *before a court* against the decision of a public prosecutor to issue a (prosecution-)EAW would be required.¹²⁶ In such circumstances, it seems more efficient to confer the power to issue EAWs directly on judges.¹²⁷

EAWs that were issued by public prosecutors prior to the *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)* judgment and that had not led to surrender to the Netherlands at the time of that judgment were never replaced by EAWs issued by examining magistrates. And prior to that judgment many surrenders to the Netherlands had already taken place on the basis of EAWs issued by public prosecutors. This raises the question what Dutch courts must do when the defendant in a criminal case before them was surrendered to the Netherlands for the purpose of prosecuting that case on the basis of an EAW issued by a Dutch public prosecutor, *i.e.* by an authority that cannot be considered to be an 'issuing judicial authority' within the meaning of Article 6(1) of FD 2002/584/JHA. In the *Puig Gordi* case the Court of

Astonishingly, the Netherlands still has not amended the declaration that designates the public prosecutor in Amsterdam as an executing judicial authority: Council document 5816/1/25, 19 February 2025, p. 20.

¹²⁵ See P.J.P. Tak, *The Dutch criminal justice system*, 3rd ed. (Wolf Legal Publishers, 2008), p. 51.

¹²⁶ Joined Cases C-508/18 and C-82/19 PPU, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456, para 75.

¹²⁷ In this vein J.W. Ouwerkerk, S.M.A. Lestrade, K.M. Pitcher, J.H. Crijns & J.M. ten Voorde, *Eindrapport De rol en positie van het openbaar ministerie als justitiële autoriteit in Europees strafrecht Een verkennende studie naar een toekomstbestendige vormgeving van de rol en de positie van het openbaar ministerie in de EU-brede justitiële samenwerking in strafzaken*, 30 September 2021, pp. 57-58.

Justice distinguished between an examination whether the EAW was issued by a judicial authority within the meaning of Article 6(1) of FD 2002/584/JHA and an examination whether that issuing judicial authority had jurisdiction to issue an EAW according to the law of the issuing Member State. The former examination is up to the executing judicial authority, the latter is up to the ‘judicial authorities of the issuing Member State’.¹²⁸ Prior to that judgment, the Dutch Supreme Court had ruled that Dutch courts may not examine, in the context of criminal proceedings after surrender to the Netherlands, whether the EAW was issued by an authority that was competent to do so (‘of het Europees aanhoudingsbevel door de daartoe bevoegde autoriteit is uitgevaardigd’), because that examination takes place during the surrender proceedings in the executing Member State.¹²⁹ The wording used seems to cover not only the question whether the EAW was issued by an authority that was a ‘judicial authority’ but also the question whether the issuing authority had jurisdiction to issue the EAW according to Dutch law. After the *Puig Gordi* judgment, the Supreme Court qualified its earlier ruling by holding that that earlier ruling means that Dutch courts may not examine, in the context of criminal proceedings after surrender to the Netherlands, whether the EAW was issued by an authority that can be considered to be a ‘judicial authority’ within the meaning of Article 6(1) of FD 2002/584/JHA (‘of het EAB is uitgevaardigd door een autoriteit die kan worden aangemerkt als een rechterlijke autoriteit in de zin van artikel 6 lid 1 Kaderbesluit’).¹³⁰ In effect, the wording of its earlier ruling was too broad, prohibiting an examination by the courts of the issuing Member State (the Netherlands) whether the issuing authority had jurisdiction to issue the EAW according to the law of the issuing Member State as well.¹³¹

(b) *FD 2008/909/JHA*

The Minister of Justice and Security is the competent authority to forward a judgment, together with a certificate, concerning a sanction involving deprivation of liberty to another Member State (Article 2:28(1) in combination with Article 1:1(a) of the Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences).¹³²

¹²⁸ Case C-158/21, *Puig Gordi and Others*, EU:C:2023:57, paras 85-87.

¹²⁹ NL:HR:2022:982, para 2.7.

¹³⁰ NL:HR:2023:481, para 2.6.2.

¹³¹ The Supreme Court’s case-law is curious because the case concerned a person who was surrendered *before* the *OG and PI (Public Prosecutor’s Offices, Lübeck and Zwickau)* judgment. The examination by the German executing judicial authority whether the EAW was issued by a ‘judicial authority’ within the meaning of Art. 6(1) of FD 2002/584/JHA, if there even was one, could not have taken into account that judgment.

¹³² Council document 14427/12, 1 October 2012, p. 2.

Apparently, the Minister of Justice and Security was designated as competent authority to send certificates and judgments to the executing Member State because that same minister was also designated as competent authority to decide whether incoming certificates and judgments would lead to mutual recognition and enforcement of a foreign sentence in the Netherlands.¹³³ Under Dutch law, the Minister of Justice and Security is responsible for the enforcement of judgments in criminal matters (see *infra*, Chapter 3). In that light, it makes sense that the Minister of Justice and Security was designated as the competent authority. Additionally, the Minister of Justice and Security is also the authority that is competent to decide whether a Dutch sentence is to be transferred to a non-EU State.¹³⁴

The role of the Minister of Justice and Security as competent authority under FD 2008/909/JHA has been criticised, particularly from the perspective of the Netherlands as *executing* Member State. The criticisms are twofold: firstly, the proceedings concerning incoming certificates do not comply with the right to an effective remedy before a court and the right to a fair trial (Article 47 of the Charter);¹³⁵ secondly, because no ‘court or tribunal’ within the meaning of Article 267 TFEU is involved in these proceedings, it is not possible to request a preliminary ruling concerning FD 2008/909/JHA when the Netherlands acts as *executing* Member State.¹³⁶

¹³³ *Kamerstukken II* 2010/11, 32885, nr. 3, p. 12-13.

¹³⁴ See Art. 52 of the Law on the Transfer of the Execution of Criminal Judgments (*Wet overdracht tenuitvoerlegging strafvonnissen*) regarding Dutch requests to transfer the execution to a non-EU State and Art. 57 of that same law regarding requests by a non-EU State to take over the execution from the Netherlands.

¹³⁵ Dölle and De Boer, “De black box van de WETS. Gebrek aan transparantie en rechtsbescherming in de procedure van strafoverdracht”, (2021) *Nederlands Tijdschrift voor Strafrecht*, 74-83.

¹³⁶ *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, 13190/1/22 REV 1, 2 December 2022, at pp. 40-43 and 93. The Court of Appeal Arnhem-Leeuwarden has a role in these proceedings but because of the predominantly administrative nature of the proceedings it did not consider itself competent to request a preliminary ruling. However, recently it asked the Court of Justice to answer the question whether it can be considered to be a ‘court or tribunal’ within the meaning of Art. 267 TFEU: Court of Appeal Arnhem-Leeuwarden, 29 March 2024, NL:GHARL:2024:2534. The Court of Justice answered that question in the negative. When it acts in proceedings concerning the mutual recognition and enforcement of foreign judgments, the Court of Appeal Arnhem-Leeuwarden does not perform a judicial function. Moreover, those proceedings have a non-adversarial nature and are not aimed at deciding a dispute. Consequently, when acting in those proceedings the Court of Appeal Arnhem-Leeuwarden is not a ‘court or tribunal’: Case C-235/24 PPU, *Niesker*, EU:C:2024:624. Following this judgment Ouwerkerk advocated a new national set-up of the proceedings in which the Court of Arnhem-Leeuwarden decides whether the judgment will be recognised and enforced after judicial proceedings in which the sentenced person can participate and which lead to a judicial decision. In this way, that court will also qualify as a ‘court or tribunal’: Ouwerkerk, “De druppel die de emmer doet overlopen. Naar een toekomstbestendige WETS-procedure voor overname van strafexecutie in Nederland: de wetgever aanzet”, DD 2024/57.

Effective remedy before a court

According to the Court of Justice, FD 2008/909/JHA is intended to create rights for the sentenced person.¹³⁷ Although it is clear that FD 2008/909/JHA does not create a right for the sentenced person to mutual recognition of his sentence, that framework decision does provide for rights on the part of the sentenced person of a procedural and substantive character, *e.g.* the right to request that mutual recognition proceedings be initiated (Article 4(5)), the right to state his opinion on forwarding the certificate (Article 6(3)) and the prohibition on aggravating the sentence (Article 8(4)). Moreover, when the issuing authority applies the provisions of national law adopted to transpose the framework decision it is implementing EU law.¹³⁸ Consequently, the Charter of fundamental rights of the European Union applies (Artikel 51(1)). Pursuant to Article 4 of the Charter, the sentenced person has the right not to be subjected to inhuman or degrading conditions of detention in the executing Member State.¹³⁹ It follows that national law must provide for an effective remedy before a court against violations of those rights (Article 47(1) of the Charter).

How does Dutch law provide for that remedy?

As a preliminary point it should be noted that the Minister of Justice and Security may only forward a judgment, together with a certificate, to the executing Member State, *inter alia*, when the sentenced person has requested it or has consented to it, unless his consent is not required (Article 2:24(c) of the Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences). If the sentenced person has requested forwarding the judgment or has consented to it, he will probably have little need of a legal remedy before a court against the decision to forward the judgment to the executing Member State. However, there are three exceptions to the requirement of consent. Probably at least one of those exceptions – the sentenced person is a national of the executing Member State in which he lives (Article 2:26(a) of the Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences) – applies quite often. Consequently, although *de jure* ‘consent required’ is the rule

¹³⁷ Case C-125/21, *Commission v Ireland (Transposition of the framework decision 2008/909)*, EU:C:2022:213, para 22.

¹³⁸ Cf. Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Caldăraru*, EU:C:2016:198, para 84; Case C-852/19, *Gavanozov II*, EU:C:2021:902, para 28.

¹³⁹ Cf. Case C-819/21, *Staatsanwaltschaft Aachen*, EU:C:2023:841 (with regard to the right to a fair trial).

and ‘no consent required’ is the exception, *in practice* ‘no consent required’ is the rule and ‘consent required’ is the exception.

The Minister of Justice and Security must afford a sentenced person the opportunity to state his views on the minister’s intention to forward a judgment to the executing Member State. To that end, he must notify the sentenced person in writing of that intention (Article 2:27(1) Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences). However, these duties do not apply if the sentenced person is not present in the Netherlands or if he asked for forwarding the judgment himself (Article 2:27(2) Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences).

The sentenced person can lodge an appeal against the intention to forward a judgment with the Court of Appeal Arnhem-Leeuwarden within 14 days of the receipt of the notification of that intention (Article 2:27(3) of Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences). The Court of Appeal will hear the sentenced person; if the sentenced person does not have a lawyer, the court will appoint one. The Court of Appeal will examine whether, when taking into account all relevant interests, the Minister of Justice and Security could reasonably have reached the intended decision (Article 2:27(4) of Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences). This rather limited standard of reviewing the minister’s intended decision is explained by the rather broad power conferred by EU and national law. Both Article 4(1) of FD 2008/909/JHA and Article 2:28(1) of Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences state that a judgment ‘may’ be forwarded to the executing Member State if the conditions for doing so are met, thereby conferring a large margin of discretion on the issuing authority. At least where the right not to be subjected to degrading or inhuman conditions of detention in the executing Member State as guaranteed by Article 4 of the Charter is at stake, the Court of Appeal should ignore the limited standard of review of Article 2:27(4) and, instead, should carry out a full review to establish whether forwarding the certificate to the executing Member State would expose the sentenced person to a real risk of degrading or inhuman detention conditions in the executing Member State.¹⁴⁰ It is doubtful whether the

¹⁴⁰ Compare Supreme Court, 15 September 2006, NL:HR:2006:AV7387, para 3.4.4, Supreme Court, 11 July 2014, NL:HR:2014:1680, para 3.4.3 and Supreme Court 25 April 2025, para 3.2.2, with regard to extradition and violations of fundamental rights.

Court of Appeal actually carries out such a review (completely),¹⁴¹ and it is, therefore, doubtful whether in such cases the legal remedy is effective.

If the Court of Appeal finds the appeal to be well-founded, the Minister of Justice and Security must refrain from forwarding the judgment to the executing Member State (Article 2:27(7) of Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences).¹⁴² Thus, one can argue that the right to an effective remedy before a court is guaranteed if the sentenced person is in the Netherlands. However, the limited scope of review¹⁴³ in cases not concerning fundamental rights violations might disqualify this remedy as an effective remedy (see *infra*).

If the sentenced person is not present in the Netherlands and if he is aware of the Minister of Justice and Security's intention to forward a judgment to the executing Member State, he could initiate civil proceedings against the State of the Netherlands contending that the intention to forward a judgment would constitute a civil tort. Under Dutch law, civil courts have so-called residual jurisdiction to offer litigants judicial protection if the law does not provide for a specific legal remedy with sufficient safeguards against an act or a decision by the State. In civil preliminary relief proceedings, the District Court The Hague could order interim measures, such as an injunction not to forward a judgment to the executing Member State. Thus, one can argue that the right to an effective remedy before a court is guaranteed for a sentenced person who is not present in the Netherlands. However, as with an appeal, on account of the Minister of Justice and Security's large margin of discretion the scope of review in civil preliminary relief proceedings, in principle, is limited to an assessment of the 'reasonableness' of the decision, *i.e.* an assessment whether the Minister of Justice and

¹⁴¹ In a string of recent judgments the Court of Appeal Arnhem-Leeuwarden applied the first step of the two-step examination introduced in the *Aranyosi and Căldăraru* judgment (Joined Cases C-404/15 and C-659/15 PPU, EU:C:2016:198) but relied on the Minister of Justice and Security not to go ahead with the transfer unless the executing Member State had given a guarantee that excluded the *in abstracto* real risk for the person concerned. See NL:GHARL:2023:2848 (Belgium); NL:GHARL:2024:2008/2009/3351 (Romania); NL:GHARL:2024:3555 (Poland) and NL:GHARL:2024:6760 (Ireland). This case-law means that the minister has to perform part of the second step and assess the sufficiency of any guarantee given by the issuing Member State. Of course, the sentenced person could initiate civil proceedings against the minister's decision that a guarantee is sufficient to exclude a real risk of inhuman or degrading detention conditions, but is inefficient to divide the legal protection with regard to the same issue between two different courts.

¹⁴² There is no ordinary legal remedy against the decision of the Court of Appeal, only an appeal in cassation in the interest of the law is possible (Article 2:27(8) of Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences).

¹⁴³ Dieben, "Overdracht en overname van de tenuitvoerlegging van buitenlandse strafrechtelijke beslissingen", in Van Elst and Van Sliedregt (Eds.), *Handboek Internationaal Stafrecht. Internationaal en Europees strafrecht vanuit Nederlands perspectief*, 3rd ed. (Wolters Kluwer, 2022), p. 599.

Security could reasonably have taken the decision at hand.¹⁴⁴ In other words, the review of the decision is not a full review (unless fundamental rights are at stake, see *supra*). Therefore, it is not certain whether this remedy would qualify as an effective remedy within the meaning of Article 47 of the Charter.¹⁴⁵

The same remedy applies against a decision not to forward a judgment to the executing Member State.

(c) *FD 2008/947/JHA*

The Public Prosecution Service is the competent authority to forward a judgment, together with a certificate, concerning a probation decision or an alternative sanction to the executing Member State (Articles 3:3(1) and 3:20(1) of the Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences). Within the Public Prosecution Service the public prosecutors of the International Centre for Mutual Legal Assistance Noord-Holland (IRC Noord-Holland; *Internationaal Rechtshulpcentrum Noord-Holland*) act as issuing authority.¹⁴⁶

The Public Prosecution Service was designated as competent authority because, under Dutch law, that institution is responsible for supervising compliance with conditions imposed in the context of a suspended sentence or a conditional release and for supervising the execution of a sentence of community service.¹⁴⁷

Comparable to forwarding a judgment concerning a custodial sentence (*supra*, under (b)), there is no duty to forward a judgment concerning a probation decision or an alternative

¹⁴⁴ Cf. Supreme Court, NL:HR:2011:BO9630. In the same vein Dieben, “Overdracht en overname van de tenuitvoerlegging van buitenlandse strafrechtelijke beslissingen”, in Van Elst and Van Sliedregt (Eds.), *Handboek Internationaal Stafrecht. Internationaal en Europees strafrecht vanuit Nederlands perspectief*, 3rd ed. (Wolters Kluwer, 2022), pp. 525-608, at 598.

¹⁴⁵ It is contested whether such proceedings constitute an effective legal remedy on account of the rather marginal assessment carried out by civil courts. In the context of the Netherlands as *executing* Member State see Dölle and De Boer, “De black box van de WETS. Gebrek aan transparantie en rechtsbescherming in de procedure van strafoverdracht”, (2021) *Nederlands Tijdschrift voor Strafrecht*, 74-83. According to AG G. Snijders, such proceedings in civil court do meet the requirements of Art. 6 of the ECHR and of Art. 47 of the Charter: NL:PHR:2024:901, para 3.34.

¹⁴⁶ Council document 13964/12, 2 October 2012, p. 2.

¹⁴⁷ *Kamerstukken II* 2010/11, 32885, nr. 3, p. 20.

sanction,¹⁴⁸ both FD 2008/947/JHA and national law conferring a large margin of discretion on the issuing authority.¹⁴⁹

Equivalence (Article 3(2) of FD 2008/947/JHA)

Article 3(1) of FD 2008/947/JHA stipulates that each Member State ‘shall inform the General Secretariat of the Council which authority or authorities, under its national law, are competent to act according to this Framework Decision in the situation where that Member State is the issuing State or the executing State’. According to Article 3(2) of FD 2008/947/JHA, the Member States ‘may designate non-judicial authorities as the competent authorities for taking decisions under this Framework Decision, provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures’.

Article 3(2) does not refer to the law of the Member States for the purpose of determining the meaning and scope of the term ‘(non-)judicial authority’. Therefore, that term is a concept of EU law that must be given an autonomous and uniform interpretation throughout the European Union.¹⁵⁰

The French and German proposal for a framework decision on mutual recognition of suspended sentences, alternative sanctions and conditional sentences¹⁵¹ provided for designation by the Member States of the competent ‘judicial authority or authorities’ (Article 4(1)). During the negotiations it was established ‘that in many Member States a judicial authority (court/judge, prosecutor or an unspecified judicial authority) would be competent for taking most or all of the decisions under the Framework Decision’.¹⁵² Nevertheless, ‘many Member States have flexibility in accepting, as issuing Member State, that decisions of their [judicial] authorities are handled in the executing State by authorities which are not necessarily to be qualified as “judicial authorities”’.¹⁵³ It was therefore agreed to delete the word ‘judicial’ in all instances where the words ‘competent judicial authority’ had been used,

¹⁴⁸ *Kamerstukken II* 2010/11, 32885, nr. 3, p. 59.

¹⁴⁹ In the same vein the Dutch Supreme Court, NL:HR:2019:46, para 3.5.

¹⁵⁰ Cf., e.g., Case C-294/16 PPU, JZ, EU:C:2016:610, para 36-37.

¹⁵¹ Initiative of the Federal Republic of Germany and of the French Republic with a view to adopting a Council Framework Decision (2007/.../JHA) of ... on the recognition and supervision of suspended sentences, alternative sanctions and conditional sentences, O.J. 2007, C 147.

¹⁵² Council document 14594/1/07, 7 November 2007, p. 2.

¹⁵³ Council document 14594/1/07, 7 November 2007, p. 2-3.

thereby leaving it ‘to the Member States to determine, in accordance with their national law, whether the authorities that are competent to act under the Framework Decision should have a “judicial nature”’.¹⁵⁴ However, France could only accept designating non-judicial authorities ‘as *enforcing* authorities for the application of the Framework Decision, where, under their domestic legislation, such authorities already have competence for enforcing national decisions with the same purpose’.¹⁵⁵ This led to the insertion of recital (21) in the preamble¹⁵⁶ and to the insertion of paragraph 2 in Article 3. Later on in the negotiations, Germany requested that a paragraph be inserted in Article 3 concerning subsequent decisions in the *executing* Member State with regard to enforcing or imposing a custodial sentence or measure in case of non-compliance with a probation measure or alternative sanction or if the sentenced person commits a new criminal offence. If such a decision is taken by another competent authority than a court, its decision must be capable of being subject to review by a court.¹⁵⁷ This led to the insertion of paragraph 3 in Article 3.¹⁵⁸

In conclusion, it appears from the *travaux préparatoires* that public prosecutors are to be regarded as ‘judicial authorities’ within the meaning of FD 2008/947/JHA and that the requirement of equivalence of Article 3(2) was adopted specifically with the role of the *executing* authority in mind (even though Article 3(2) does not explicitly make this distinction). Furthermore, it follows from Article 3(3) that the term ‘judicial’ is not limited to courts, otherwise the term ‘judicial authority’ could have been used instead of the term ‘court or (...) another independent court-like body’. It would seem that the definition of the concept of ‘judicial authority’ within the meaning of FD 2002/584/JHA – this concept includes not only judges or courts but also other authorities that participate in the administration of criminal justice¹⁵⁹ but not the executive¹⁶⁰ or the police¹⁶¹ – can also be applied to the concept of ‘judicial authority’ under FD 2008/947/JHA, with one important proviso. Because

¹⁵⁴ Council document 14594/1/07, 7 November 2007, p. 3.

¹⁵⁵ Council document 14594/1/07, 7 November 2007, p. 3 (emphasis added).

¹⁵⁶ ‘All Member States should ensure that sentenced persons, in respect of whom decisions under this Framework Decision are taken, are subject to a set of legal rights and remedies in accordance with their national law, regardless of whether the competent authorities designated to take decisions under this Framework Decision are of a judicial or a non-judicial nature’.

¹⁵⁷ Council document 15553/07, 27 November 2007, p. 6.

¹⁵⁸ ‘If a decision under Article 14(1)(b) or (c) is taken by a competent authority other than a court, the Member States shall ensure that, upon request of the person concerned, such decision may be reviewed by a court or by another independent court-like body’.

¹⁵⁹ Case C-452/16 PPU, *Poltorak*, EU:C:2016:858, para 33.

¹⁶⁰ Case C-477/16 PPU, *Kovalkovas*, EU:C:2016:861, para 35.

¹⁶¹ Case C-452/16 PPU, *Poltorak*, EU:C:2016:858, para 34.

decisions that impinge on the right to liberty of the sentenced person – *i.e.* decisions to enforce or to impose a sanction involving deprivation of liberty in case of non-compliance with the alternative sanction or probation decision – can only be taken or must be capable of review by a court or another independent court-like body (Article 3(3)), there seems to be no need to require statutory rules and an institutional framework capable of guaranteeing that an issuing authority that participates in the administration of justice but is itself not a court of a judge is independent vis-à-vis the executive,¹⁶² when deciding on forwarding a judgment in a specific case.¹⁶³

Since the Netherlands has designated the Public Prosecution Service as competent issuing authority, one can argue that Article 3(2) of FD 2008/947/JHA has no relevance for the Netherlands as issuing Member State.

Effective remedy before a court

What was said about the right to an effective remedy against violations of the rights of the sentenced person under FD 2008/909/JHA (see *supra*, under (b)), applies, *mutatis mutandis*, to FD 2008/947/JHA. If FD 2008/909/JHA was intended to create rights for sentenced persons, then the same goes for FD 2008/947/JHA. Therefore, national law must provide for an effective remedy before a court against violations of those rights.

The Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences does not provide for a legal remedy against the decision of the Public Prosecution Service to forward or not to forward a certificate to the executing Member State. According to the *travaux préparatoires* of the Law on Mutual Recognition and Enforcement of Custodial and Suspended Sentences, the underlying assumption of FD 2008/947/JHA is that the sentenced person requested the imposition of an alternative sanction or a probation decision, or at least stated that he would be willing to carry out an alternative sanction or to comply with any conditions. That is why that framework decision, unlike FD 2008/909/JHA, does not contain provisions on consent to forwarding the judgment by the sentenced person.¹⁶⁴ Nevertheless, it

¹⁶² Joined Cases C-508/18 & 82/19 PPU, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456, para 74.

¹⁶³ Compare Case C-584/19, *Staatsanwaltschaft Wien (Falsified transfer orders)*, EU:C:2020:1002, para 74.

¹⁶⁴ *Kamerstukken II* 2010/11, 32885, nr. 3, p. 19.

is only possible to forward a judgment to the Member State of the sentenced person's lawful and ordinary residence 'in cases where the sentenced person has returned or wants to return to that State' or to another Member State 'upon request of the sentenced person' (Article 9(1)-(2) of FD 2008/947/JHA). If the sentenced person has returned or wishes to return to his Member State of lawful and ordinary residence or if he requests the forwarding of the judgment to another Member State, it is reasonable to assume that he will have no need for an effective remedy against the decision to forward the judgment to that Member State. In practice, however, if a Dutch national reaches out to the issuing authority because he does not want to carry out his sentence of community service in the executing Member State but instead wants to carry it out in the Netherlands, the issuing authority will withdraw the certificate.¹⁶⁵

In any case, comparable to the situation of a sentenced person on whom a custodial sentence or measure was imposed (see *supra* under (b)), the sentenced person could initiate civil tort proceedings against the State of the Netherlands and ask the District Court The Hague to issue, as an interim measure, an injunction to forward or not to forward a certificate to the executing Member State.¹⁶⁶ Given the margin of discretion, what was said before about the limited scope of review (*supra* under (b)) applies here as well.

(d) FD 2009/829/JHA

The Public Prosecution Service is the competent authority to forward a decision on supervision measures, together with a certificate, to the executing Member State (Article 5:7:4(1)-(2) of the Code of Criminal Procedure).¹⁶⁷ It may either forward the decision to the Member State in which the person concerned has his permanent residence if he consents to return to that Member State (Article 5:7:16(1)) or to another Member State if the competent authority of that Member State has consented to such forwarding (Article 5:7:16(2)). However, it will not exercise its power to forward a decision unless the court that has rendered that decision instructs it to do so (Article 5:7:16(3) of the Code of Criminal Procedure). Reading the relevant provisions in combination, one might be led to think that Public Prosecution Service may only forward if the court instructs it to do so¹⁶⁸ (provided of

¹⁶⁵ Statement public prosecutor 2 at the national meeting of practitioners on 24 October 2004.

¹⁶⁶ *Kamerstukken II* 2011/12, 32885, nr. 7, p. 18.

¹⁶⁷ Council document 15014/13, 18 October 2013, p. 2.

¹⁶⁸ *Kamerstukken II* 2012/13, 33422, nr. 3, p. 15; *Kamerstukken II* 2012/13, 33422, nr. 3, p. 21. The initiative for a transfer usually emanates from the public prosecutor handling the case and sometimes from the court or the

course, that the conditions for forwarding are met), but that it is not bound to forward a decision even if the court instructs it to do so (and even if the conditions for forwarding are met). In other words, one might be led to think that the provisions afford the Public Prosecution Service discretion in this regard. However, case-law insists that the Public Prosecution Service does not have any discretion and must forward a decision if the court instructs it to do so.¹⁶⁹ The proposal for a new Code of Criminal Procedure confirms this interpretation (see *infra*, under ‘*Effective remedy before a court*’). The proposed new provision (Art. 8.8.4(1)), which evidently is not intended as a substantive change,¹⁷⁰ states unequivocally that the Public Prosecution Service will issue an ESO, if the court has determined that an ESO should be issued.¹⁷¹

Within the Public Prosecution Service the public prosecutors of IRC Noord-Holland act as issuing authority.¹⁷²

Equivalence (Article 6(2) of FD 2009/829/JHA)

Pursuant to Article 6(1) FD 2009/829/JHA the Member States shall inform the General Secretariat of the Council which ‘judicial authority or authorities’ are competent under their law to act as issuing authority and executing authority. However, pursuant to Article 6(2) of FD 2009/829/JHA, Member States may ‘(a)s an exception to paragraph 1 and without prejudice to paragraph 3, (...) designate non-judicial authorities as the competent authorities for taking decisions under this Framework Decision, provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures’.

defence. Often public prosecutors already contact IRC Noord-Holland to check whether a possible decision to suspend remand detention could be transferred to another Member State: *Evaluation report on the ninth round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, 13190/1/22 REV 1, 2 December 2022, p. 79.

¹⁶⁹ District Court of Amsterdam, 24 September 2015, NL:RBAMS:2015:6386.

¹⁷⁰ The proposed provision corresponds to Art. 5.7.4(2) and Art. 5.7.16(3) of the present code: *Kamerstukken II* 2024/25, 36636, nr. 3, p. 303.

¹⁷¹ ‘Het openbaar ministerie *vaardigt* een Europese toezichtbeslissing uit (...)’/ ‘The Public Prosecution Service *issues* a European Surveillance Order (...)’ (emphasis added).

¹⁷² *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on The Netherlands*, 13190/1/22 REV 1, 2 December 2022, p. 77.

The proposal of the European Commission for this framework decision¹⁷³ defined a European supervision order as a ‘judicial decision’ (Article 1) and defined the concept of ‘issuing authority’ as ‘a court, a judge, an investigating magistrate or a public prosecutor, with competence under national law to issue a European supervision order’ (Article 2(c)). The Explanatory Memorandum explained that the ‘European supervision order is a decision issued by a judicial authority (*i.e.* a court, a judge, an investigating magistrate or a public prosecutor)’.¹⁷⁴ Therefore, under the regime of the proposal a public prosecutor would qualify as a ‘judicial authority’.

FD 2009/829/JHA does not contain a definition of the concept ‘issuing (judicial) authority’. It does not refer to the law of the Member States for the purpose of determining the meaning and scope of that term. Therefore, that term is a concept of EU law that must be given an autonomous and uniform interpretation throughout the European Union.¹⁷⁵

During the negotiations, at the request of one Member State the provision on designating the competent authorities was amended in order to allow for the possibility that authorities other than judicial authorities could act under the framework decision. This eventually resulted in what is now Article 6(1)-(2). Another Member State felt that only judicial authorities should be able to act. As a compromise, the provision that eventually became Article 6(3) was redrafted to express that decisions concerning *the issuing of an arrest warrant* could only be taken by a ‘competent judicial authority’.¹⁷⁶ This provision concerns subsequent decisions by the authorities of the *issuing* Member State relating to supervision measures ‘following a breach of the supervision measures or a failure to comply with a summons to attend any hearing or trial in the course of criminal proceedings’.¹⁷⁷

Since Article 6(3) refers to the concept of ‘judicial authority’ and – unlike Article 3(3) of FD 2008/947/JHA – does not expressly require the intervention of a court, either at the level of the decision to issue an arrest warrant or at the level of review of that decision, one could argue that the concept of ‘judicial authority’ is not limited to courts but also encompasses

¹⁷³ Proposal for a Council framework decision on the European supervision order in pre-trial procedures between Member States of the European Union, COM(2006) 468 final.

¹⁷⁴ COM(2006) 468 final, p. 8.

¹⁷⁵ Cf., e.g., Case C-294/16 PPU, JZ, EU:C:2016:610, para 36-37.

¹⁷⁶ Council document 13151/08, 19 September 2008, p. 3.

¹⁷⁷ Recital (9) of the preamble.

other authorities that participate in the administration of justice, such as Public Prosecutor's Offices.¹⁷⁸ One could also argue that the requirement of independence vis-à-vis the executive does not apply. The issuing of an arrest warrant by the issuing judicial authority does not, in itself, infringe the right to liberty of the person concerned. He is still in the executing Member State and the arrest warrant is only valid in the territory of the issuing Member State. Only the issuing of an EAW based on that arrest warrant would infringe his right to liberty.¹⁷⁹

In any case, even if a Dutch public prosecutor could not be considered as a 'judicial authority', the designation of the Public Prosecution Service would comply with the requirement of equivalence. Under Dutch law, the public prosecutor has the power to order the arrest of a person who does not comply with the conditions set for suspending his remand on detention (Article 84(1) of the Code of Criminal Procedure). Consequently, the Public Prosecution Service 'has competence for taking decisions of a similar nature under their national law and procedures' within the meaning of Article 6(2) of FD 2009/829/JHA.

Effective remedy before a court

With regard to an effective remedy before a court under FD 2009/829/JHA, what was said concerning that right under FD 2008/909/JHA (see *supra*, under (b)), applies, *mutatis mutandis*. As it is likely that FD 2009/829/JHA, like FD 2008/909/JHA and FD 2008/947/JHA, was intended to create rights for the person concerned, national law must provide for an effective remedy before a court against violations of those rights.

The Code of Criminal Procedure does not provide for an explicit legal remedy against a decision by the Public Prosecution Service to forward or not to forward a decision on supervision measures to the executing Member State. However as stated before, the Public Prosecution Service may only exercise its power to forward a decision on the instruction of the court that rendered that decision and is bound to do so if the court so instructs. Since the Public Prosecution Service does not have any discretion in this regard, the question whether there is a legal remedy before a court against a decision by the Public Prosecution Service on forwarding the ESO seems irrelevant. The court's decision whether or not to conditionally

¹⁷⁸ Compare Joined Cases C-508/18 and C-82/19 PPU, *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456, para 50.

¹⁷⁹ Compare Case C-268/17, *AY (Arrest Warrant – Witness)*, EU:C:2018:602, para 28.

suspend remand detention and whether or not to instruct the issuing authority to forward is determinative.

Under Dutch law supervision measures may only be imposed in the context of a decision by a court to conditionally suspend an order for remand detention (Article 80 of the Code of Criminal Procedure). Therefore, for an ESO to be issued a court must have taken a decision to conditionally suspend remand detention and must have given an instruction to issue an ESO. This does not mean that the instruction to issue an ESO needs to be a separate decision. In this regard, the proposal for a new Code of Criminal Procedure clarifies that, if the court that decides to order a conditional suspension deems it necessary that an ESO be issued, it will order so *in its decision on conditional suspension*.¹⁸⁰

If the need to issue an ESO arises after the court has conditionally suspended remand detention, the court may, on request by the public prosecutor or the person concerned or *ex officio*, change that order to include an order to issue an EIO (article 81(1) of the Code of Criminal Procedure).¹⁸¹

Moreover, the (implicit) consent of the person concerned is always required for forwarding a decision. If the decision is to be sent to his Member State of lawful and ordinary residence, the person concerned must consent to return to that Member State (Article 9(1) of FD 2009/829/JHA). Upon request of the person concerned – and therefore with his (implicit) consent – the decision may be sent to another Member State (Article 9(2) of FD 2009/829/JHA). Presumably, the person concerned will have no need for the possibility to challenge the forwarding a decision before a court.

As to the decision not to forward a decision on supervision measures, normally, the suspect or accused person himself will request the court to suspend his remand detention. In the context of a request for suspension he could also raise the question whether the decision on supervision measures should be forwarded or not (after all, such a decision may only be forwarded *on instruction* by the court). If the court refuses to conditionally suspend the order for remand detention – which, *a fortiori*, means that there is no decision on supervision measures, let alone an instruction to issue an ESO –, the person concerned has the right to

¹⁸⁰ *Kamerstukken II 2024/25*, 36636, nr. 3, p. 304.

¹⁸¹ *Kamerstukken II 2024/25*, 36636, nr. 3, p. 304.

appeal that decision (Article 87(2) of the Code of Criminal Procedure).¹⁸² It can be argued that the appeal proceedings would meet the need of an effective remedy before a court, regardless of whether there is a separate effective remedy against the decision to forward or not to forward the decision on supervision measures itself. If the court conditionally suspends the order for remand detention but does not order that an ESO be issued, the person concerned may request the court to change its decision to include an order to issue an ESO (see *supra*). Comparable to appeal proceedings, it can be argued that such proceedings would constitute an effective remedy before a court.

In any case, the person concerned could initiate civil proceedings against the State of the Netherlands contending that the intention to forward or not to forward¹⁸³ a decision on supervision measures would constitute a civil tort.¹⁸⁴ What was said before about the (limited) scope of review (see *supra*, under (b)) applies here as well. However, civil proceedings are only possible if there is no specific legal remedy that offers sufficient safeguards. Arguably, the remedy of appeal against a decision refusing to conditionally suspend remand detention and the remedy of requesting a change in a decision on conditionally suspending remand detention without an order to forward the decision on supervision measures are remedies before a court that offer sufficient safeguards.

(e) Directive 2014/41/EU

Pursuant to Article 5.4.21(1) of the Code of Criminal Procedure, the public prosecutor, the examining magistrate (*rechter-commissaris*) or a court (*gerecht*)¹⁸⁵ may issue a European Investigation Order (EIO).¹⁸⁶ However, one of the conditions for issuing an EIO is that the

¹⁸² If the decision to refusal conditional suspension was taken by the examining magistrate, the District Court will deal with the appeal. If such a decision was taken by the District Court, the Court of Appeal will handle the appeal.

¹⁸³ According to the report on the 9th round of mutual evaluations 'If the Netherlands authorities refuse to transfer the supervision order, the suspects/defendants person has the right to appeal against such a decision and ask for a change to the measure imposed': *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, 13190/1/22 REV 1, 2 December 2022, p. 80. This statement is incorrect insofar as it relates to a refusal to forward the decision on supervision measures ('transfer of the supervision order'). As explained, in the main text, there is no specific legal remedy against such a decision. Presumably, the report had in mind the right to appeal a decision refusing conditional suspension of remand detention.

¹⁸⁴ *Kamerstukken II* 2012/13, 33422, nr. 3, p. 11 with regard to the mirror image (a decision to execute in the Netherlands a decision on supervision measures).

¹⁸⁵ The generic word 'court' encompasses both District Courts and Courts of Appeal.

¹⁸⁶ Letter of 12 July 2017, No. 2099596.

requirements according to national law for carrying out the investigative measure in an domestic case are met (Article 6(1)(b) of Directive 2014/41/EU; Article 5:4:21(2)(a) of the Code of Criminal Procedure). It follows that ‘only an authority which is competent to order such an investigative measure under the national law of the issuing State may be competent to issue an EIO’.¹⁸⁷ Therefore, it depends on the investigative measure sought which of the three categories of authorities is competent to issue an EIO for that investigative measure.

Under Dutch law the Minister of Justice and Security has the power to give specific instructions to members of the Public Prosecution Service (Article 127 of the Law on the organisation of the judiciary), including instructions whether or not to issue an EIO. In contrast to FD 2002/584/JHA, under Directive 2014/41/EU even a public prosecutor who is exposed to the risk of being subject to individual instructions from the executive can be a ‘judicial authority’.¹⁸⁸ The main reason for this distinction is that, with two exceptions, the EIO does not interfere with the right to liberty, unlike the EAW.¹⁸⁹

Effective remedy before a court

Pursuant to Article 14(1) of Directive 2014/41/EU, Member States must ensure that legal remedies equivalent to those available in a similar domestic case are applicable to the investigative measures indicated in the EIO. However, this provision imposes no duty on the Member States to provide additional legal remedies to those already existing in national law.¹⁹⁰

Nevertheless, In the *Gavanozov II* judgment, the Court of Justice held that Article 47 of the Charter requires that there is a legal remedy before a court in the issuing Member State against the decision to issue an EIO for the purpose of carrying out searches and seizures or hearing of a witness by videoconference in the issuing Member State. After all, the former

¹⁸⁷ Case C-724/29, *Spetsializirana prokuratura (Traffic and location data)*, EU:C:2021:1020, para 35. However, according to AG A. Rantos, this requirement only applies if the EIO is issued by an issuing judicial authority within the meaning of Art. 2(c)(i) of the directive (*i.e.* by a judge, court, investigating judge or public prosecutor), not if the EIO is issued by any other competent authority within the meaning of Art. 2(c)(ii) of the directive: Case C-635/23, *WBS GmbH*, EU:C:2025:95.

¹⁸⁸ Case C-584/19, *Staatsanwaltschaft Wien (Falsified transfer orders)*, EU:C:2020:1002, para 74.

¹⁸⁹ Case C-584/19, *Staatsanwaltschaft Wien (Falsified transfer orders)*, EU:C:2020:1002, para 73. The two exceptions are: a temporary transfer of a person already held in custody in the executing State for the purpose of carrying out an investigative measure (Art. 22) and a temporary transfer of a person already held in custody in the issuing State for the purpose of carrying out an investigative measure (Art. 23).

¹⁹⁰ Case C-852/19, *Gavanozov II*, EU:C:2021:902, para 26.

investigative measure constitutes an interference with the right to respect for private and family life, home and communications, whereas the latter investigative measure is likely to adversely affect the person concerned (given the consequences of not testifying or giving false testimony).¹⁹¹ That legal remedy must enable the person concerned, with regard to search and seizures, ‘to contest the need for, and lawfulness of, that EIO, at the very least having regard to the substantive reasons for issuing such an EIO’.¹⁹² And, with regard to hearing a witness by videoconference, ‘to challenge, at the very least, the substantive reasons for issuing such an EIO’.¹⁹³

The Code of Criminal Procedure does not provide for any specific legal remedy against a decision by a public prosecutor, an examining magistrate or a court whether or not to issue an EIO, with one exception that does not apply here.¹⁹⁴ The person concerned could initiate civil preliminary relief proceedings against the State of the Netherlands¹⁹⁵ and ask the District Court The Hague to issue an interim measure, such as an injunction to issue or not to issue an EIO. What was said before about the limited scope of review (*supra* under (b)) applies here as well.

When the criminal proceedings in the context of which the EIO was issued reach trial, the trial court may examine whether the decision to issue the EIO is in accordance with the law (since such an examination is not up to the authorities of the executing Member State).¹⁹⁶ Of course, the trial court can only afford *a posteriori* redress, such as imposing a lower sentence or excluding the evidence gathered in the execution of the EIO.¹⁹⁷

¹⁹¹ Case C-852/19, *Gavanozov II*, EU:C:2021:902, paras 31 and 47.

¹⁹² Case C-852/19, *Gavanozov II*, EU:C:2021:902, para 41.

¹⁹³ Case C-852/19, *Gavanozov II*, EU:C:2021:902, para 49.

¹⁹⁴ Pursuant to case-law, the legal remedy for interested parties against seizures of objects within the Netherlands (Article 552a of the Code of Criminal Procedure) is also applicable to seizures in another Member State on the basis of a Dutch EIO.

¹⁹⁵ Verrest, in: *T&C Internationaal strafrecht en strafrechtelijke samenwerking*, 10th ed. (Wolters Kluwer, 2023) art. 5.4.21, aant. 4 (regard to issuing an EIO). Interestingly, the report on the Netherlands in the context of the mutual evaluation of the EIO refers to summary proceedings but only with regard to witnesses and only *ex post facto*: *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on the Netherlands*, Council document 5616/1/24 REV 1, 15 February 2024, p. 37.

¹⁹⁶ NL:HR:2023:913, para 6.16.2.

¹⁹⁷ On the basis of Art. 359a of the Code of Criminal Procedure: *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on the Netherlands*, Council document 5616/1/24 REV 1, 15 February 2024, p. 37.

(f) EU Convention on Mutual Assistance in Criminal Matters

The EU Convention on Mutual Assistance in Criminal Matters is included in the research on account of its provisions on service and sending of procedural documents intended for persons who are in the territory of another Member State (Article 5).

Under the Code of Criminal Procedure all notifications required by law – such as summonses or subpoenas – are carried out on the orders of the Public Prosecution Service, unless the law explicitly states otherwise (Article 36a(1) of the Code of Criminal Procedure). Therefore, the Public Prosecution Service is the competent authority.

Effective remedy before a court

One can wonder whether Article 5 of the EU Convention on Mutual Assistance in Criminal Matters is intended to create rights for suspects, accused persons or sentenced persons. It could be argued that, in certain circumstances, the issuing Member State is obligated to make use of the exceptions to the rule of sending the summons directly by post, laid down in Article 5(2), and to request that the executing Member State serves the summons on the person concerned, especially where it has not been possible to serve the summons by post. However, according to the Dutch Supreme Court Article 5 does not impose any obligation on the issuing Member State – and, therefore, does not confer any right to the person concerned – to employ Article 5(2).¹⁹⁸

The Code of Criminal Procedure does not provide for any specific legal remedy before a court against serving or sending procedural documents intended for persons who are in the territory of another Member State.

In theory, the person concerned could initiate civil proceedings against the State of the Netherlands contending that the intention to send or to serve procedural documents pursuant to Article 5 would constitute a civil tort. Again in theory, the District Court The Hague could order interim measures in civil preliminary relief proceedings, such as an injunction not to send or to serve procedural documents. Of course, the person concerned would have to be

¹⁹⁸ At least in the context of serving the summons: HR, 11 June 2024, NL:HR:2024:842, para 2.5.3. However see also Chapter 5.3.1.

aware of the intention to send or to serve procedural documents to an address abroad. What was said before about the limited scope of review (*supra* under (b)) applies here as well.

Of course, once the case reaches trial the defence may argue that and the trial court will examine *ex officio* whether the defendant who is not present at trial was summoned in accordance with the law (see also Chapter 5).

(g) European Convention on the Transfer of Proceedings in Criminal Matters

Pursuant to Article 13(1) of the European Convention on the Transfer of Proceedings in Criminal Matters all requests specified in this convention shall be sent:

- by the Ministry of Justice of the requesting State to the Ministry of Justice of the requested State or, if special mutual arrangements exist,
- directly by the authorities of the requesting State to those of the requested State.

A Contracting State may declare that it adopts, in so far as it itself is concerned, rules of transmission other than those laid down in Article 13(1) (Article 13(3)). The Netherlands has not availed itself of this option.

Under national law, the authority that is competent to request that another Member State takes over the proceedings is dependent on whether the applicable treaty expressly provides for direct transmission thereof by judicial authorities. If the applicable treaty does so, the public prosecutor is the competent authority (Article 5.3.5 of the Code of Criminal Procedure). If not, the Minister of Justice and Security is the competent authority (Article 5.3.2 of the Code of Criminal Procedure). The minister will take a decision upon a proposal by the public prosecutor (Article 5.3.1 of the Code of Criminal Procedure). Such a proposal is not binding.

Since the European Convention on the Transfer of Proceedings in Criminal Matters does not expressly provide for direct transmission of a request to the requesting State, since the Netherlands has not entered into special mutual arrangements with other Member States,¹⁹⁹

¹⁹⁹ Art. 6 of the EU Convention on Mutual Assistance in Criminal Matters stipulates that requests for mutual assistance be made directly between judicial authorities. However, the European Convention on the Transfer of

and since it has not made a declaration pursuant to Article 13(3), the Minister of Justice and Security is the competent authority to request a transfer of proceedings under the convention.

Effective remedy before a court

The European Convention on the Transfer of Proceedings in Criminal Matters is a convention drawn up by the Council of Europe. It is not part of EU law. Consequently, Article 47 of the Charter is not applicable, unless the issuing authority is implementing EU law. We will examine whether Dutch law provides for an effective remedy before a court nonetheless.

In cases in which detention on remand was applied, the public prosecutor must notify a defendant who is present in the Netherlands or who has a known abode outside of the Netherlands that he has proposed to the Minister of Justice and Security to request a transfer of proceedings (Article 5.3.1(2) of the Code of Criminal Procedure). The defendant can lodge a complaint against such a notification with the Court of Appeal within fourteen days (Article 5.3.1(5) of the Code of Criminal Procedure). That court will only rule after having heard the complainant or, at least, after having summoned the complainant to be heard. The complainant has the right to be assisted by a lawyer. The Court can order that the complainant be prosecuted in the Netherlands. The review on appeal is not a limited review (compare *supra*, 1.3.1(b) ('*Effective remedy before a court*'), but rather a full review (Article 5:3.1(5) in combination with Article 12(i) of the Code of Criminal Procedure).²⁰⁰

In other cases, a defendant could initiate tort proceedings in civil court and ask for an injunction against a proposal to request a transfer of proceedings, or indeed an injunction to an actual request for transfer of proceedings. However, there is no duty to notify a defendant of a proposal to request a transfer of proceedings other than in the circumstances described in Article 5.3.1(2) of Code of Criminal Procedure). Practically speaking, if the duty of notification does not apply the defendant will usually have no knowledge of such a proposal.

Proceedings in Criminal Matters does not come within the scope of the EU convention (See Art. 1(1)). Therefore, it cannot be regarded as a special mutual arrangement within the meaning of Art. 13(1) of the European Convention on the Transfer of Proceedings in Criminal Matters.

²⁰⁰ Valkenburg, in: *T&C Strafvordering*, 15th ed. (Wolters Kluwer, 2023), Art. 12i, aant. 2.

Moreover, what was said before about the limited scope of review (*supra* under (b)) applies here as well.²⁰¹

(h) European Convention on Mutual Assistance in Criminal Matters

The European Convention on Mutual Assistance in Criminal Matters was only included in the research because it contains an alternative to transfer of proceedings for those Member States that are not a party to the European Convention on the Transfer of Proceedings in Criminal Matters, *e.g.* Germany and Poland.

Article 21 of the European Convention on Mutual Assistance in Criminal Matters provides for the ‘laying of information’ by one Contracting State ‘with a view to proceedings in the courts of another Party’. Even though one or both States are not bound by the European Convention on the Transfer of Proceedings in Criminal Matters, this provision allows one Contracting Party ‘to request another Party to institute proceedings against an individual’.²⁰²

Such requests must be transmitted between the Ministries of Justice concerned unless a Contracting Party has made a declaration that some or all requests for assistance shall be sent to it through other channels (Article 21(1)). This provision is supplemented by Article 6(1) of the EU Convention on Mutual Assistance in Criminal Matters. Pursuant to this provision, ‘Any information laid by a Member State with a view to proceedings before the courts of another Member State within the meaning of Article 21 of the European Mutual Assistance Convention (...) may be the subject of direct communications between the competent judicial authorities’.

It should be noted that European Convention on Mutual Assistance in Criminal Matters is applicable to mutual assistance ‘in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party’ (Article 1(1)). Since the concept of ‘judicial authority’ may have a different meaning in different States, Article 24 of European Convention on Mutual

²⁰¹ Reijntjes, “Overdracht en overname van strafvervolging” in Van Elst and Van Sliedregt (Eds.), *Handboek Internationaal Strafrecht. Internationaal en Europees strafrecht vanuit Nederlands perspectief*, 3rd ed. (Wolters Kluwer, 2022), p. 521: marginal review.

²⁰² *Explanatory Report to the European Convention on Mutual Assistance in Criminal Matters*, p. 11, available at <https://rm.coe.int/16800c92bd> (last accessed on 30 March 2025).

Assistance in Criminal Matters enables the Contracting Parties to state which authorities they consider as ‘judicial authorities’ within the meaning of that convention. The Netherlands has declared that ‘as regards the Netherlands, judicial authorities for the purposes of the Convention are to be understood as meaning members of the judiciary responsible for administering the law, examining magistrates and members of the Department of Public Prosecution’.²⁰³

Under national law, the laying of information within the meaning of Article 21 of the European Convention on Mutual Assistance in Criminal Matters is governed by the same provisions as a request concerning a transfer of proceedings to another State.²⁰⁴ As a result, the public prosecutor is the competent authority for the laying of information within the meaning of Article 21(1) of the European Convention on Mutual Assistance in Criminal Matters (see *supra*, under (g)).

Effective remedy before a court

What was stated with regard to the European Convention on the Transfer of Proceedings in Criminal Matters (see *supra* under (g)) applies *mutatis mutandis* to the laying of information.

The institutional set-up of transferring proceedings – decisions are taken either by an executive organ upon proposal by a public prosecutor, or by a public prosecutor, with only moderate judicial oversight – has met with criticism in legal literature. One commentator raises the question whether in the Dutch system non-judicial organs do not have too much power concerning decisions on the transfer of proceedings.²⁰⁵

Conclusions with regard to the competent authorities

The Netherlands designated courts, examining magistrates, the Public Prosecution Service and the Minister of Justice and Security as competent authorities. Two EU instruments make

²⁰³ *Trb.* 1969, 63, p. 13.

²⁰⁴ De Jonge, in: *T&C Internationaal strafrecht en strafrechtelijke samenwerking*, 10th ed. (Wolters Kluwer, 2023), Art. 5.3.1, aant. 1e.

²⁰⁵ Reijntjes, “Overdracht en overname van strafvervolgning” in Van Elst and Van Sliedregt (Eds.), *Handboek Internationaal Strafrecht. Internationaal en Europees strafrecht vanuit Nederlands perspectief*, 3rd ed. (Wolters Kluwer, 2022), pp. 522-523.

the designation of a non-‘judicial’ authority dependent on the condition that such an authority has competence for taking decisions of a similar nature under national law (FD 2008/947/JHA and FD 2009/829/JHA), but the authorities designated by the Netherlands under those instruments either are ‘judicial’ authorities within the meaning of those instruments (FD 2008/947/JHA) or comply with that condition (FD 2008/829/JHA).

In practice, issuing authorities that are not courts or judges sometimes feel the need to be able to refer questions to the Court of Justice.²⁰⁶ If another authority than a court or a judge is the competent issuing authority, Dutch law provides for a legal remedy before a court. In some cases, this remedy may be rather theoretical and in some cases the effectiveness of this remedy is in doubt. Nevertheless, access to proceedings before a (civil) court means that there is access to a ‘court or tribunal’ within the meaning of Article 267 TFEU that may or must refer questions on the interpretation of the EU instruments to the Court of Justice,²⁰⁷ in particular questions about the *issuing* side. It goes without saying that the possibility of clarifying the interpretation of the EU instruments is important for the effective and coherent interpretation of those instruments,²⁰⁸ all the more so since *executing* authorities, even if they have a ‘judicial’ nature, do not always qualify as a ‘court or tribunal’ within the meaning of Article 267 TFEU.²⁰⁹

1.3.2. Central authorities

Did your MS designate “central authorities” (within the meaning of the instruments)? If so, which authorities and what are their respective competences? What is the role of the central authority in choosing the form of cooperation?²¹⁰

²⁰⁶ Statement by public prosecutor 2 at the national meeting of practitioners on 24 October 2024.

²⁰⁷ When Dutch civil courts exercise so-called residual jurisdiction (see *supra*, under (b), Effective remedy before a court) they are a ‘court or tribunal’ within the meaning Art. 267 TFEU according to the Court of Justice: C-235/24 PPU, *Niesker*, EU:C:2024:624, para 48.

²⁰⁸ The evaluation team that carried out the evaluation of the Netherlands in the context of the 9th round of mutual evaluations is of the opinion that the availability of judicial review by the Court of Justice of the interpretation of mutual recognition instruments is of the utmost importance: *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, 13190/1/22 REV 1, 2 December 2022, p. 93, with regard to FD 2008/909/JHA.

²⁰⁹ See C-66/20, *Finanzamt für Steuerstrafsachen und Steuerfahndung Münster*, EU:C:2021:670 (the *Procura della Repubblica di Trento* does not exercise a judicial function when it is called upon to adopt a decision on the recognition and execution of an EIO and, therefore, is not a ‘court or tribunal’; C-235/24 PPU, *Niesker*, EU:C:2024:624: when acting in proceedings concerning the mutual recognition and enforcement of custodial sentences, the Court of Appeal Arnhem-Leeuwarden does not perform a judicial function and, therefore, is not a ‘court or tribunal’.

²¹⁰ It is assumed that the central authority has no role in deciding whether to ask for judicial cooperation, and if so, which form of judicial cooperation. However, if that assumption does not hold true for your MS, please explain.

Of the instruments and conventions that are in scope, only

- FD 2002/584/JHA;
- FD 2009/829/JHA and
- Directive 2014/41/EU

provide for designating central authorities.²¹¹ The Netherlands did not designate central authorities under any of these instruments.

As far as FD 2002/584/JHA is concerned, the argument for not designating a central authority with regard to issuing EAWs was that this would create an extra link in the chain that would have no added value. The issuing judicial authority – at that time the public prosecutor – would take care of sending the EAW to the executing Member State.²¹² Of course, public prosecutors no longer are competent to issue EAWs. Once an examining magistrate has issued an EAW, the actual transmission of that EAW will take place, as much as possible, through the intervention of the public prosecutor (Art. 46(1) of the Law on Surrender, with regard to an alert in the SIS). The public prosecutor will act as a contact for the executing judicial authority.²¹³ Indeed, as previous research has shown²¹⁴ and as research in the current project confirms, issuing examining magistrates are not kept in the loop once they have issued an EAW. Usually, they do not receive any requests for supplementary information (see Article 15(2) of FD 2002/584/JHA),²¹⁵ except for requests for a guarantee provided for in Article 5(3)

²¹¹ Interestingly, the public prosecutor responsible within the Public Prosecution Service for forwarding judgments under FD 2008/947/JHA, a framework decision which does not provide for designating central authorities, refers to the Public Prosecution Service as the ‘central authority’: Beun, “Overdracht van vrijheidsbeperkende sancties binnen de EU”, (2019) *Strafblad*, 37-43, at 37. Even the experts who carried out the evaluation on the Netherlands in the context of the 9th round of mutual evaluations made this mistake: *Evaluation report 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, Council document 13190/1/22 REV 1, 2 December 2022, p. 64 and 65.

²¹² *Kamerstukken II* 2003/04, 29042, nr. 12, p. 24-25.

²¹³ *Kamerstukken II* 2003/04, 29042, nr. 3, p. 3.

²¹⁴ Glerum and Kijlstra, “Practice in the Netherlands”, in Barbosa *et al*, *European Arrest Warrant Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23 (Eleven, 2022), pp. 93-236, at 125-126 and 187-188.

²¹⁵ Interview with examining magistrate 2; interview with examining magistrate 3. Both examining magistrates stated that they had not received any requests for supplementary information. Following the interview with magistrate 3 the authors submitted a number of questions to the weekly meeting of the Amsterdam examining magistrates, among which the question whether examining magistrates receive requests for supplementary information concerning EAWs that they had issued. They responded in the negative.

of FD 2002/584/JHA,²¹⁶ and are not even informed of the outcome of EAW proceedings.²¹⁷ Presumably, the public prosecutor will answer requests by the executing judicial authority without having recourse to the issuing examining magistrate.²¹⁸

As far as FD 2009/829/JHA is concerned: since the Public Prosecution Service was to be the competent authority and since that service would allocate the tasks and duties as competent authority to a central unit, it was felt that it was not needed to designate a central authority.²¹⁹

As far as Directive 2014/41/EU is concerned: no reasons for not designating a central authority were given during the process of transposition of that directive.

1.3.3. Coordination

Are there any mechanisms (in law or in practice) for coordinating between:

- different (judicial) authorities that are competent under one and the same instrument/convention and;
- different (judicial) authorities that are competent under different instruments/conventions?

To our knowledge, there are no mechanisms, in law or in practice, for coordination between different (judicial) authorities that are competent under one and the same instrument/convention. The same holds true for different (judicial) authorities that are competent under different instruments/conventions.

Every court has one or more European law court coordinators (*gerechtscoördinatoren Europees recht*). The European law court coordinator is usually an experienced judge but in some courts members of the legal support staff may also function as European law court coordinator. Together, the court coordinators form a national network. The role of the court

²¹⁶ Glerum and Kijlstra, "Practice in the Netherlands", in Barbosa *et al*, *European Arrest Warrant Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23 (Eleven, 2022), pp. 93-236, at 183-184; interview with examining magistrate 3.

²¹⁷ Unless the EAW was issued in a case in which the examining magistrate already had a previous involvement: after the surrender to the Netherlands, the surrendered person will be brought before that examining magistrate to decide on pre-trial detention.

²¹⁸ Examining magistrate 2 presumed that the public prosecutor would provide supplementary information, if requested by the executing judicial authority. If that authority settles for information provided by the public prosecutor instead of the issuing examining magistrate then that is fine by her. However, the International Centre for Mutual Legal Assistance of the Amsterdam Public Prosecution Office advises Amsterdam public prosecutors to put the answer to requests for supplementary information concerning material matters, *e.g.* requests to clarify the description of the offence, before the issuing examining magistrate for his approval. Requests concerning practical matters can be dealt with by the public prosecutors without involving the issuing examining magistrate. See Glerum and Kijlstra, "Practice in the Netherlands", in Barbosa *et al*, *European Arrest Warrant Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23 (Eleven, 2022), pp. 93-236, at 126.

²¹⁹ *Kamerstukken II* 2012/13, 33422, nr. 3, p. 14.

coordinator is that of an ‘information broker’: upon request or of his own accord he shares information about European law within his court and within the network.²²⁰ The role of European law court coordinator is not used as a mechanism for coordination between competent issuing authorities.

Within each court, a coordinating examining magistrate coordinates the activities of all the examining magistrates in his or her court. The coordinating examining magistrates of the courts meet regularly in the context of a national expert-group of coordinating examining magistrates (*expertgroep rechters-commissarissen*).²²¹ That expert-group discusses legal and policy issues concerning judicial cooperation insofar as examining magistrates are concerned. As with the network of European law court coordinators, the expert-group is not a mechanism for coordinating with other competent authorities.

Within the Public Prosecution Service, there are ten regional International Centres for Mutual Legal Assistance (*Internationale rechtshulpcentra*; IRC), one national IRC and one IRC that deals with complex fraud and environmental crime cases. The tasks of the IRC’s include:

- advising members of the Public Prosecution Service on incoming and outgoing requests for judicial cooperation;²²²
- registration;
- coordination;
- quality management;
- monitoring progress.²²³

However, the tasks of the IRC do not seem to include coordination with competent authorities outside of the Public Prosecution Service or the Police.

²²⁰ <https://intro.rechtspraak.minjus.nl/LOV/Europees/Paginas/GCEnetwerk.aspx> (last accessed on 30 March 2025).

²²¹ <https://intro.rechtspraak.minjus.nl/LOV/Straf/CommissiesWerkgroepen/paginas/ContactgegevenskabinettenRC.aspx> (last accessed on 30 March 2025).

²²² IRC Amsterdam advises public prosecutors of the Public Prosecution Office Amsterdam on requests to issue an EAW.

²²³ [https://www.internationalerechtshulp.nl/samenwerken/internationale-rechtshulp-centra#:~:text=Een%20Internationaal%20Rechtshulp%20Centrum%20\(IRC,het%20gebied%20van%20internationale%20rechtshulp](https://www.internationalerechtshulp.nl/samenwerken/internationale-rechtshulp-centra#:~:text=Een%20Internationaal%20Rechtshulp%20Centrum%20(IRC,het%20gebied%20van%20internationale%20rechtshulp) (last accessed on 30 March 2025).

2. Investigation and prosecution

General introduction

As discussed in the proposal, our perspective is the perspective of the competent national authority that has to decide whether or not to request judicial cooperation in a criminal case with a particular transnational component:

- either the person concerned resides in another Member State;
- or he is a national or resident of another Member State (but present in the issuing Member State).

In order to establish (a lack of) coherence and effectiveness when applying the instruments, chapters 2 and 3 are divided according to the general goals pursued by the competent national authority: investigation/prosecution on the one hand (Chapter 2) and enforcement of a sentence on the other (Chapter 3). Chapters 2-5 correspond to elements I and II of the methodology.

As to Chapter 2, the goal of investigation and/or prosecution can only be pursued in the stages preceding the stage of enforcement of a sentence. Those stages are the pre-trial stage and the trial stage. Thus, the concept of “prosecution” includes the trial. It is not excluded that at the trial stage – and thus during “prosecution” – investigative measures (such as interrogating the defendant in another MS) are carried out.

The pre-trial stage comprises the investigation into an offence from the moment the authorities become aware that an offence has been committed (even when the probable author of that offence is not yet known) up to the decision that the probable author of the offence must stand trial. The trial stage starts from the moment the competent national authority decides that the person concerned must stand trial. It ends when the decision of a court to convict the person concerned and to impose a sentence on him becomes final and enforceable. It comprises, therefore, a trial on appeal. Proceedings in which only questions of law are addressed are excluded. During such proceedings, there is no need for forms of judicial cooperation that are in the scope of the project, i.e. that are capable of prejudicing the liberty of the person concerned (see p. 6).²²⁴

The chapter on investigation/prosecution is subdivided into:

- a general part, identifying *in abstracto* the instruments that can be employed to pursue the general goal of investigation/prosecution (i.e. their “applicability”) (2.1), and
- a specific part, identifying the considerations that play a role when deciding on whether to employ those instruments *in concreto* in the pre-trial and trial stages (2.2 and 2.3) in connection with more specific goals that are pursued (i.e. their “application” in a given case).

2.1 Applicability of the instruments according to EU law

²²⁴ Of course, once the sentence is final it may be necessary to order the arrest and detention of the person concerned to ensure the enforcement of the sentence, but this concerns the enforcement stage, not the trial stage.

In Section 2.1, the listed instruments are those that – in our preliminary view – apply to that particular stage from the of EU-law perspective. This means that in this stage national law and national arrangements are not relevant.²²⁵

From the perspective of EU law, there are doubts regarding the applicability of some of the instruments listed.²²⁶ These instruments are denoted by a question mark in red, like this: ‘FD 2009/829/JHA (?)’. The reason for the question mark is explained in red. The NARs will give their opinion on the applicability of those instruments from the perspective of EU law. Please refer to the case-law of the CJEU, national case-law, legal literature and national parliamentary debates where relevant.²²⁷

2.1.1 Pre-trial stage

The pre-trial stage is subdivided into two parts:

- substage 1: the national authorities have reasonable grounds for believing that a certain person has committed the offence but cannot yet order his arrest and detention on remand under national law.
- substage 2: arrest and detention on remand are possible under national law.

Each of the two substages corresponds to a subsection: section 2.1.1.1 (substage1) and section 2.1.1.2 (substage 2). Each of those subsections distinguishes between two situations: either the suspect is present in the issuing Member State or he is present in another Member State.

2.1.1.1 Substage 1 (no detention on remand possible)

(a) Person concerned present in issuing MS

- FD 2009/829/JHA (?)
- Directive 2014/41/EU
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

(b) Person concerned present in another MS

- FD 2009/829/JHA (?)
- DR 2014/41
- EU Convention on Mutual Assistance

²²⁵ Considerations with regard to national law and arrangements are relevant when dealing with the application of instruments *in concreto*, therefore in Chapter 2.2 and 2.3.

²²⁶ See also MR2.0: *some preliminary explorations*.

²²⁷ With regard to national sources: only insofar as they concern the applicability/the scope of the EU instrument.

**- European Convention on Transfer of Proceedings/European
Convention on Mutual Assistance in Criminal Matters.**

Although an EAW, in general, can be issued in the pre-trial stage, it is not mentioned here, because in substage 1 it is not possible to order detention on remand.

Applicability of FD 2009/829/JHA

FD 2009/829/JHA seems to require that detention on remand is possible as a precondition to issuing an ESO. After all, ESO is ‘an alternative to provisional detention’ (Art. 1). Is it possible under EU law to issue an ESO, if detention on remand itself is not possible?

Only one of the instruments mentioned in 2.1.1.1 raises an applicability issue under EU law. FD 2009/829/JHA seems to require that detention on remand is possible as a precondition to issuing an ESO. After all, a decision on supervision measures is defined as a decision ‘imposing on a natural person, *as an alternative to provisional detention*, one or more supervision measures’ (Article 1).²²⁸ This raises the question whether it is possible, under EU law, to issue an ESO, if detention on remand itself is not (yet) possible?

There are good reasons for answering the question in the affirmative. The European Commission’s Proposal for a framework decision on supervision measures already stated that

‘As regards the thresholds, the European supervision order is an option whenever there is a possibility under the national law of the issuing Member State to order that a suspect be remanded in custody, irrespective of the fact that the thresholds vary between Member States. However, the European supervision order is not only an alternative to pre-trial detention. It may also be issued in relation to an offence for which only less severe coercive measures (*e.g.* travel prohibition) than pre-trial detention are allowed, *i.e.* where the threshold may be lower than for remand in custody’.²²⁹

The proposed threshold was obviously linked to the proposed scope of the framework decision: it would also cover ‘less serious offences (below the threshold of one year in the European arrest warrant)’.²³⁰ Depending on the law of the issuing Member State, offences

²²⁸ Emphasis added.

²²⁹ Proposal for a Council framework decision on the European supervision order in pre-trial procedures between Member States of the European Union, COM(2006) 468 final, p. 8.

²³⁰ COM(2006) 468 final, p. 7. See Art. 2(1) of FD 2002/584/JHA.

below that threshold might not be capable of providing a basis for detention on remand. Consequently, the words ‘as an alternative to pre-trial detention’ did not appear in the European Commission’s definition of a ‘European supervision order’.

During the negotiations concerning the proposal, some Member States were of the opinion that ‘the ESO should be an alternative only to pre-trial detention and not to other pre-trial coercive measures. Hence, an ESO should only be issued if under the law of the issuing Member State a pre-trial detention order would be possible’.²³¹

However, some Member States provide for imposing supervision measures even if pre-trial detention would not be possible (yet).²³² During the negotiations, it was emphasised that no harmonisation of national criminal law and/or national criminal procedural law was intended and that the conditions for issuing an ESO would be governed by the law of the issuing Member State. This indicates that such Member States would be allowed to issue an ESO on the basis of such supervision measures. Moreover, the proposed scope of the framework decision was retained: pursuant to its preamble, FD 2009/829/JHA is ‘not restricted to particular types or levels of crime, supervision measures should generally be applied in case of less serious offences’.²³³

In any case, the words ‘as an alternative to pre-trial detention’ in the definition of a ‘decision on supervision measures’ are to be interpreted against the background of the preamble to FD 2009/829/JHA. Recital (4) of the preamble makes clear that an ESO can be issued if according to the law of the issuing Member State a pre-trial detention order would not be possible (yet):

‘The measures provided for in this Framework Decision should also aim at enhancing the right to liberty and the presumption of innocence in the European Union and at ensuring cooperation between Member States when a person is subject to obligations or supervision pending a court decision. As a consequence, the present Framework Decision has as its objective the promotion, where appropriate, of the use of non-custodial measures as an alternative to provisional detention, *even where, according to*

²³¹ Council document 5442/07, 31 January 2007, p. 3.

²³² See Council document 10662/07, 25 July 2007 (+ ADD 1, ADD 2, ADD 3 and ADD 4).

²³³ Recital (13).

the law of the Member State concerned, a provisional detention could not be imposed ab initio'.²³⁴

Incidentally, this is also the view of the Dutch government. The explanatory memorandum to the proposal to transpose FD 2009/829/JHA into Dutch law points out that several Member States provide for the possibility of imposing conditions and obligations on a suspect/defendant pending trial, even where it is not possible (yet) to order his pre-trial detention, and that non-compliance with those conditions or obligations can lead to pre-trial detention. According to the Dutch government, such conditions and obligations are within the scope of FD 2009/829/JHA.²³⁵

2.1.1.2 Substage 2 (detention on remand possible)

(a) Person concerned present in issuing MS

(i) detention on remand possible but not ordered

- **FD 2009/829/JHA (?)**
- **DR 2014/41**
- **EU Convention on Mutual Assistance**
- **European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.**

Applicability of FD 2009/829/JHA

An ESO is 'an alternative to provisional detention' (Art. 1 FD 2009/829/JHA). Does this mean that under EU law detention on remand must be ordered as a precondition to issuing an ESO subsequently?

With regard to the applicability of FD 2009/829/JHA the same issue arises as discussed in 2.1.1.1. The same answer applies.

(ii) person in detention on remand

- **FD 2009/829/JHA**
- **DR 2014/41**

²³⁴ Emphasis added.

²³⁵ *Kamerstukken II* 2012/13, 32442, nr. 3, pp. 3-4.

- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

(b) Person concerned present in another MS

(i) detention on remand possible but not ordered

- FD 2009/829/JHA (?)
- DR 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

(ii) detention on remand ordered

- FD 2002/584/JHA (?)
- FD 2009/829/JHA (?)
- DR 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

Applicability of FD 2002/584/JHA

What is the view in your country on whether it is possible, under EU law,²³⁶ to issue a prosecution-EAW with the sole purpose of interrogating the requested person as a suspect/accused?

With regard to the applicability of FD 2002/584/JHA the question arises whether it is possible, under EU law, to issue a prosecution-EAW for the *sole* purpose of interrogating the requested person as a suspect/accused person.

²³⁶ At various places the Annotated Index requires the NARs to put forward their opinion on the applicability of certain instruments to certain substages, either as a matter of EU law or as a matter of national law. These are different questions. It may well be that a certain instrument does apply as a matter of EU law, but does not apply as a matter national law, and vice versa. It may also be that a certain instrument allows a MS to refrain from providing for a certain measure but that a MS has chosen not to make use of that option. The answer to such questions may show that there are defects – (in the former situation) or legitimate choices (in the latter situation) that stand in the way of “effective and coherent” application of the instruments.

FD 2002/584/JHA recognises two distinct purposes of the EAW: an EAW may be issued either for conducting a prosecution or for enforcing a sentence (Article 1(1) of FD 2002/584/JHA). Interrogation of a suspect/accused person is not one of those purposes. Of course, investigative measures aimed at evidence gathering, such as an interrogation, can be part of a prosecution. In any case, transnational evidence gathering is the province of the EIO. The preamble to Directive 2014/41/EU confirms that an EAW should not be issued for the *sole* purpose of interrogation:

‘(25) This Directive sets out rules on carrying out, at all stages of criminal proceedings, including the trial phase, of an investigative measure, if needed with the participation of the person concerned with a view to collecting evidence. For example an EIO may be issued for the temporary transfer of that person to the issuing State or for the carrying out of a hearing by videoconference. However, where that person is to be transferred to another Member State for the purposes of prosecution, including bringing that person before a court for the purpose of the standing trial, a European Arrest Warrant (EAW) should be issued in accordance with Council Framework Decision 2002/584/JHA (...).

(26) With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. The issuing authority should consider, in particular, whether issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative’.

In conclusion: it is not possible, under EU law, to issue a prosecution-EAW for the sole purpose of interrogating the requested person as a suspect/defendant.

Applicability of FD 2009/829/JHA

FD 2009/829/JHA seems to require that the person concerned is present in the issuing MS as a precondition to issuing an ESO to the MS in which the person concerned is lawfully and ordinarily residing. According to Art. 9(1) ‘A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State’. Is it possible under EU law to issue an ESO, if the person concerned already has returned to that MS?

One should distinguish between two situations: the person is not present in the issuing Member State but in another Member State and his detention on remand is possible but not ordered (2.1.1.2 (b)(i)), and the person is not present in the issuing Member State but in another Member State and his detention on remand is ordered (2.1.1.2 (b)(ii)).

With regard to the first situation see the Applicability remarks, 2.1.1.1 *supra*. With regard to the second situation a different applicability issue presents itself than the one discussed in 2.1.1.1. The issue here is not whether it is possible to issue an ESO if detention on remand cannot be ordered or is not ordered but whether an ESO can be issued if the person concerned is not or is no longer in the issuing Member State. Depending on the answer to that question FD 2009/829/JHA may or may not be used as an instrument ‘to ensure the due course of justice and, in particular, that the person concerned will be available to stand trial’ (Article 1(a) of FD 2009/829/JHA).

According to Article 9(1) of FD 2009/829/JHA ‘A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, *having been informed about the measures concerned, consents to return to that State*’.²³⁷

The italicised words indicate that the decision on supervision measures should precede the return of the person concerned to the Member State of his lawful and ordinary residence. Article 9(2) of FD 2009/829/JHA provides for forwarding the certificate to ‘a Member State other than the Member State in which the person is lawfully and ordinarily residing’ upon request of the person concerned and on condition that the competent authority of that Member State has consented to such forwarding. This provision does not speak of ‘consent to return’ to that Member State. This, in itself, is logical. As to the ‘consent’-part: the request of the person concerned necessarily implies consent. As to the ‘return’-part: Article 9(2) pertains to situations in which the person concerned wants to be supervised in a Member State other than the Member State of his lawful and ordinary residence; in other words, the person concerned wants to depart to that Member State instead of returning to the Member State of his lawful and ordinary residence.

²³⁷ Emphasis added.

The preamble supports the interpretation that the decision on supervision measures should precede the departure from the issuing Member State. Recital (6) deals with the contents of the certificate, and stipulates that it

‘(...) should specify the address where the person concerned *will stay* in the executing State (...)’.²³⁸

In conclusion: FD 2009/829/JHA does not provide for issuing an ESO if detention on remand is ordered but the person concerned no longer is in the issuing Member State.

2.1.2 Trial Stage

(a) Person concerned present in issuing MS

(i) detention on remand possible²³⁹ but not ordered

- **FD 2009/829/JHA (?)**
- **DR 2014/41**
- **EU Convention on Mutual Assistance**
- **European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.**

Applicability of FD 2009/829/JHA

An ESO is ‘an alternative to provisional detention’ (Art. 1 FD 2009/829/JHA). Does this mean that, under EU law, detention on remand must be ordered as a precondition to issuing an ESO subsequently?

With regard to the applicability issue concerning FD 2009/829/JHA see 2.1.1.1 (*supra*).

Applicability of the European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters

²³⁸ Emphasis added.

²³⁹ The focus on proceedings concerning an offence for which detention on remand is (ultimately) possible implies that it is possible to impose a sentence involving deprivation of liberty (*sensu stricto*). After all, detention on remand would not be proportionate and would, therefore, be contrary to Article 5 of the ECHR/Article 6 of the Charter, if only a non-custodial sanction could be imposed for the offence. Consequently, proceedings concerning an offence which only carries a non-custodial sanction are out of scope.

At the trial stage, is it possible to transfer proceedings under the European Convention on Transfer of Proceedings? There is nothing in the provisions of that convention that precludes a transfer at that stage and the *Explanatory Report* refers explicitly to the trial stage.²⁴⁰ The laying of information under Article 21 of the European Convention on Mutual Assistance in Criminal Matters is essentially form free. This provision equally does not prevent its application at the trial stage.

(ii) person concerned in detention on remand

- FD 2009/829/JHA
- DR 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

(b) Person concerned is present in another Member State

(i) detention on remand possible but not ordered

- FD 2009/829/JHA (?)
- DR 2014/41 (?)
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

Applicability of FD 2009/829/JHA

FD 2009/829/JHA seems to require that the person concerned is present in the issuing MS as a precondition to issuing an ESO to the MS in which the person concerned is lawfully and ordinarily residing. According to Art. 9(1) 'A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State'. Is it possible under EU law to issue an ESO, if the person concerned already has returned to that MS?

With regard to the applicability issue concerning FD 2009/829/JHA see 2.1.1.2 (b) (*supra*).

Applicability of Directive 2014/41/EU

²⁴⁰ *Explanatory Report to the European Convention on the Transfer of Proceedings in Criminal Matters*, p. 10, para 26, available at <https://rm.coe.int/16800c9312> (last accessed on 30 March 2025).

Directive 2014/41 sets rules that apply to ‘all stages of criminal proceedings, including the trial phase’ (recital (25)). At the same time, these rules pertain to carrying out ‘investigative’ measures ‘with a view to gathering evidence’ (recital (25)).

Under Directive 2014/41, is a videoconference possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)?²⁴¹

At the trial stage, the situation of a person who is present in another Member State raises an applicability issue concerning Directive 2014/41/EU.

Directive 2014/41/EU sets rules that apply to ‘all stages of criminal proceedings, including the trial phase’ (recital (25)). At the same time, these rules pertain to carrying out ‘investigative’ measures ‘with a view to gathering evidence’ (recital (25)).

Therefore, is videoconferencing possible under Directive 2014/41/EU for the sole purpose of ensuring the presence of the accused at the trial (*i.e.* without the purpose of gathering evidence)?²⁴² If not: is such a videoconference possible without issuing an EIO? Is a videoconference possible under Directive 2014/41/EU for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

Directive 2014/41/EU does not use the word ‘interrogating’ but uses the word ‘hearing’. According to Article 24(1) the issuing judicial authority may

‘issue an EIO for the purpose of hearing a suspected or accused person by videoconference or other audiovisual transmission’.²⁴³

The word ‘hearing’ denotes an activity which the suspected or accused is subjected to by the issuing judicial authority. Since the object of the EIO is to have ‘specific investigative

²⁴¹ Cf. Case C-285/23.

²⁴² For a comparison between Art. 24 of Directive 2014/41/EU and the provisions about videoconference of the EU Convention on Mutual Assistance and of the Council of Europe European Convention on Mutual Assistance in Criminal Matters see Roth, “Der grenzüberschreitende Videovernehmung von Zeugen und Beschuldigten”, (2024) Neue Zeitschrift für Strafrecht, 329-337, at 332-333.

²⁴³ For a comparison between Art. 24 of Directive 2014/41/EU and the provisions about videoconference of the EU Convention on Mutual Assistance and of the Council of Europe European Convention on Mutual Assistance in Criminal Matters see Roth, “Der grenzüberschreitende Videovernehmung von Zeugen und Beschuldigten”, (2024) Neue Zeitschrift für Strafrecht, 329-337, at 332-333.

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measure(s) carried out in another Member State ('the executing State') to obtain evidence (...) (Article 1(1) of Directive 2014/41/EU),²⁴⁴ the activity 'hearing' the suspected or accused person by videoconference would seem to denote hearing him as an investigative measure in order to obtain a statement from him that could be used in evidence. Indeed, according to the Court of Justice an investigative measure is 'any investigative act intended to establish a criminal offence, the circumstances in which it was committed and the identity of the perpetrator' and its ultimate purpose is 'to ensure that the executing Member State sends certain evidence to the issuing Member State, that evidence being identified in Article 13(4) and Article 15(1)(b) as objects, documents or data'.²⁴⁵ Consequently, this would seem to preclude issuing an EIO for the sole purpose of ensuring the presence of the accused at the trial. Ensuring the presence of the accused at the trial is, in itself, not an investigative measure in order to gather evidence.²⁴⁶ Moreover, recital (25) of the preamble to Directive 2014/41/EU lends support to this interpretation.

'This Directive sets out rules on carrying out, at all stages of criminal proceedings, including the trial phase, of an investigative measure, if needed with the participation of the person concerned with a view to collecting evidence. For example an EIO may be issued for the temporary transfer of that person to the issuing State or for the carrying out of a hearing by videoconference. However, where that person is to be transferred to another Member State for the purposes of prosecution, *including bringing that person before a court for the purpose of the standing trial*, a European Arrest Warrant (EAW) should be issued in accordance with Council Framework Decision 2002/584/JHA (...)'.²⁴⁷

One can read this recital as meaning that the purpose of standing trial is outside of the scope of the directive. In this reading videoconferencing *at the trial stage* is limited to hearing *witnesses*.

²⁴⁴ See also recitals (7) and (25) of the preamble.

²⁴⁵ Case C-583/23, *Delda*, EU:C:2025:6, paras. 28 and 32.

²⁴⁶ In the *AVVA and Others* (*Trial by videoconference in the absence of a European Investigation Order*) case, German authorities were apparently of this opinion. They had refused to execute an EIO issued by a Latvian judicial authority 'on the ground that it was not an investigative measure that was sought, but the participation of an accused person in a hearing by videoconference': Joined Cases C-225/24 & C-285/23, *AVVA and Others* (*Trial by videoconference in the absence of a European Investigation Order*), EU:C:2024:462, para 27.

²⁴⁷ Emphasis added.

This interpretation is supported in Dutch legal literature,²⁴⁸ and, incidentally, this is also the view of the Dutch government on the scope of Article 24 of Directive 2014/41/EU.²⁴⁹ However, according to one interviewee connected to Eurojust this is a minority opinion: only four Member States refuse to *execute* an EIO for the purpose of a hearing via videoconference at the trial stage.²⁵⁰ Presumably, in those Member States *issuing* an EIO for such a purpose is not allowed.²⁵¹

If a videoconference for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence) possible without issuing an EIO?²⁵²

Since the answer seems to be that Directive 2014/41/EU does not constitute the basis for videoconferencing for the sole purpose of ensuring the presence of the accused at the trial, the follow-up question arises whether videoconferencing is possible without an EIO. This question

²⁴⁸ De Hoon, Hirsch Ballin & Bollen, *De verdachte in beeld. Eisen en waarborgen voor het gebruik van videoconferentie ten aanzien van de verdachte in het Nederlandse strafproces in rechtsvergelijkend perspectief* (Vrije Universiteit Amsterdam, 2020), p. 74; Salverda & Verrest, “Het gebruik van videoconferentie voor berechting in grensoverschrijdende strafzaken in de EU – misschien een goed idee, maar op welke basis?”, (2022) Boom Strafbld, 106-113, at 109; Salverda, “Het gebruik van videoconferentie bij de berechting van een in het buitenland verblijvende verdachte”, *DD* 2024/35, paragraph 2.2.

²⁴⁹ *Kamerstukken II* 2016/17, 34611, nr. 3, p. 15.

²⁵⁰ Interview with Eurojust.

²⁵¹ The reports on the mutual evaluation of the EIO that are available at present paint a more varied picture. In Austria hearings via videoconference during the main trial are never possible (*Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Austria*, Council document 8494/1/24 REV 1, 21 May 2024, p. 35).

In Croatia, it is not possible to issue or enforce an EIO for the purpose of ensuring the participation of the accused person throughout the main trial via videoconference (*Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on the Republic of Croatia*, Council document 16309/1/23 REV 1, 15 February 2024, p. 49).

Estonian law does not contain any provision governing the issuing or executing of an EIO to ensure that the accused person will also be effectively present at the hearing, such requests requiring an EAW since they do not aim at evidence gathering (*Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Estonia*, Council document 8475/1/24 REV 1, 21 May 2024, p. 50).

In Latvia, it is permissible for an accused individual to participate in their trial via videoconference even in a cross-border situation (*Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Latvia*, Council document 7030/1/24 REV 1, 21 May 2024, p. 7).

In the Netherlands, as already stated, an EIO may be issued to hear an accused person by videoconference, but only for investigative measures, not to stand trial (*Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on the Netherlands*, Council document 5616/1/24 REV 1, 15 February 2024, p. 42).

In Spain it is possible to issue an EIO for the purpose of ensuring the participation of the accused person at trial, except for trials where the punishments exceeds five years of imprisonment and jury trials (*Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on Spain*, Council document 13641/1/24 REV 1, 8 October 2024, p. 48).

In Poland this is not possible (*Evaluation report on the 10th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on Poland*, 13516/1/24 REV 1, 2 October 2024, p. 59).

²⁵² Cf. Case C-255/23.

was pending before the CJEU but the CJEU declined to answer it.²⁵³ In a recent opinion in a case that focussed on the interpretation of the right to be present at the trial as guaranteed by Article 8 of Directive (EU) 2016/343,²⁵⁴ AG L. Medina pointed out that the use of videoconferencing in criminal matters is not harmonised at EU level, apart from its use in the context of judicial cooperation. He draws the conclusion that the use of videoconferencing in criminal matters is governed by the law of the Member States but that this does not impact on Member States' obligation to comply with fundamental rights, such as the right to be present at trial.²⁵⁵ The Court of Justice followed AG Medina in holding that:

- Article 8(1) of Directive (EU) 2016/343 does not govern the question whether an accused person may, at his request, participate in his trial by videoconference (which question is, therefore, governed by domestic law);
- this provision, consequently, does not preclude that an accused person participates, at his request, in his trial by videoconference; and
- his right to a fair trial must be guaranteed.²⁵⁶

Directive 2014/41/EU harmonises the use of videoconferencing in the context of judicial cooperation in criminal matters. Since that directive does not seem to provide for videoconferencing in order to ensure the presence of the accused person at the trial and since it does not seem to strive for full harmonisation, Member States would seem to be free to go beyond that directive. However, case-law of the ECtHR requires that this measure has a basis in national law and that the fundamental rights of the accused person are respected.²⁵⁷ Nevertheless, if such a measure is carried out without the prior knowledge and consent of the

²⁵³ Joined Cases C-225/24 & C-285/23, *AVVA and Others (Trial by videoconference in the absence of a European Investigation Order)*, EU:C:2024:462.

²⁵⁴ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, O.J. 2016, L 65/1.

²⁵⁵ Opinion, 18 April 2004, *FP and Others (Trial by videoconference)*, C-760/22, EU:C:2024:328, paras 50, 51, 64.

²⁵⁶ C-760/22, *FP and Others (Trial by videoconference)*. EU:C:2024:574. Klip is of the opinion that a defendant has a right to be present at this trial online and that this right can be derived from the case-law of both the ECtHR and the Court of Justice: "The Right to be Present Online", (2024) European Journal of Crime, Criminal Law and Criminal Justice, 1-14, at 13. However this editorial was written before the Court of Justice rendered its judgment in Case C-760/22. In a purely domestic case AG at the Dutch Supreme Court D.J.M.W. Paridaens was of the opinion that an accused person can only claim the right to participate in the trial by videoconference to a certain extent, to wit only in those cases where the interest of the accused person of being (physically) present at the trial requires the court to adjourn the case in order for the accused person to be present: NL:PHR:2024:765, para 13. The Supreme Court did not decide this issue: NL:HR:2024:1771.

²⁵⁷ Compare Opinion, 18 April 2004, *FP and Others (Trial by videoconference)*, C-760/22, EU:C:2024:328, para 49; Salverda, "Het gebruik van een videoconferentie bij de berechting van een in het buitenland verblijvende verdachte", *DD* 2024/35, paragraph 3.

Member State where the person is present this might be considered to constitute an infringement of that Member State's sovereignty.²⁵⁸ It is a fundamental tenet of international law that, 'failing the existence of a permissive rule to the contrary', a State may not 'exercise its power in any form in the territory of another State'.²⁵⁹ A Member State that conducts a trial via videoconference is exercising its criminal jurisdiction (*i.e.* its so-called jurisdiction to enforce),²⁶⁰ at least partially, in the territory of the Member State where the person concerned is present.²⁶¹

Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

One could argue that the reasons that militate against an EIO solely for the purpose of ensuring the presence of the accused at trial via videoconferencing do not seem cogent when answering the question whether an EIO may be issued for the purpose of interrogating the accused at the trial by the trial court. Interrogation by its very nature is an *investigative* measure within the meaning of Directive 2014/41/EU. Pursuant to recital (25), the directive 'sets out rules on carrying out, at all stages of criminal proceedings, *including the trial phase*, of an investigative measure'.²⁶² Therefore, if interrogating the accused person at the trial is part of the trial according to the law of the issuing Member State, one could argue that issuing an EIO for the purpose of such an interrogation is possible.²⁶³ On the other hand, one can point out that,

²⁵⁸ In this vein Salverda & Verrest, "Het gebruik van videoconferentie voor berechting in grensoverschrijdende strafzaken in de EU – misschien een goed idee, maar op welke basis?", (2022) Boom Straflblad, 106-113, at 109-110. From the judgment in the *AVVA and Others (Trial by videoconference in the absence of a European Investigation Order)* it appears that the Latvian Supreme Court has a similar opinion: 'having regard to the territorial scope of the Law on Criminal Procedure, the jurisdiction of the Republic of Latvia is limited to the national territory. The holding of a videoconference in the absence of international mutual judicial assistance is thus possible only if the procedural act is carried out within the jurisdiction of the Republic of Latvia'. See Joined Cases C-225/24 & C-285/23, *AVVA and Others (Trial by videoconference in the absence of a European Investigation Order)*, EU:C:2024:462, para 28.

²⁵⁹ *SS 'Lotus' Case (France v Turkey)* PCIJ 1927 Series A No 10 Sept 7th, 18.

²⁶⁰ As distinct from its jurisdiction to prescribe. See De Hoogh & Molier, "Jurisdiction" in Horbach, Lefeber and Ribbelink, *Handboek Internationaal Recht* (Eds.), (TMC Asser Press, 2007), pp. 195-229, at 201-204.

²⁶¹ In the same vein, with regard to Article 10 of the EU Convention on Mutual Assistance, Gleß/Wahl, "§ 10 EU-Rhübk", in Schomburg/Lagodny (Eds.), *Internationale Rechtshilfe in Strafsachen*, 6th ed. (C.H. Beck, 2020), para 4: 'Die Videovernehmung auf der Grundlage von Art. 10 gestattet also (in begrenzten Umfang) **hoheitliches Handeln im Ausland (...)**'. Likewise, with regard to hearing witnesses and conducting a trial via videoconference in *civil* proceedings, Voß, "Grenzüberschreitende Videoverhandlungen jenseits des Rechtshilfewegs – Wunsch oder Wirklichkeit?", in Reuß & Windau (eds.), *Göttinger Kolloquien zur Digitalisierung des Zivilverfahrensrechts – Tagungsband zum Sommersemester 2021* (Universitätsverlag Göttingen, 2021), pp. 43-57, at pp. 47-49 and 51-52.

²⁶² Recital (25) of the preamble to the directive (emphasis added).

²⁶³ In a recent request for a preliminary reference the referring court wants to know whether an EIO may be issued 'for the hearing by videoconference of an accused person who is in custody in the executing State during the hearing of oral argument, **for the purpose of gathering evidence as part of his or her examination** and with the additional aim of ensuring that he or she participates in the trial (...)' (C-325/24 (*Bissilli*), emphasis added).

although recital (25) declares that the directive is applicable at the trial stage as well, it seems to limit that applicability to the hearing of witnesses by excluding the trial of the person concerned.²⁶⁴

Under Directive 2014/41, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)?

A different issue than the preceding ones is whether Directive 2014/41/EU allows for a temporary transfer for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence). Unlike Article 11 of the European Convention on Mutual Assistance in Criminal Matters in its original version,²⁶⁵ Articles 22 and 23 of Directive 2014/41/EU are not limited to the purposes of personal appearance as a witness or of a confrontation. Comparable to Article 9 of the EU Convention on Mutual Legal Assistance, those provisions have a wide scope and describe the purpose of a temporary transfer to the issuing or to the executing Member State as ‘carrying out an investigative measure with a view to gathering evidence for which the presence of that person on the territory of the [issuing/executing] State is required’.²⁶⁶ Unlike Article 11 of the European Convention on Mutual Assistance in Criminal Matters, as amended by the Second Additional Protocol²⁶⁷ to that convention, Articles 22 and 23 do not explicitly exclude the purpose of standing trial.²⁶⁸ Nevertheless, the same arguments that seem to militate against videoconferencing for the sole purpose of ensuring the presence of the accused person at the trial also seem to oppose a temporary transfer for that purpose. As with videoconferencing, the object of a temporary transfer is to carry out an investigative measure with a view to gathering evidence (Articles 22(1) and 23(1) of Directive 2014/41/EU). Ensuring the presence of the accused person at the trial, in itself, does not constitute an investigative measure. Moreover, recital (25) of the preamble seems to indicate that the purpose of standing trial is outside the scope of Directive

²⁶⁴ According to the EIO mutual evaluation report on the Netherlands, even though it is not possible to issue an EIO for the use of videoconference for the purpose of standing trial, it is possible to issue an EIO for the use of videoconference for the purpose of hearing the accused person at trial with the aim of gathering evidence (*Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on the Netherlands*, Council document 5616/1/24 REV 1, 15 February 2024, p. 42). According to Croatian law, neither is possible (*Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on the Republic of Croatia*, Council document 16309/1/23 REV 1, 15 February 2024, p. 49).

²⁶⁵ Article 11 was amended by the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (see main text, *supra*).

²⁶⁶ This means that an EIO may be issued, e.g., for an examination of a person’s body: Wörner, “§ 91c” in Ambos/König/Rackow (Eds.), *Rechtshilferecht in Strafsachen*, 2nd ed. (Nomos, 2020), chapter 4 para 571.

²⁶⁷ Strasbourg, 8 November 2011, ETS No. 182.

²⁶⁸ Article 11: ‘A person in custody whose personal appearance for evidentiary purposes *other than for standing trial* is applied for by the requesting Party shall be temporarily transferred (...)’ (emphasis added).

2014/41/EU. The reason for recital (25) seems to be that a temporary transfer for standing trial would amount to a surrender, which is governed by a different regime. This is precisely why Article 11 of the European Convention on Mutual Assistance in Criminal Matters, as amended by the Second Additional Protocol, explicitly excludes the purpose of standing trial.²⁶⁹

Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

The question remains whether a temporary transfer is possible for the purpose of interrogation of the accused at the trial by the trial court. Interrogating an accused person at the trial could be classified as an investigative measure, and its object would be to gather evidence. Since according to recital (25) of the preamble the scope of Directive 2014/41/EU includes investigative measures at the trial stage, one could argue for an answer in the affirmative. However, as said before recital (25) also seems to limit the EIO's applicability at the trial stage to the hearing of *witnesses*.

Conclusion

One can conclude that the wording of the provisions on videoconferences and temporary transfers is such that it raises some questions that, in the absence of guidance by the Court of Justice, cannot be answered definitively yet. In other words, those provisions are less than clear on some issues, to say the least.

(ii) detention on remand ordered

- FD 2002/584/JHA
- FD 2009/829/JHA (?)
- DR 2014/41 (?)
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

Applicability of FD 2009/829/JHA

²⁶⁹ See the *Explanatory Report*, §37: 'In the minds of the drafters, the transfer of a person for the purpose of standing trial amounts to extradition, while the transfer of a person for "evidentiary purposes other than for standing trial" excludes the idea of extradition' (<https://rm.coe.int/16800cce57> (last accessed on 30 March 2025)).

FD 2009/829/JHA seems to require that the person concerned is present in the issuing MS as a precondition to issuing an ESO to the MS in which the person concerned is lawfully and ordinarily residing. According to Art. 9(1) ‘A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State’. Is it possible under EU law to issue an ESO, if the person concerned already has returned to that MS?

With regard to the applicability of FD 2009/829/JHA see 2.1.1.2(b) (*supra*).

Applicability of Directive 2014/41/EU

Directive 2014/41/EU sets rules that apply to ‘all stages of criminal proceedings, including the trial phase’ (recital (25)). At the same time, these rules pertain to carrying out ‘investigative’ measures ‘with a view to gathering evidence’ (recital (25)).

Under Directive 2014/41, is a videoconference possible with the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? If not: is such a videoconference possible without issuing an EIO?²⁷⁰ Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

Under Directive 2014/41, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

With regard to the applicability of Directive 2014/41/EU see 2.1.2(b)(i) (*supra*).

2.2 Applicability and application of the instruments at the pre-trial stage according to national law

General introduction

In this section, the object is to tie instruments that are applicable *in abstracto* in the various (sub)stages of the pre-trial stage to *specific* needs for judicial cooperation.

This presupposes that the instruments that are applicable *in abstracto* according to both EU law (see paragraph 2.1) and *national law*. If there are applicability issues according to national law concerning the pre-trial stage, the NARs are requested to address them in this paragraph.

Given our person based approach and given the focus on (alternatives to) measures concerning deprivation of liberty, in the pre-trial stage the specific needs for judicial cooperation are basically twofold:

²⁷⁰ Cf. Case C-255/23 and Case C-285/23.

- (aa) executing investigative measures/prosecution such as interrogating the suspect or executing a confrontation (if he is present in another MS);²⁷¹
- (bb) ensuring that the suspect is available to the competent authority for the purpose of investigative measures/prosecution (whether or not he is present in the issuing MS).²⁷² This means ensuring that the competent authority can reach the suspect for such measures as an interrogation, a confrontation *et cetera*.²⁷³

However, as a safety-valve, we have included the option ‘(dd) other?’²⁷⁴

With regard to each substage and each subdivision of each substage (present in issuing MS/present in another MS; detention on remand not possible/detention on remand possible; detention on remand possible but not ordered/detention on remand ordered) the NAR will first describe which national authority is in charge of the investigation/prosecution at that stage and, with regard to each specific need for judicial cooperation, which national authority is competent to request that form of judicial cooperation at that stage.²⁷⁵ Please be as concrete as possible: do not just mention ‘the Public Prosecutor’s Office’ or ‘the court’, but specify to which tier of jurisdiction the competent authorities belong, e.g. ‘the Public Prosecutor’s Office at the first instance court’ or ‘the first instance court’ and, where relevant, specify their territorial competence, e.g. ‘the Public Prosecutor’s Office at the first instance court in X’ or ‘the first instance court in X’.

The NAR will examine whether the competent national authority takes into account less intrusive alternatives when deciding on which form of judicial cooperation to request and which instrument(s) to apply. The NAR will describe in a factual way which considerations play a role²⁷⁶ when the competent national authority has to take that decision. To that end, the NARs will (also) endeavour to ascertain whether:

- the impact on the right to liberty, if any, is taken into account and whether there are alternatives to (pre-trial) detention (cf. the Recommendation on the procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions);²⁷⁷
- the national attribution of competence hinders or impairs considering such alternatives;
- the impact on free movement rights, if any, is taken into account;
- the fact that a previous request for judicial cooperation was unsuccessful is taken into account when taking further decisions and, if so, in which way;
- the possibility that requesting judicial cooperation might prejudice future decisions on seeking judicial cooperation is taken into account and, if so, in what way;²⁷⁸

²⁷¹ (aa) concerns measures which require the presence of the person concerned, such as interrogation (whether or not by videoconference) or confrontation. For convenience’s sake, we will use ‘interrogation’ as a short hand designation.

²⁷² Later on, we will clarify why the situation in which the person is in the issuing MS is also taken into account.

²⁷³ E.g., by summoning the person concerned.

²⁷⁴ Not ‘(cc)’. That designation is reserved for something else. See the introduction to section 2.3.

²⁷⁵ Refer to the relevant provisions of national law and, if necessary, to national case-law in the footnotes.

²⁷⁶ That means that at this point no normative approach as to which considerations should play a role should be used. The normative approach is reserved for the separate memorandum.

²⁷⁷ O.J. 2023, L 86/44.

²⁷⁸ This calls for an exercise in thinking in scenarios: if the requested form of judicial cooperation does not achieve its intended result, what other form(s) of judicial cooperation will the issuing judicial authority then employ?

- the issuing authority engages in a dialogue with the executing authority before taking a decision and, if so, in what way and whether it uses videoconferencing (or other audio-visual transmission)/telephone conference to that end.

In the country report, only these considerations will be described. In a *separate* memorandum, the NAR will express his opinion on whether the decisions of the competent national authorities on the application of the various instruments are ‘effective and coherent’ (within the meaning of *MR2.0: some preliminary explorations*). These four separate memoranda will, in turn, form the basis of the overarching analysis in the end report.

Some of the instruments are followed by a question mark in red. Those are the instruments whose applicability under EU law is under doubt (see 2.1). The NARs will provide their assessment regarding the applicability of those instruments within the framework of national law. Please refer to case-law of the CJEU, to national case-law and legal literature, where relevant. Also, refer to infringement proceedings against the NAR’s MS, where relevant.

Introduction

First, we will make some preliminary remarks. Following these remarks, we will describe which authorities are competent in relation to investigation/prosecution at the pre-trial stage, and which authorities are competent to initiate judicial cooperation at that stage.

Subsequently, in accordance with the order of the Annotated Index we will describe any issues of *applicability* according to Dutch law (but only if there are issues).

The sections about the *application* of instruments according to Dutch law are divided into three subsections:

1. *The instruments separately*

For each applicable instrument we will describe our findings on the application of that instrument.

2. *The interplay of instruments*

In this subsection we look at the interplay of the applicable instruments, *i.e.* answer the question how these instruments relate to each other.

3. *Goals and instruments*

This section is dedicated to the relationship between choosing a specific goal of investigation/prosecution and applying the available instruments (see our general observation under **Preliminary remarks**, *infra*).

Preliminary remarks

Goals and instruments

In this chapter about the pre-trial stage, the Annotated Index deals with the applicability and application of the instruments with a view to achieve specific goals, *i.e.* executing investigative measures/prosecution such as interrogating the suspect or executing a confrontation (if he is present in another Member State) and ensuring that the suspect is available to the competent authority for the purpose of carrying out investigative measures/prosecution. These goals relate to the scope of the project. The scope of the project is limited to those instruments that involve deprivation of liberty of a suspect, accused or sentenced person and instruments that offer a (less intrusive) alternative to measures involving deprivation of liberty of a suspect, accused or sentenced person.²⁷⁹ Investigative or prosecutorial measures that do not impact on the liberty of a person, such as executing a search, seizing objects or intercepting telecommunication, are not relevant against this background.

What emerged from the interviews with practitioners is that the specific goals do not stand alone when taking decisions about which instrument to apply. Let us illustrate this with the goal of interrogating the suspect who is present in another Member State.

When the goal is to interrogate a suspect who is not present in the Netherlands but in the Member State where he lives/resides, this can be achieved using four instruments.

1. Issuing a prosecution-EAW (if detention on remand has been ordered).
2. Issuing an EIO in order to carry out an interrogation either by the authorities of the executing Member State or through video-conference by the Dutch authorities.
3. Arranging an interrogation in an informal way, for example by inviting the suspect for an interrogation in the Netherlands.
4. Transferring the proceedings to the Member State where the suspect is present.

²⁷⁹ See Chapter 1.

However, the real choice behind these options is whether to investigate/prosecute in the Netherlands or in the Member State where the suspect is present. Options 1, 2 and 3 imply a choice for the Netherlands and option 4 for the other Member State. And in taking a decision on where to investigate/prosecute, the goal of interrogating the suspect is not the only factor that is taken into account, in fact it is not dominant in taking the decision. This decision is made within a broader assessment in which various factors play a role. According to the prosecutors interviewed the interests of the suspect and (the) victim(s) are taken into account. For example, in case of minor suspects proceedings should in principle be transferred to the Member State where these suspects live.²⁸⁰ Also relevant is whether the victims live in another Member State.²⁸¹ A simple case to illustrate this was mentioned by one of the prosecutors: when the suspect and victims all live in Germany this could lead to a transfer of proceedings to the German authorities even though the suspicion is that the suspect physically abused the victims in the Netherlands.²⁸² Other circumstances, more related to investigative technicalities, like the location of evidence, witnesses and criminal assets, and concentration of investigation/prosecution efforts, can also lead to the decision to transfer proceedings.²⁸³ In other words, as the interviews show the goal of interrogating the suspect is just one of the goals that are relevant, besides other relevant goals such as resocialisation, hearing witnesses, seizure of assets, protecting victims etc.

Similar remarks can be made with regard to the goal of arranging a confrontation. Particular relevant in this context seems to be the location of witnesses.

When dealing with the instruments in paragraph 2.2.1 and 2.2.2 we will first deal with any applicability issues and then sketch for each instruments some issues that are connected to the application of the instrument in practice (*The instruments separately*). After that we will deal with the *interplay of the instruments* and the relationship between *goals and instruments*.

Initiating cooperation by another Member State: entering into a dialogue beforehand

²⁸⁰ Interview with prosecutor 4; interview with prosecutor 5.

²⁸¹ Interview with prosecutor 5; interview with prosecutor 6.

²⁸² Interview with prosecutor 6.

²⁸³ Interview with prosecutor 4.

In the context of the Annotated Index, the issuing authority is the authority that seeks cooperation by applying one of the instruments in scope. But of course, authorities of another Member State than the issuing Member State can also initiate cooperation. In a well-known case in which Dutch suspects and Dutch victims were involved in a violent event in Spain, the Dutch Prosecution Service proposed to the Spanish authorities to transfer the proceedings to the Dutch authorities because of the specific circumstances of the case. The main consideration for transferring the proceedings was that the Dutch suspects were all minors. Following this proposal, proceedings were transferred by Spain to the Netherlands.²⁸⁴

Pre-trial stage: competent authorities in the Netherlands

In general

At the pre-trial stage, four authorities play a role.

The police conducts investigations into criminal offences, in order to gather information about the offence and its probable perpetrator. It does so under the direction of the public prosecutor.

The public prosecutor directs the investigation by the police and decides whether or not to (continue to) prosecute a suspect, on the basis of the evidence gathered by the police (and the examining magistrate, see *infra*). Certain intrusive investigative measures may only be carried out on the order of a public prosecutor. A public prosecutor may order the arrest of a suspect who was not caught red-handed for an offence for which detention on remand is possible²⁸⁵ (Article 54(1) of the Code of Criminal Procedure). After arrest, the public prosecutor may order that the suspect remain in police custody for a maximum period of six days (Articles 57(1) and 58(2) of the code of criminal procedure).²⁸⁶

For certain intrusive investigative measures the public prosecutor needs the authorisation by an examining magistrate. The examining magistrate may order that the suspect is remanded in

²⁸⁴ Interview with prosecutor 1.

²⁸⁵ In principle, detention on remand is only possible for offences that carry a maximum sentence of at least four years (Art. 67 of the Code of Criminal Procedure).

²⁸⁶ However, the suspect must be brought before the examining magistrate within three days and 18 hours counting from his arrest (Art. 59a of the Code of Criminal Procedure), in order to comply with Art. 5(3) of the ECHR.

custody for a maximum period of 14 days (Article 64(1) of the Code of Criminal Procedure). For the rest, a leading commentary on Dutch criminal procedural law characterises the powers of the examining magistrate as powers that allow that authority to supervise the lawfulness and the progress of the pre-trial investigation, to supervise that the right balance is struck between the interest of the investigation and the rights of the defence, and to supervise the completeness of the pre-trial investigation.²⁸⁷

At the pre-trial stage, the District Court's role is basically confined to decisions on continuing the remand detention.

Judicial cooperation

The examining magistrates are competent to issue EAWs at the pre-trial stage (Article 44 of the Law on Surrender) but in practice they will do so only upon request by the public prosecutor competent to prosecute the case (see Chapter 1.3.1(a)).

As discussed in Chapter 1.3.1(c), the public prosecutors of the International Centre for Mutual Legal Assistance Noord-Holland (*Internationaal Rechtshulpcentrum Noord-Holland*) act as issuing authority under the national legislation that implements FD 2009/829/JHA, but they may only and must forward a judgment if so requested by the court that ordered a supervision measure (see Chapter 1.3.1(d)).

The competent Dutch authorities to issue an EIO at the pre-trial stage are public prosecutors and examining magistrates. It depends on the investigative measure sought whether the public prosecutor or the examining magistrate judge is competent: the issuing authority must be competent to order the investigative measure under the same conditions in a similar domestic case (Article 5.4.21(2)(b) of the Code of Criminal Procedure; see Chapter 1.3.1(e)). Although public prosecutors and examining magistrates are competent to issue an EIO for the purpose of interrogating a suspect or an accused person, only examining magistrates (or courts) may issue an EIO for the purpose of hearing a suspect or accused person by videoconference (Article 5.4.25(2) of the Code of Criminal Procedure).

²⁸⁷ Corstens, Borgers & Kooijmans, *Het Nederlands strafprocesrecht*, 10th ed. (Wolters Kluwer, 2021), 132-140.

The competent Dutch authority to request a transfer of proceedings to which the European Convention on the Transfer of Proceedings in Criminal Matters applies, is the Minister of Justice and Security, as we saw in Chapter 1.3.1(c). However, such a request will always be initiated by the public prosecutor who is competent to prosecute the case.²⁸⁸ If the European Convention on the Transfer of Proceedings in Criminal Matters does not apply, the competent public prosecutor who is competent to prosecute the case may transmit directly to its counterpart ‘information (...) with a view to proceedings in the courts’ of that Member State within the meaning of Article 21 of the European Convention on Mutual Assistance in Criminal Matters.

Lastly, as regards the EU Convention on Mutual Assistance, the Public Prosecution Service is in charge of carrying out notifications, such as summonses. Therefore, the public prosecutor is the competent authority with regard to service and sending of procedural documents (see Chapter 1.3.1(c)).

2.2.1. Substage 1 (no detention on remand possible)

(a) Person concerned present in issuing MS

(bb) Ensuring that the suspect is available

- FD 2009/829/JHA (?)

Applicability according to Dutch law

ESO possible under national law?

As discussed in paragraph 2.1.1.1, under EU law the possibility of remand detention is not a precondition to ordering an ESO. However, as FD 2009/829/JHA does not intend to harmonise the various supervision measures that are possible according to the law of the Member States,

²⁸⁸ The competence of public prosecutors is determined by Article 9 of the Code of Criminal Procedure. Leaving aside appellate jurisdiction, in essence there are three categories of offices of the Public Prosecution Service: the Public Prosecution Office attached to a District Court (the public prosecutors of such an office are competent to prosecute offences that are within the competence of that District Court), the National Office of the Public Prosecution Service (the public prosecutors of the National Office are competent to prosecute offences that are designated by Governmental Decree) and the National Office of the Public Prosecution Service for Financial, Economic and Environmental Offences (public prosecutors of that office are competent to prosecute offences that are covered by the Act on Special investigation Services).

they are not required to provide for supervision measures not yet possible under their law.

In the legal order of the Netherlands, the only supervision measure available is the decision to conditionally suspend a court order concerning remand detention (see Article 80(1) of the Code of Criminal Procedure).²⁸⁹ Consequently, there must always be a previous decision by a court ordering detention on remand, which means that detention on remand must be possible. In conclusion, under Dutch law an ESO cannot be issued if no detention on remand is possible.

Application

Not possible under Dutch law (see *supra*).

(dd) Other

No other goal was mentioned by the interviewees.

(b) Person concerned is present in another MS

(aa) Executing investigative measures/prosecution such as interrogating the suspect

Applicability according to Dutch law

- DR 2014/41²⁹⁰

Is it possible to interrogate a suspect via videoconferencing without issuing an EIO?

²⁸⁹ *Kamerstukken II* 2012/13, 33422, nr. 3, p. 3-4.

²⁹⁰ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the “coherent and effective” application of the instruments.

The Code of Criminal Procedure allows for videoconferencing, *inter alia*, in order to interrogate a suspect (Article 131a(1) of the Code of Criminal Procedure). The question whether it is allowed to interrogate a suspect via videoconferencing without issuing an EIO presupposes that the suspect is not in the issuing Member State, *i.e.* in the Netherlands. Although to date this has never been explicitly established in case-law, Article 131a in itself seems to pertain exclusively to situations in which the defendant is in the territory of the Netherlands. Carrying out an interrogation via videoconference of a suspect who is present in another Member State would mean exercising criminal jurisdiction, at least partially, in the territory of another Member State and, without the knowledge or consent of that Member State, could be seen as an infringement of its sovereignty.²⁹¹ In any case, the Code of Criminal Procedure contains *separate* rules concerning *judicial cooperation* with other (Member) States with regard to videoconferencing, *i.e.* rules concerning situations in which the suspect is not in the territory of the Netherlands. In conclusion, interrogation by videoconferencing requires cooperation with the Member State in which the suspect is present pursuant to the rules of judicial cooperation.²⁹²

The separate rules concerning judicial cooperation with regard to videoconferencing distinguish between videoconferencing in the relations with non-EU Member States (or EU Member States that are not bound by Directive 2014/41/EU) on the basis of an applicable treaty or solely on the basis of national law (Article 5.1.3a of the Code of Criminal Procedure) and videoconferencing on the basis of an EIO (Article 5.4.25 of the Code of Criminal Procedure). Except when the intended executing Member State is Denmark or Ireland, – these Member States are not bound by Directive 2014/41/EU –,²⁹³ the issuing authority should base its request for

²⁹¹ In the context of a case concerning the execution of an Estonian EAW, a Dutch public prosecutor argued that Estonia had violated Dutch sovereignty by trying the requested person, who was in the territory of the Netherlands, by way of videoconferencing: District Court of Amsterdam, 6 January 2022, NL:RBAMS:2022:64. The court did not have to deal with this argument since Estonia had withdrawn the EAW.

²⁹² Salverda, “Het gebruik van videoconferentie bij de berechting van een in het buitenland verblijvende verdachte”, *DD* 2024/35, paragraph 2.2.

²⁹³ See recitals (44) and (45) of the preamble to Directive 2014/41/EU.

videoconferencing on the EIO if the suspect is present in another Member State. Consequently, it is not possible to interrogate a suspect via videoconference who is present in another Member State without an EIO (unless that other Member State is Denmark or Ireland).

Although not mentioned by the interviewees, the fact that Denmark and Ireland are not bound by Directive 2014/41/EU is likely to cause problems. The fragmented character of that directive – it does not cover all investigative measures and it is not applicable in two Member States – was lamented by the Government during the discussions in Parliament about the transposition of the directive.²⁹⁴ That fragmented character means that, in the relations with Denmark and Ireland, Dutch authorities will have to fall back on the older legal framework, which does not offer all of the possibilities of the directive. For Dutch authorities, part of that older legal framework is Article 10(9) of the EU Convention on Mutual Legal Assistance. Pursuant to the first subparagraph of that provision, hearing by videoconference of an accused person is *at the discretion* of the Member States and is subject to the agreement of their competent judicial authorities. Furthermore, the second subparagraph of that provision allows Member States to declare that they will not apply the first subparagraph at all. Denmark has made such a declaration, stating ‘that it will not agree to requests for the hearing of an accused person by videoconferencing’.²⁹⁵

- EU Convention on Mutual Assistance in Criminal Matters

Inviting him for an interrogation or confrontation etc. (sending/service documents)

Is it possible to use this convention to ‘informally’ invite the person concerned to come to the issuing Member State for an interrogation? Article 5(1) of the

²⁹⁴ *Kamerstukken II* 2016/17, 34611, nr. 3, p. 5.

²⁹⁵ See *Trb.* 2013, 14, p. 5. It should be added that the Netherlands also made such a declaration (*Trb.* 2004, 211, p. 3). It seems that the declaration has not been withdrawn, even though national legislation by now explicitly provides for the execution of requests for hearing an accused person by videoconference (see *infra*, **para 2.3(b)(i)(aa)** (‘Applicability according to Dutch law’)).

convention provides for sending (or service) of ‘procedural documents’ to persons who are in the territory of another Member State directly by post. It is doubtful whether an informal invitation qualifies as a ‘procedural document’ within the meaning of Article 5. According to the *Explanatory Report* that term should be given a broad interpretation, and be taken to include, *e.g.*, summonses and court decisions.²⁹⁶ Nevertheless the *Explanatory Report* also refers to ‘procedural documents’ as ‘relating to criminal proceedings *which are required to be sent by a Member State*’.²⁹⁷ Dutch law does not provide for summoning a suspect to an interrogation. Against this background, it is problematic, *a fortiori*, to classify an informal invitation to an interrogation as a ‘procedural document’.

Of course, the authorities could invite the suspect without basing themselves on the convention, *e.g.*, by inviting him via e-mail or telephone. However, this could be seen as an exercise of criminal jurisdiction on the territory of another Member State and, insofar as the authorities of that Member State have not consented to it, as an infringement of the sovereignty of that Member State. By contrast, Article 5(1) of the convention implies prior authorisation by the executing Member State to take action that has effect on its territory.²⁹⁸ Thus, sending a summons directly via post to a person who is in the territory of another Member State on the basis of Article 5(1) cannot be considered to be an infringement of that Member State’s sovereignty.

Application

(2.2.1 substage 1 (no detention on remand possible), **(b) Person concerned present in another MS, (aa) Executing investigative measures/prosecution such as interrogating the suspect**)

²⁹⁶ *Explanatory Report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union*, O.J. 2000, C 397, 29 December 2000, p. 11.

²⁹⁷ *Ibid.* (emphasis added).

²⁹⁸ Cf. *Explanatory Report to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters*, p. 13 (para 126), available at <https://rm.coe.int/16800cce57> (last accessed on 30 March 2025).

The instruments separately

- DR 2014/41

- Issuing an EIO in order to interrogate the suspect by the authorities of the executing Member State.

This option was mentioned by practitioners, *i.e.* prosecutors, however as an exceptional option. EIO's are more often issued in order that the authorities of another Member State hear witnesses or to gather evidence (through, *e.g.*, a search or a read-out of a telephone). In cases in which several goals are at stake, amongst which interrogating the suspect, for efficiency reasons interrogation by the authorities of the executing Member State is a more attractive option than interrogation of the suspect by the Dutch authorities via videoconferencing.²⁹⁹ Furthermore, interrogation by the executing authorities is more often applied in minor cases than in major cases.³⁰⁰

- Issuing an EIO in order to interrogate the suspect by the Dutch authorities via videoconferencing.

Prosecutors mentioned practical problems with regard to videoconferencing. If an interrogation takes place in several sessions during several days, setting up a conference can be cumbersome. Also if many people are involved scheduling-problems can occur.

- Interrogating the suspect by videoconference without issuing an EIO.

²⁹⁹ Interview with prosecutor 4.

³⁰⁰ Interview with prosecutor 1.

The question is whether this is possible. See *Applicability, supra*. In any case, this option did not pop up during the interviews.³⁰¹

- EU Convention on Mutual Assistance

- Inviting the suspect for an interrogation in an informal way (by sending/service of documents) was mentioned by some prosecutors. However, it was – rightly (see *supra, Applicability*) – seen as problematic. Nevertheless, according to one of the prosecutors³⁰² this option is used albeit with restraint.

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

- *In general*
Transfer of proceedings is an instrument that is underused.³⁰³ Among the reasons given for that underuse are differing rules on evidence in the issuing and executing Member State, the costs and quality of translations, the time-consuming nature of transfer of proceedings and the lack of involvement of victims and suspects in decision-making.³⁰⁴ Practicalities as the need of translation of documents³⁰⁵ were mentioned by interviewees as

³⁰¹ Legal literature mentions a case – in a reverse situation (another Member State is the issuing Member State) – in which defendants who were present in the Netherlands participated in a Spanish trial via videoconferencing: Salverda & Verrest, “Het gebruik van videoconferentie voor berechting in grensoverschrijdende strafzaken in de EU – misschien een goed idee, maar op welke basis?”, (2022) Boon Strafbld, 106-113, at 106. However, it is not clear whether the purpose was only ensuring the defendants’ attendance at trial or also interrogating them. In the former case, the legal basis for this cannot have been the execution of a Spanish EIO by Dutch authorities, as Dutch law does not allow for this (*supra*).

³⁰² Interview with prosecutor 1.

³⁰³ Van der Wilt, “Overname van strafvervolgning door Nederland: Een onderbenutte rechtshulpvariant?”, (2022) Delikt en Delinkwent, 103; interview with public prosecutor 3. In footnote 2 of his article, Van der Wilt provides the following statistics about incoming requests: 48 (2018), 40 (2019) and 43 (2020); public prosecutor 3 states that these statistics are not correct.

³⁰⁴ De Jonge, “Transfer of criminal proceedings: from stumbling block to cornerstone of cooperation in criminal matters in the EU”, (2020) ERA Forum, 449-464, at 452.

³⁰⁵ According to De Jonge, the translation of a file of a several hundred pages may easily run into tens of thousands of euros: “Transfer of criminal proceedings: from stumbling block to cornerstone of cooperation in criminal matters in the EU”, (2020) ERA Forum, 449-464, at 453. On translations and the costs thereof see also Verrest, Lindemann, Mevis & Salverda, *The Transfer of Criminal Proceedings in the European Union. An exploration of the current practice and of possible ways for improvement, based on practitioners’ views* (Eleven, 2022), pp. 61-65.

obstacles to using this instrument. Also a lack of awareness that transfer of proceedings is an option plays a role. As a more psychological explanation of the reluctance of (some) prosecutors to transfer proceedings was mentioned that prosecutors are dedicated to finishing ‘their’ case instead of someone else taking over.³⁰⁶

- *As a last resort*

The option of a transfer of proceedings when the goal is to have the suspect interrogated was mentioned by several interviewees. Having said this, it should be noted that this option was primarily mentioned as a last resort (‘Plan B’) in case all other options fail.³⁰⁷ Since we are dealing with a situation in which detention in remand is not possible, issuing a prosecution-EAW is not an option. So, transfer of proceedings comes into play when an EIO or an attempt to arrange an interrogation in an informal way does not yield the desired result.

- *As option beforehand*

None of the interviewees mentioned a situation in which the option of the transfer of proceedings was taken into account beforehand together with other options (like issuing an EIO) solely for the purpose of interrogation.

The option of the transfer of proceedings was mentioned as one of the options beforehand in the broader context of deciding in which Member State investigations and/or prosecution should take place.³⁰⁸ We refer to paragraph 2.2 under **Preliminary remarks** (*Goals and instruments*).

In the context of this broader decision of course the possibilities/impossibilities of interrogation can play a role, but a decision to transfer proceedings to another Member State

³⁰⁶ Interview with prosecutor 3; interview with prosecutor 6. At the national meeting on 24 October 2024 lack of awareness, ‘hassle’ (practical problems) and ‘ownership’ were mentioned by prosecutor 7 as reasons not to choose for a transfer of proceedings up front.

³⁰⁷ Interview with prosecutor 5. However, at the national meeting on 24 October 2024 prosecutors 4, 6 and 7 stated that, *in general*, they did recognise that a transfer of proceedings is only ‘plan B’.

³⁰⁸ Interview with prosecutor 5. Sometimes the choice is made in a very early stage of the investigation in which Member States cooperate in a Joint Investigation Team (JIT) and laid down in a JIT-agreement.

solely with a view to achieve an interrogation, that is without other factors taken into account, did not pop up during the interviews.

- *As a complementary measure*

The practice of executing EAWs shows that a transfer of proceedings is sometimes effected to complement surrender. In such cases, there is an investigation or prosecution against the requested person in the Netherlands for other offences than those covered by the EAW. Because the requested person will be surrendered to the issuing Member State, the public prosecutor decides to transfer the proceedings concerning the other offences to the issuing Member State as well, using the EAW as a piggyback ride, so to speak.³⁰⁹

Interplay of the instruments

Interrogating a suspect by videoconference without issuing an EIO does not seem to be an option that is used in practice. Also, arranging an interrogation in an informal way is at most exceptional.

That leaves us with issuing an EIO and transferring proceedings.

As far as issuing an EIO is concerned, the choice between an interrogation by the executing authorities or via videoconferencing by the Dutch authorities seems to depend on at least two factors. If the interrogation has to be done on short notice execution by the executing authorities seems to have the preference.³¹⁰ Also, if the interrogation is complicated and will last for several days with many persons involved a videoconference seems to be less efficient.³¹¹

³⁰⁹ See, e.g., District Court of Amsterdam, 24 August 2023, NL:RBAMS:2023:5466.

³¹⁰ Interview with prosecutor 1.

³¹¹ Interview with prosecutor 1.

Other circumstances, like the interest of the suspect and victims, do not seem to be relevant.

Choosing between issuing an EIO and transferring proceedings is, in fact, a choice between investigating/prosecuting in the Netherlands or in another Member State more than a choice between which instrument to use. We refer to the section on ‘Goals and instruments’ (*infra*).

Goals and instruments

As we pointed out in the previous section and in paragraph 2.2., the real choice in practice is not between different applicable instruments given a specific goal (executing investigative/prosecutorial actions or having the suspect available for these actions) but between different goals. In the situation in which the suspect is present in another Member State and detention on remand is not possible, the real choice is keeping investigation/prosecution in the hands of the Dutch authorities or transferring proceedings to another Member State. Relevant factors in making this choice are:³¹²

- the interests of the suspect (*inter alia* is the suspect a minor?);
- the interests of the victims (where do they reside?);
- the location of evidence, witnesses and assets;
- the possibility to serve the sentence in the Netherlands if the suspect is a Dutch national or resident;³¹³
- concentration of investigative/prosecutorial efforts.^{314 315}

³¹² Interview with prosecutor 4; interview with prosecutor 5.

³¹³ Interview with prosecutor 4.

³¹⁴ Interview with prosecutor 3; interview with prosecutor 4.

³¹⁵ In deciding whether to transfer proceedings prosecutors also consider to drop parts of the case, i.e. the parts that relate to the Netherlands only, in order to transfer a case to another Member State that only covers a suspicion relating to facts that took place in the other Member State. (Interview with prosecutor 6).

(bb) Ensuring that the suspect is available

Applicability according to Dutch law (2.2.1 substage 1 (no detention on remand possible), (b) Person concerned present in another MS, (bb) Ensuring that the suspect is available)

- FD 2009/829/JHA (?)

ESO possible under national law?

Issuing an ESO is not possible under Dutch law if there is no remand detention order (see 2.2.1(a)(bb), *supra*).

- EU Convention on Mutual Assistance in Criminal Matters

Keeping in contact with him while he's abroad (sending/service documents)

See the applicability remarks in 2.2.1(b)(aa) (*supra*).

(dd) Other (?)

No other goal was mentioned by the interviewees.

Application (2.2.1 substage 1 (no detention on remand possible), (b) Person concerned present in another MS, (aa) Executing investigative measures/prosecution such as interrogating the suspect)

The instruments separately

- FD 2009/829/JHA (?)

- Not possible under Dutch law.

- EU Convention on Mutual Assistance in Criminal Matters

- Keeping in contact with him while he is abroad (sending/service documents)

This not a measure involving deprivation or even restriction of liberty. Since detention on remand is not possible and, consequently, issuing an ESO is not possible according to Dutch law, sending or service of documents on the basis of the EU convention in order to keep in contact with a suspect who is abroad is not an alternative to an option that impacts the liberty of the suspect according to Dutch law. Such a measure, therefore, is out of scope.

- European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters

What has been said about transfer of proceedings in relation to achieving the goal of interrogation or confrontation applies more or less to the situation in which the goal is to keep the suspect available for investigative or prosecutorial measures without having the suspect in detention.

The interplay between instruments

No interplay here, since in this situation no instrument that has an impact on the liberty of the suspect is applicable.

Goals and instruments

Does not apply.

(dd) Other (?)

No other goal was mentioned by the interviewees.

2.2.2. Substage 2 (detention on remand possible)

(a) Person concerned present in issuing MS

(i) detention on remand possible but not ordered

(bb) Ensuring that the suspect is available

Applicability according to Dutch law

- FD 2009/829/JHA

ESO possible under national law?

Issuing an ESO is not possible according to Dutch law (see 2.2.1(a)(bb), *supra*).

Application

The instruments separately

- FD 2009/829/JHA

Issuing an ESO not possible.

Interplay of instruments

Does not apply.

Goals and instruments

Does not apply

(dd) other?

(ii) person concerned in detention on remand

In this situation, there is no need for judicial cooperation because the suspect is already available for investigative/prosecution measures.

Applicability according to Dutch law (substage 2 (detention on remand possible, **(a) Person concerned present in in issuing MS, (ii) Person concerned in detention on remand**)

According to the Annotated Index, in this situation, there is no need for judicial cooperation because the suspect is already available for investigative or prosecution measures.

Nevertheless, some remarks will be made. If the person concerned is in detention in remand in the issuing Member State, this is the typical situation in which according to Dutch law an ESO is possible. However, an ESO will be issued in this situation in order to be able to suspend the detention on remand in such a way that the suspect will return to the Member State where he lives and at the same time is 'under control' through supervision measures that will be executed in that Member State. Of course, in this way the suspect will remain available for further investigative/prosecutorial measures (through appropriate supervision measures), but this is not the goal of issuing an ESO. After all, when the suspect is in detention on remand he is already available. In other words, the goal of issuing an ESO is not to ensure that the suspect is available, but to make it possible to suspend the detention on remand whilst keeping the suspect available, i.e. the ESO is primarily issued in the interest of the suspect.

Application (substage 2 (detention on remand possible, **(a) Person concerned present in in issuing MS, (ii) Person concerned in detention on remand**)

The instruments separately

The ESO is not widely used according to the prosecutors interviewed,³¹⁶ not even in cases which are particularly suited for the ESO. In practice, *e.g.*, the circumstances that the suspect or accused person is a national of another Member State and that the sentence expected to be imposed on him is less than six months sometimes result in a ruling that the person concerned presents a serious risk of flight and, therefore, that remand detention cannot be suspended conditionally, even if the person concerned has a known address in that other Member State.³¹⁷ The reasoning behind such rulings is that an execution-EAW will probably be met by a refusal on account of the nationality of the person concerned,³¹⁸ that a transfer of sentence will probably be met with a refusal because the sentence remaining to be served will probably be less than six months,³¹⁹ and that, since the person will probably not be traceable in the Netherlands after his release, there is a real risk that he will escape his sentence. The reference to the EAW-based ground for refusal is not very convincing: if the executing judicial authority refuses surrender for the purpose of executing a sentence because the requested person is a national of the executing Member State, that executing Member State itself must enforce that sentence pursuant to Article 4(6) of FD 2002/584/JHA. Apparently, the possibility of issuing an ESO does not play a role, although this is contrary to the European Commission's recommendations that alternatives to pre-trial detention should be preferred, such as the ESO, in particular where the offence is punishable by only a short sentence of imprisonment³²⁰ as is the case here.

³¹⁶ Interview with public prosecutor 2; interview with public prosecutor 3. As was also stated in 2018 in: Lindeman, Jacobs & Boone, "De praktijk van de Europese toezichtmaatregel: begin van een meeromvattende invloed van de EU op de voorlopige hechtenis?", *Strafblad* 2018/6. Since then, not much seems to have changed. See the statistics in *Evaluation report 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, Council document 13190/1/22 REV 1, 2 December 2022, p. 81. In 2019, there was only one outgoing case (and seven incoming cases). There is, however, no central registration of ESO's issued in place (interview with prosecutor 2).

³¹⁷ See, *e.g.*, the decision by the examining magistrate in the District Court of Amsterdam of 13 Januari 2025 (*parketnummer* 13-011182-25, unpublished). However, on appeal the District Court found that there was no serious risk of flight since the person concerned had a known address in Spain where he could be contacted by the Dutch authorities, and ordered his release from remand detention.

³¹⁸ See Art. 4(6) of FD 2002/584/JHA.

³¹⁹ See Art. 9(1)(h) of FD 2008/909/JHA.

³²⁰ Commission Recommendation of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, C(2022) 8987 final, p. 9 (recommendation (10) and p. 10 (recommendation (10)).

The interplay between instruments

Not applicable. As to the interplay between the EAW and the ESO: there is none. However, it has been suggested that there should be an interplay between the ESO and the EAW and that, in fact, there is an ‘untapped potential’ in that interplay. An ESO could be usefully engaged, so it is argued, once the person concerned is surrendered to the issuing Member State (for the purpose of conducting a prosecution). The likelihood that an ESO might be issued after the surrender of the person concerned is a factor that the executing judicial authority might consider when faced with the argument that detention conditions in the issuing Member State are subpar.³²¹ Apparently, the reasoning is that such a factor might be decisive in ordering surrender notwithstanding the poor conditions of detention in the issuing Member State: if an ESO is issued, the requested person will not be detained any longer and, therefore, will not be subjected to those poor conditions of detention. This all seems rather theoretical: if the conditions of detention in the issuing Member State are inhuman or degrading, the executing judicial authority would probably not – and in our opinion should not – expose the requested person to them even if it is likely that, after surrender, an ESO would be issued. The requested person would, after all, be detained for some time pending the decision on issuing an ESO. Moreover, the fact that the person concerned is surrendered on the basis of an EAW might have a negative influence on decisions on detention on remand in the issuing Member State. Persons who were surrendered might be considered to present a flight risk, and, therefore, not to be ideal candidates for an ESO. Finally, the public interest in ensuring the presence of the accused at trial might be considered to be higher for those person who were surrendered, given the energy and resources spent on surrender.³²²

Even so, there might be un ‘untapped potential’ in the interplay between the ESO and the EAW, if the ESO could be used to replace the EAW once the

³²¹ Ryan, “The Interplay Between The European Supervision Order And The European Arrest Warrant: An Untapped Potential Waiting To Be Harvested”, (2020) *European Papers*, 1531-1542.

³²² Martufi & Peristeridou, “Pre-Trial Detention And EU-Law: Collecting Fragments Of Harmonisation Within The Existing Legal Framework”, (2020) *European Papers*, 1477-1492, at 1490.

requested person is arrested in the executing Member State. If the requested person has his lawful and ordinary residence in that Member State and if it is likely that he will comply with supervision measures in that Member State, withdrawing the EAW and replacing it with an ESO might be a less intrusive measure to ensure that the person is available for prosecution and trial.

Goals and instruments

As was also observed with regard to the transfer of proceedings, the goal of keeping the suspect available for investigation/prosecution does not stand alone but is ‘in the mix’ with other goals, *i.e.* enabling the suspension of the detention on remand in the interest of the suspect.

(b) Person concerned present in another Member State

(i) detention on remand possible but not ordered

(aa) Executing investigative measures/prosecution such as interrogating the suspect

Applicability according to Dutch law (substage 2 (detention on remand possible), **(b) Person concerned present in another Member State, (i) detention on remand possible but not ordered, (aa) Executing investigative measures/prosecution such as interrogating the suspect**)

- EU Convention on Mutual Assistance in Criminal Matters

See the applicability remarks in 2.2.1(b)(aa) (*supra*).

Application (substage 2 (detention on remand possible), **(b) Person concerned present in another Member State, (i) detention on remand possible but not ordered, (aa) Executing investigative measures/prosecution such as interrogating the suspect**)

The instruments separately

- DR 2014/41

Temporary transfer³²³/videoconference

According to the interviewees, the option of a temporary transfer is not or only seldom used in practice.³²⁴

- EU Convention on Mutual Assistance in Criminal Matters

Inviting him for, e.g., an interrogation (sending/service documents)

See *supra*, 2.2.1(b)(aa), *Application*.

- European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for interrogating a suspect in another MS for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option.

See *supra*, 2.2.1(b)(aa), *Application*.

Interplay of instruments

In this situation the interplay between the different applicable instruments will be limited. As we have seen in the previous section these instruments are not, at least not often, used.

Goals and instruments

The real choice is not the choice between instruments once detention on remand is possible but not ordered, but the choice between ordering detention on remand or not. Similar to what we have seen in par. 2.2

³²³ It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the executing MS.

³²⁴ This is corroborated by the report on the 10th round on mutual evaluations: *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on the Netherlands*, 5616/1/24 REV 1, 15 February 2024, p. 41.

under **Preliminary Remarks** (*Goals and instruments*), this choice is made on the basis of a broader assessment in which not only the goal of an interrogation/confrontation is taken into account.

(bb) ensuring that the suspect is available

Applicability according to Dutch law (substage 2 (detention on remand possible), **(b) Person concerned present in another Member State, (i) detention on remand possible but not ordered, (bb) Ensuring that the suspect is available**)

- FD 2009/829/JHA

An ESO is 'an alternative to provisional detention' (Art. 1 FD 2009/829/JHA). Is it possible under national law to issue an ESO, if detention remand is possible but not ordered?

Not possible under Dutch law. See *supra* (2.2.1(a)(bb)).

- EU convention on Mutual Assistance in Criminal Matters

Keeping in contact with him while he's abroad (sending/service documents)

See the applicability remarks in 2.2.1(b)(aa) (*supra*).

Application (substage 2 (detention on remand possible), **(b) Person concerned present in another Member State, (i) detention on remand possible but not ordered, (bb) Ensuring that the suspect is available**)

- FD 2009/829/JHA (?)

An ESO is 'an alternative to provisional detention' (Art. 1 FD 2009/829/JHA). Is it possible under national law to issue an ESO, if detention remand is possible but not ordered?

Issuing an ESO not possible.

- EU Convention on Mutual Assistance in Criminal Matters

Keeping in contact with him while he's abroad (sending/service documents)

Keeping in touch with the suspect using the means provided in this convention in order to keep him available for investigative/prosecutorial actions was not mentioned by the interviewees. Besides, there is the issue of whether the convention is applicable to 'informal' communications with the suspect, and, if not, informal communications with the suspect might be seen as an infringement of sovereignty (see supra, 2.2.1(b)(aa), *Applicability*).

- European Convention on Transfer on Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for ensuring that a suspect is available in another MS for the benefit of the investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option.

In the context of the broader decision where to investigate/prosecute (in the Netherlands or in another Member State) it is conceivable that the possibilities/impossibilities of keeping the suspect available, *e.g.* for an interrogation or confrontation, play a role, but a decision to transfer proceedings to another Member State solely with a view to keeping him 'under control' did not pop up during the interviews. We refer to paragraph 2.2 under **Preliminary remarks** (*Goals and instruments*).

(dd) Other (?)

No other goal was mentioned by the interviewees.

(ii) detention on remand ordered

(aa) Executing investigative measures/prosecution such as interrogating the suspect

Applicability according to Dutch law(substage 2 (detention on remand possible),

(b) Person concerned present in another Member State, (ii) detention on remand possible ordered, (aa) Executing investigative measures/prosecution such as interrogating the suspect)

- FD 2002/584/JHA (?)

Under national law, is it possible to issue a prosecution-EAW for the sole purpose of interrogating the requested person as a suspect? Pending the decision on the execution of a prosecution-EAW, the person concerned could be heard in the executing MS or be temporarily transferred to the issuing MS on the basis of Art. 18 and 19 FD 2002/584/JHA.

There is no reason – and no room – to deviate from the conclusion reached under EU law: under national law it is not allowed to issue a prosecution-EAW for the sole purpose of interrogating a suspect. See *supra*, 2.1.1.2(b)(ii).

Application (substage 2 (detention on remand possible), **(b) Person concerned present in another Member State, (i) detention on remand possible but not ordered, (aa) Executing investigative measures/prosecution such as interrogating the suspect)**

The instruments separately

- FD 2002/584/JHA (?)

Several interviewees were of the opinion that issuing an EAW solely for the purpose of interrogating the suspect or executing a confrontation is not possible. Requests for issuing such an EAW will be rejected.³²⁵ An EAW comes into play in more or less severe cases, that is if there are grounds and reasons

³²⁵ Interview with prosecutor 6; interview with prosecutor 7. Which does not mean that it never happens (interview with prosecutor 6).

for detaining the suspect in detention on remand in the Netherlands after his surrender (*e.g.*, because of the risk of collusion), so that the suspect will remain in detention when and after he has been interrogated awaiting further investigative/prosecutorial actions.³²⁶

That an EAW may not be issued solely for the purpose of interrogating the suspect might not be the prevailing opinion amongst the issuing authorities of the Member States. In the explanatory memorandum accompanying the bill to transpose the directive on the EIO into Dutch law, the government made a statement to the effect that, in practice, an EAW is sometimes used (by other Member States) just to hear a suspect only once.³²⁷ A recent Fundamental Rights Agency report lends support to this statement. It mentions that defence lawyers from a number of Member States consider that ‘the EAW is overused because it is issued very often in cases in which other instruments – such as a European Investigation Order (...) – could be used’. Italian lawyers even noted that EIO’s ‘should be used more frequently in cases involving ongoing investigations, rather than issuing an EAW for the mere purpose of questioning a defendant’. Experts who participated in a FRA expert meeting on the EAW concluded that EIO’s ‘could be used to replace EAWs, for instance where the person was sought only for questioning. The experts admitted, however, that the EAW is the instrument most often used, as judicial authorities have experience with it, whereas they may not have experience with other (less coercive) instruments’.³²⁸

A temporary transfer or an interrogation in the executing Member State on the basis of Articles 18 and 19 of FD 2002/584/JHA does not seem to play a role in practice. This option was called a blind spot by one of the prosecutors.³²⁹ With respect to the reverse situation, according to the government the Netherlands as executing Member State has never received a request based on those provisions.³³⁰

³²⁶ Interview with prosecutor 6.

³²⁷ *Kamerstukken II* 2016/17, 34611, nr. 3, p. 4.

³²⁸ *European Arrest Warrant Proceedings – Room For Improvement To Guarantee Rights In Practice* (FRA, 2024), p. 31-32.

³²⁹ Interview with prosecutor 4. At the national meeting on 24 October 2024 lack of awareness was mentioned as a reason for the underuse of Art. 18 and 19 FD 2002/584/JHA.

³³⁰ *Kamerstukken II* 2023/24, 36491, nr. 3, p. 50.

- DR 2014/41

Temporary transfer³³¹/videoconference

The option of issuing an EIO in order to transfer the suspect temporarily to the Netherlands in order to interrogate the suspect or to execute a confrontation was not mentioned in the interviews.

Issuing an EIO in order to have the suspect interrogated by authorities of the executing Member State on the contrary is not unusual.

Several interviewees mentioned the option of issuing an EIO in order to interrogate the suspect by the Dutch authorities via videoconference.

- EU Convention on Mutual Assistance in Criminal Matters

Keeping in touch with him while he's abroad (sending/service documents)

If it is not possible to issue an EAW, even if detention remand was ordered, conceivably the authorities might use the convention to remain in contact with the suspect. However, none of the interviewees mentioned this possibility, and, as stated before, using the convention in this way raises issues of applicability and sovereignty (see *supra*, 2.2.1(b)(aa), Applicability).

- European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides ensuring that a suspect is available for investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to the MS of residence may be an option.

In the context of the broader decision where to investigate/prosecute (in the Netherlands or in another Member State) the possibilities/impossibilities of interrogation or confrontation can play a role, but a decision to transfer

³³¹ It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the executing MS.

proceedings to another Member State solely with a view to achieve an interrogation or confrontation, that is without other factors taken into account, did not pop up during the interviews. We refer to paragraph 2.2 under **Preliminary remarks** (*Goals and instruments*).

The interplay of the instruments

The main interplay seems to be between two ‘variants’ of the EIO. Here we have a choice between having the suspect interrogated by the authorities of the executing Member State and interrogating the suspect by Dutch authorities via videoconference.

Relevant for making the choice seems to be whether an interrogation should be realised on short notice. In that case, the quicker option is an interrogation by the executing authorities.³³²

If the interrogation lasts for several days and/or requires the involvement of many persons/agenda’s then interrogation by the executing authorities is also more efficient.

If other goals come into play, like hearing witnesses, a search or a read-out of a telephone, then it is more efficient to have the executing authorities carry out the investigative measures. An interrogation will then be included in the ‘package’.

By contrast, when a more interactive interrogation is required, interrogation by the Dutch authorities via videoconference comes into play. The possibilities of more interaction between Dutch authorities and the suspect during the interrogation could also be achieved when Dutch authorities attend the interrogation by the executing authorities. However, the room to intervene seems to be limited³³³ and depends on how the executing authorities carry out the interrogation.

³³² According to an examining magistrate, this depends on the Member State that has to carry out the interrogation: interview with examining magistrate 2.

³³³ According to one interviewee, there is no such room at all. When the executing authority carries out the interrogation, the issuing authority’s hands are tied: interview with examining magistrate 2.

Real interaction is, of course, achieved by an interrogation by the Dutch authorities in the Netherlands through issuing an EAW. However as stated before, issuing an EAW for the sole purpose of an interrogation does not seem to be an option (see *The instruments separately* and, hereafter, *Goals and instruments*).

An EIO does not guarantee that the suspect will be interrogated, since it entails no coercion.³³⁴ In case a suspect does not cooperate,³³⁵ prosecutors look at issuing an EAW in order to effectuate an interrogation.³³⁶ However, as stated before, issuing an EAW for the sole purpose of interrogation is not an (acceptable) option.

Two examining magistrates stated that they had never been asked to issue and had never issued an EIO for the purpose of interrogating a suspect or an accused person. They presumed that such EIO's would be issued by the public prosecutor.³³⁷ With regard to the choice between an EAW and an EIO one of the examining magistrates said: it is the prosecutor that makes the choice,³³⁸ and another stated that, given that EAWs are only requested and issued for (very) serious offences, an EIO is never a real option.³³⁹ Nevertheless, yet other examining magistrates asserted that the examining magistrate takes the possibility of an EIO into account when deciding on a request to issue an EAW (see *supra*, paragraph 1.3.1(a)).

Goals and instruments

The real choice as far as achieving an interrogation is concerned seems to be the choice between an interrogation by the executing authorities and an interrogation by Dutch authorities. As we have seen, in making this choice

³³⁴ One examining magistrate refers to a case in which she had to switch from an interrogation by way of videoconference to an interrogation by the authorities of the executing Member State, because the accused person did not consent to videoconferencing: interview with examining magistrate 2.

³³⁵ In the sense that he/she does not appear. If the suspect appears but remains silent, then the aim of interrogating the suspect has been achieved.

³³⁶ Interview with prosecutor 3; interview with prosecutor 6.

³³⁷ Interview with examining magistrate 1; interview with examining magistrate 2.

³³⁸ Interview with examining magistrate 1.

³³⁹ Interview with examining magistrate 2.

efficiency seems to play an important role. Whether other investigative goals are on the table is also relevant.

In cases in which the abode of the suspect is unknown, issuing an EIO is not possible. This can be a reason to decide to execute the interrogation in the Netherlands instead of in another Member State through issuing an EAW. The alternative option of issuing a SIS-alert³⁴⁰ and then, when the suspect is located, issuing an EIO was seen by some prosecutors as cumbersome, since that takes two steps instead of one that, moreover, has proved to be effective.³⁴¹

In the context of the broader decision where to investigate/prosecute (in the Netherlands or in another Member State) the possibilities/impossibilities of interrogation or confrontation can play a role, but a decision to transfer proceedings to another Member State solely with a view to achieve an interrogation or confrontation, that is without other factors taken into account, did not pop up during the interviews. We refer to paragraph 2.2 under **Preliminary remarks** (*Goals and instruments*).

(bb) ensuring that the suspect is available

Applicability according to Dutch law (substage 2 (detention on remand possible), **(b) Person concerned present in another Member State, (ii) detention on remand ordered, (bb) Ensuring that the suspect is available**)

- FD 2009/829/JHA (?)

ESO possible under national law?

Is an ESO possible under national law? In this situation, there is a decision to remand the person concerned in detention. However, the person concerned is not present in the Netherlands. There is no reason to believe that the national

³⁴⁰ Art. 34(1)(c) of Regulation (EU) 2018/1862 provides for an alert in the SIS for the purpose of communicating the place of residence or domicile of persons who 'are sought to be summoned to appear before the judicial authorities in connection with criminal proceedings in order to account for acts for which they are being prosecuted'.

³⁴¹ Interview with prosecutor 3.

provisions have a wider scope than the provisions of FD 2009/829/JHA (see *supra* (2.1.1.2, applicability remarks)). In fact, during the legislative process the Government recognised that the framework decision does not contain rules concerning situations in which the person concerned is not in the issuing Member State, because in such situations FD 2002/584/JHA could be used.³⁴² Consequently, since the person concerned is no longer in the issuing Member State, it is not possible to issue an ESO.

There are indications that this opinion is not shared by authorities of other Member States. The competent Dutch authority refers to cases in which the Netherlands is the *executing* Member State. Sometimes the issuing Member State releases the person concerned and sends them back to the Netherlands, without having first sent an ESO to the Netherlands, and therefore, before the competent Dutch authority has taken a decision on the recognition of the ESO. This is problematic, because without recognition there can be no supervision.³⁴³

Application (substage 2 (detention on remand possible), **(b) Person concerned present in another Member State, (ii) detention on remand ordered, (bb) Ensuring that the suspect is available**)

The instruments separately

- FD 2002/584/JHA

See *supra* par 2.2.2 (ii)(aa) under *Application*

³⁴² *Kamerstukken II* 2012/13, 33422, nr. 3, p. 12.

³⁴³ *Evaluation report 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, Council document 13190/1/22 REV 1, 2 December 2022, p. 82; interview with prosecutor 2. This prosecutor stated that, in such cases, 'the paperwork' will be done afterwards.

- FD 2009/829/JHA

ESO possible under national law?

No application possible.

- EU Convention on Mutual Assistance in Criminal Matters

Keeping in touch with him while he's abroad (sending/service documents)

See *supra* par 2.2.2 (ii)(aa) under *Application*

- European Convention on Transfer of Proceedings in Criminal
Matters/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides ensuring that a suspect is available for investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to the MS of residence may be an option.

See *supra* par 2.2.2 (ii)(aa) under *Application*

The interplay of the instruments

See *supra* par 2.2.2 (ii)(aa) under *Application*

Goals and instruments

See *supra* par 2.2.2 (ii)(aa) under *Application*

(dd) Other (?)

No other options mentioned by the interviewees.

2.3 Applicability and application of the instruments at the trial stage according to national law

General introduction

In section 2.3, the various instruments will be linked to specific needs for judicial cooperation at the trial stage. The needs in this section are as follows:

- (aa) executing investigative measures/prosecution such as interrogating the suspect or executing a confrontation (if he is present in another MS);³⁴⁴
- (bb) ensuring that the suspect is available to the competent authority for the purpose of investigative measures/prosecution or ensuring his availability for the trial (whether or not he is present in the issuing MS). This means ensuring that the competent authority can reach the suspect for such measures as an interrogation, a confrontation et cetera.
- (cc) ensuring the suspect's presence at trial:
- (dd) other (?)

Nota bene: the trial stage is part of the investigation/prosecution phase. That is why (aa) is also included. As stated before, at the trial stage, and thus during "prosecution", there may be a need for investigative measures.

What was said in the introduction to section 2.2 concerning the task of the NAR applies *mutatis mutandis* to this section.

- (a) **Person concerned present in issuing MS**
 - (i) **detention on remand possible but not ordered**
 - (bb) **Ensuring that the suspect is available**

Applicability according to Dutch law

- FD 2009/829/JHA (?)

An ESO is 'an alternative to provisional detention' (Art. 1 FD 2009/829/JHA). Is it possible under national law to issue an ESO, if detention on remand is possible but not ordered, and, if so, under what conditions?

No, this not possible. See *supra*, 2.2.1(a)(bb).

³⁴⁴ See the Introduction to section 2.2.

Application

Issuing an ESO is not possible.

(dd) Other (?)

No other goal was mentioned by the interviewees.

(ii) person concerned in detention on remand

In this situation, there is no need for judicial cooperation because the suspect is already available for investigative/prosecution measures and availability for trial is ensured.

However, see *supra* (2.2.2(a)(i)(ii)) with regard to the ESO.

(b) Person concerned is present in another MS

(i) detention on remand possible but not ordered

(aa) executing investigative measures/prosecution such as interrogating the suspect;

Applicability according to Dutch law (trial stage, (b) Person concerned is present in another MS, (i) detention on remand possible but not ordered, (aa) Executing investigative measures/prosecution such as interrogating the suspect)

- DR 2014/41³⁴⁵

Temporary transfer³⁴⁶/videoconference

Under national law, is a videoconference possible with the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)?

No, under Dutch law an EIO for a videoconference with the sole purpose of ensuring the presence of the accused at the trial is not possible.

The Code of Criminal Procedure allows for videoconferencing in order for the defendant to participate in the trial, but, as far as the trial hearing at which the court examines the merits of the case is concerned, only if he consents to it (Article 131a of

³⁴⁵ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the “coherent and effective” application of the instruments.

³⁴⁶ It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the executing MS.

the Code of Criminal Procedure in combination with Article 2(1)(b) of the Royal Decree on videoconferencing). Although to date this has never been explicitly established in case-law, these rules seem to pertain exclusively to situations in which the defendant is in the territory of the Netherlands. Pursuant to Article 539a of the Code of Criminal Procedure, it is not allowed to exercise the *powers*, conferred by any statutory provision, *concerning the trial* outside of the jurisdiction of the district court,³⁴⁷ and, *a fortiori*, outside of the territory of the Netherlands.³⁴⁸ Article 131a is such a provision, in that it allows videoconferencing (also) at the trial hearing. If the defendant is present in another Member State, videoconferencing at the trial on the basis of Article 539a would mean exercising, at least partially, a power concerning the trial hearing outside of the Netherlands.³⁴⁹ Moreover, there are *separate* rules concerning *judicial cooperation* with other (Member) States with regard to videoconferencing, *i.e.* where the defendant is not in the Netherlands. The existence of these rules supports the interpretation that Article 131a is limited to situations in which the defendant is in the territory of the Netherlands.

Both the rules governing judicial cooperation with non-EU States and the rules governing the EIO exclude using videoconferencing in order for the defendant to participate in the trial (with one notable exception, see *infra*).

As a preliminary issue, we have to point out that it has been argued that videoconferencing for the trial of an accused person does not even meet the definition of mutual legal assistance as laid down in Article 5.1.1 of the Code of Criminal Procedure.³⁵⁰ According to that opinion, requests for such a purpose are not within the scope of the provisions concerning judicial cooperation. Presumably, this opinion is

³⁴⁷ *Kamerstukken II* 1964/65, 7979, nr. 3, p. 9.

³⁴⁸ HR, 12 December 2000, *NJ* 2001/240: the trial court held an inspection ('schouw' or 'descente') - which means that the trial hearing is temporarily relocated - *in the territory of Belgium*, which is contrary to Article 539a. See further Van Elst, "Rechtsmacht" in R. van Elst and E. van Sliedregt (Eds.), *Handboek Internationaal Strafrecht. Internationaal en Europees strafrecht vanuit Nederlands perspectief*, 3rd ed. (Wolters Kluwer, 2022), pp. 89-188, at 180-181.

³⁴⁹ Apparently, the Latvian Supreme Court has a similar opinion: 'having regard to the territorial scope of the Law on Criminal Procedure, the jurisdiction of the Republic of Latvia is limited to the national territory. The holding of a videoconference in the absence of international mutual judicial assistance is thus possible only if the procedural act is carried out within the jurisdiction of the Republic of Latvia'. See Joined Cases C-225/24 & C-285/23, *AVVA and Others (Trial by videoconference in the absence of a European Investigation Order)*, EU:C:2024:462, para 28.

³⁵⁰ Verrest, in: *T&C Internationaal strafrecht en strafrechtelijke samenwerking*, art. 5.1.3a, aant. 2.

based on the fact that, although Article 5.1.1(1) also refers to mutual assistance during the trial phase, Article 5.1.1(2) limits the definition of a request for mutual assistance to requests for the carrying out of or lending assistance to *investigative* measures and certain other measures which do not bear any relation with the trial phase.³⁵¹ The opinion that videoconferencing for the trial of an accused person does not meet the statutory definition of mutual legal assistance is confirmed by the government proposal for a new Code of Criminal Procedure (see *infra*). The new provision that lists the possible forms of mutual legal assistance (Article 8.2.2) is said to correspond to Article 5.1.1.³⁵² Accordingly, applying videoconferencing for trying an accused person does not constitute a recognised form of mutual legal assistance.³⁵³

In any case, both Article 5.1.3a(1) and Article 5.1.9³⁵⁴ of the Code of Criminal Procedure (concerning outgoing and incoming requests for videoconferencing in the context of mutual legal assistance) use the word ‘verhoren’ (*i.e.* ‘to interrogate’) with regard to an accused person, and Article 5.1.9 contains the qualifying condition ‘in het kader van de opsporing en vervolging van strafbare feiten’ (‘in the context of the investigation and prosecution of offences’). Articles 5.4.13 and 5.4.25 of the Code of Criminal Procedure (concerning incoming and outgoing EIO’s for videoconferencing) use the same word ‘verhoren’ with regard to an accused person. Accordingly, the *travaux préparatoires* state that videoconferencing can only be used in the course of the investigation or prosecution, not for the purpose of conducting the trial.³⁵⁵

³⁵¹ Apparently, interrogating the accused person at the trial is not seen as an investigative measure. This line of reasoning raises the question why videoconferencing for the purpose of hearing a witness at the trial qualifies as mutual legal assistance, and why videoconferencing for the purpose of interrogating an accused person at the trial does not. If the former measure is an investigative measure, why isn’t the latter as well?

³⁵² *Kamerstukken II* 2024/25, 36636, nr. 3, p. 190.

³⁵³ *Kamerstukken II* 2024/25, 36636, nr. 3, p. 193.

³⁵⁴ Prior to the entry into force of Article 5.1.9, Dutch law did not provide for executing requests for hearing a suspect or an accused person by videoconference. Although both Art. 9(8) of the Second Additional Protocol to the CoE European Convention on Mutual Assistance in Criminal Matters and Art. 10(9) of the EU Convention on Mutual Assistance stipulate that Member States may, at their discretion, apply the provisions on videoconferencing to hearings of an accused person, both provisions also afford the Member States the opportunity to declare that they will not avail themselves of that possibility. The Netherlands made declarations to that effect under both conventions (*Trb.* 2002, 30, p. 44; *Trb.* 2004, 211, p. 2). It seems that the Netherlands has not withdrawn these declarations, even though under the current national legal framework it is possible to execute a request for hearing an accused person by videoconference.

³⁵⁵ *Kamerstukken II* 2015/16, 34493, nr. 3, p. 20 with regard to Article 5.1.3a; *Kamerstukken II* 2016/17, 34611, nr. 3, p. 15 with regard to Article 5.4.13. See Salverda, “Het gebruik van videoconferentie bij de berechting van een in het buitenland verblijvende verdachte”, *DD* 2024/35, paragraph 2.2, for reference to further statements to the same effect. The EIO mutual evaluation report on the Netherlands states that it is unlikely that the Dutch position on this issue will change in the near future: *Evaluation report on the 10th round of mutual evaluations on*

In 2029, the new Code of Criminal Procedure is expected to enter into force. Article 8.2.5 of the government proposal concerning Book 8 (international and European cooperation in criminal matters) of the new Code of Criminal Procedure concerns outgoing requests for videoconferencing and reads as follows: ‘Het verzoek kan eveneens worden gedaan voor het, *anders dan in het kader van zijn berechting*, doen horen, verhoren of ondervragen van dan wel het laten bijwonen van een verhoor of zitting door een verdachte per videoconferentie’ (‘The request can also be done for, *other than in the context of his trial*, hearing, interrogation or interrogating or having a suspect attend an interrogation or hearing by videoconference’).³⁵⁶ The phrase ‘other than in the context of his trial’ also appears in Article 8.2.15 concerning incoming requests for videoconferencing. According to the explanatory memorandum, Article 8.2.5 corresponds to Article 5.1.3a of the present code, and Article 8.2.15 to Article 5.1.9 of the present code. The explanatory memorandum explicitly states that, *as with the current provisions*, the proposed new provisions do not allow the use of videoconferencing for the purpose of trying the accused person.³⁵⁷ At the substantive level, the proposed provisions on EIO’s for videoconferencing (Articles 8.5.7 (outgoing EIO’s) and 8.5.25 (incoming EIO’s) do not differ from the current provisions. The explanatory memorandum states that the directive does not allow using videoconferencing as an alternative to the physical presence of the accused person at the trial because its (exclusive or even main) goal would not be obtaining evidence (cf. Article 1(1) of Directive 2014/41/EU).³⁵⁸ In light of the later judgment in the *Delda* case, this seems a correct assessment.³⁵⁹ Referring to recital (25) of the preamble to Directive 2014/41/EU, the explanatory memorandum adds that if the issuing Member State wants to prosecute and try the person concerned, its competent authority must issue an EAW. Unlike Article 8.2.5, the national provisions on the EIO and videoconferencing do not explicitly state that they do not apply to the trial of the accused person in order to stay as closely as possible to the wording of the directive.³⁶⁰

the implementation of the European Investigation Order (EIO). Report on the Netherlands, Council document 5616/1/24 REV 1, 15 February 2024, p. 42.

³⁵⁶ *Kamerstukken II* 2024/25, 36636, nr. 2 (emphasis added).

³⁵⁷ *Kamerstukken II* 2024/25, 36636, nr. 3, p. 193.

³⁵⁸ *Kamerstukken II* 2024/25, 36636, nr. 3, p. 256.

³⁵⁹ Case C-583/23, *Delda*, EU:C:2025:6, para 32.

³⁶⁰ *Kamerstukken II* 2024/25, 36636, nr. 3, p. 256.

Whatever the wording and spirit of the current and coming national provisions concerning videoconferencing as a means of judicial cooperation, should the Netherlands ever ratify a treaty that explicitly provides for cooperation in the form of videoconferencing for the purpose of standing trial, such a treaty would take precedence over the national provisions (cf. Chapter 1.2).

As we said, there is one exception to the rule that judicial cooperation in the form of videoconferencing for the purpose of standing trial is not possible (but it does not apply to relations with EU Member States). Pursuant to Article 8(1) of the Agreement between the Kingdom of the Netherlands and Ukraine on International Legal Cooperation regarding Crimes connected with the Downing of Malaysia Airlines Flight MH17 on 17 July 2014,³⁶¹ an accused person who is present in the territory of Ukraine and whose extradition to the Netherlands has been refused, may stand trial in the Netherlands via a videoconference link, but only if he consents to it (Article 8(2)). Standing trial by videoconference pursuant to the Agreement is not considered to be *in absentia* (Article 8(3)). As explained in the main text (*supra*), this provision takes precedence over the national provisions on judicial cooperation that deviate from it. In this specific instance, the legislator chose to provide for a separate law governing judicial cooperation with the Ukraine regarding crimes connected with the downing of flight MH17. The provisions on videoconferencing are implemented in Article 4 of the Act on prosecuting and trying offences in connexion with the downing of Malaysia Airlines flight MH17.³⁶² The provisions on standing trial by videoconference were not used during the MH17 trial.³⁶³

Under national law is a videoconference for the sole purpose of ensuring the presence of the accused at the trial possible without issuing an EIO?

No. From the answer to the previous question it follows that Article 131a of the Code of Criminal Procedure does not apply to situations in which the accused person is not in the territory of the Netherlands.

³⁶¹ Tallinn 7 July 2017, *Trb.* 2017, 102. On the actual MH17 trial see Van der Wilt, “Enkele overpeinzingen over MH17”, (2020) *Delikt en Delinkwent*, 57-67; Van Elst, “De vonnissen in de strafzaak MH17 in internationaal strafrechtelijk perspectief”, (2023) *Boom Strafbblad*, 298-306.

³⁶² *Sib.* 2018, 263.

³⁶³ Klip, “The Right to be Present Online”, (2024) *European Journal of Crime, Criminal Law and Criminal Justice*, 1-14, at 10.

Under national law, is issuing an EIO for videoconferencing possible with the sole purpose of interrogating the person concerned at the trial by the trial court?

One could conceive of a Dutch trial as consisting of a number of separate parts. One of those parts would be the interrogation of the accused person by the court as opposed to the part of the trial where the accused person and his lawyer put forward their defence. At the trial, the court will question the accused person about the offence he is charged with as part of the examination whether the accused person is guilty of the offence with which he is charged (Article 286(1) of the Code of Criminal Procedure). The statement of the accused person, if probative, may be used in evidence against him (Article 339 of the Code of Criminal Procedure). One could, therefore, argue that questioning the accused person at trial amounts to an investigative measure to gather evidence. There is no explicit national provision that states that an EIO may be issued at all stages of the proceedings, including the trial stage. On the other hand, there is no explicit national provision that excludes issuing an EIO at the trial stage. Article 5.4.21(1) of the Code of Criminal Procedure provides a strong indication that an EIO may be issued at the trial stage: in addition to the public prosecutor and the examining magistrates this provision designates ‘*gerechten*’ (‘courts’) as competent authorities to issue an EIO. One could, therefore, argue that videoconferencing with the sole purpose of interrogating the accused person at the trial is possible. Nevertheless, the *travaux préparatoires* explicitly state that ‘Verhoor van een verdachte met als doel berechting’ (‘Interrogating an accused person for the purpose of trying him’) is not possible.³⁶⁴ Evidently, the legislator saw the trial as a whole. Moreover, limiting the videoconference to the interrogation of the accused person raises questions from the perspective of the accused person’s rights of defence: how will the court ensure that the accused is able to hear and participate in the other part(s) of the trial?³⁶⁵ The explanatory memorandum accompanying the proposal for a new Code of Criminal Procedure mentions that the proposed provision on EIOs for videoconferencing (Article 8.5.7) materially corresponds to the present provision.³⁶⁶

³⁶⁴ *Kamerstukken II* 2016/17, 34611, nr. 3, p. 15. The EIO mutual evaluation report on the Netherlands provides corroboration: videoconference may be used in the trial phase to hear accused persons ‘but only for evidence purposes and not during their own trial’ (*Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on the Netherlands*, Council document 5616/1/24 REV 1, 15 February 2024, p. 42, emphasis added).

³⁶⁵ Salverda, “Het gebruik van een videoconferentie bij de berechting van een in het buitenland verblijvende verdachte”, *DD* 2024/35, paragraph 4.

³⁶⁶ *Kamerstukken II* 2024/25, 36636, nr. 3, p. 256.

Under national law, is videoconferencing possible for the sole purpose of interrogating the person concerned at the trial by the trial court without issuing an EIO?

No. As stated before, the national provision on videoconferencing (Article 131a of the Code of Criminal Procedure) does not apply to situations in which the accused person is not in the territory of the Netherlands.

Under national law, is issuing an EIO for temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (*i.e.* without the purpose of gathering evidence)?

This does not seem to be possible under Dutch law.

Article 5.4.26 of the Code of Criminal Procedure implements Article 22 of Directive 2014/41/EU (temporary transfer to the issuing Member State) and Article 5.4.27 of the code implements Article 23 of the directive (temporary transfer to the executing Member State) in the context of the Netherlands as *issuing* Member State. Neither national provision explicitly refers to the kind of investigative measures that are to be carried out. However, the national provisions on temporary transfer in the context of the Netherlands as *executing* Member State both state that the purpose is ‘ter uitvoering van een *opsporingsbevoegdheid* voor het verzamelen van bewijs’ (*i.e.* ‘the carrying out of an *investigative power* for the gathering of evidence’).³⁶⁷ A systematic interpretation means that Articles 5.4.26 and 5.4.27 must serve the same purpose. The wording of this purpose seems to preclude using a temporary transfer solely in order to ensure attendance at trial. The term ‘*opsporingsbevoegdheid*’ (investigative power) has a special meaning in Dutch law. It refers to the powers of the police (and the public prosecutor) to investigate offences not to the powers of the court concerning the trial. This conclusion is corroborated by statements made in the context of a recent amendment to the Law on Extradition. The *travaux préparatoires* explicitly state that a temporary transfer of an accused person in order to be present at his trial is *only possible if his (extradition or) surrender has been allowed but his actual surrender is not yet possible*.³⁶⁸ This statement refers to a so-called ‘conditional surrender’ within the meaning of Article 24(2) of FD 2002/584/JHA, which Dutch law denotes as

³⁶⁷ Emphasis added.

³⁶⁸ *Kamerstukken II* 2021/22, 36003, nr. 8, p. 7.

‘provisional surrender’.³⁶⁹ Such a conditional surrender is only possible after the executing judicial authority has decided to execute the EAW. The national provision that transposes Article 24(2) into Dutch law limits the purpose of conditional surrender to standing trial.³⁷⁰

Finally, the proposal for a new Code of Criminal Procedure contains a provision on issuing a Dutch EIO for a temporary transfer to the Netherlands in the proposed Code of Criminal Procedure that materially corresponds to the present provision. As a clarification, however, a sentence is added to make clear that this provision may only be applied in order to gather evidence (‘ter uitoefening van een bevoegdheid voor het verkrijgen van bewijs waarvoor zijn aanwezigheid in Nederland is vereist’; ‘in order to carry out a competence with a view to gathering evidence for which the presence of that person in the Netherlands is required’). Comparably to EIOs for videoconferencing, the explanatory memorandum refers to recital (25) of the preamble to Directive 2014/41/EU and states that if the transfer is wanted in connection with the prosecution and trial of the person concerned an EAW should be issued.³⁷¹

Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

On the one hand, it can be argued that this is possible. Interrogation is an investigative measure and the directive also applies to investigative measures at the trial stage (see *supra*). On the other hand, when seen against the background of the scope of the provisions on videoconferencing, it does not seem likely that the legislator intended to provide for any interrogation of the person concerned at the trial stage, either by way of videoconferencing or a temporary transfer.³⁷²

Moreover, in contrast to videoconferencing, temporary transfer is a measure that interferes with the right of liberty of the person concerned,³⁷³ in other words is a more

³⁶⁹ Glerum & Kijlstra, “Practice in the Netherlands”, in Barbosa et. al. (Eds.), *The European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23 (Eleven, 2022), pp. 135-136.

³⁷⁰ Prior to 1 October 2024, the national provision that transposed Article 24(2) into Dutch law limited the purpose of conditional surrender to standing trial. However, this provision was amended on 1 October 2024 (see Chapter 1.1(a)). Article 24(2) of FD 2002/584/JHA does not limit conditional surrender to situations in which the requested person will stand trial in the issuing Member State.

³⁷¹ *Kamerstukken II* 2024/25, 36636, nr. 3, p. 257.

³⁷² See *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on the Netherlands*, Council document 5616/1/24 REV 1, 15 February 2024, p. 42.

³⁷³ Compare Case C-510/19, *Staatsanwaltschaft Wien (Falsified transfer orders)*, EU:C:2020:1002, para 73.

intrusive measure than videoconferencing. It does not seem logical that the more intrusive measure would have a wider scope of applicability than the less intrusive measure.

In conclusion: it does not seem possible to effect a temporary transfer for the purpose of interrogation of the accused at the trial by the trial court.

- EU convention on Mutual Assistance in Criminal Matters

Inviting him for an interrogation (serving summons abroad)

No applicability issues.

- European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters

Transfer of proceedings to the MS where the person concerned is present. This is not an instrument that provides for executing investigative measure/prosecution in the issuing MS, e.g. interrogation.

However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option. Is it possible under national law to transfer proceedings that are at the trial stage, and if so, under what conditions?

No, under Dutch law it is not possible to transfer proceedings once the trial has commenced. Once the trial has commenced, the public prosecutor no longer may withdraw the summons (Article 266(1) of the Code of Criminal Procedure), and the trial must, therefore, continue and lead to a judgment.³⁷⁴ That is why, pursuant to Article 5:3:3(1) of the Code of Criminal Procedure, a public prosecutor may not bring the case to trial once he has proposed to the Minister of Justice and Security to request a transfer of the proceedings in that case to another Member State (unless the Minister rejects the proposal or, if he accepted it, subsequently withdraws the request, or if the requested State rejects the request or, if it granted the request, subsequently halted the proceedings).

The proposal for a new Code of Criminal Procedure contains a provision that explicitly excludes a transfer of proceedings to another country, once the public prosecutor has submitted an indictment and the case has not been finally dealt with by

³⁷⁴ *Kamerstukken II* 1983/84, 15971 (R 1133) and 15972, nr. 14, p. 26. See also HR, 28 February 1984, *NJ* 1984/490: once the trial has started, the accused person, in general, has a claim to continuing the trial.

the court yet (Article 8.4.2(1)). This provision intends to codify the case-law discussed above.³⁷⁵

Application (trial stage, **(b) Person concerned is present in another MS, (i) detention on remand possible but not ordered, (aa) Executing investigative measures/prosecution such as interrogating the suspect**)

The instruments separately

- Directive 2014/41/EU

Although according to Dutch law issuing an EIO for the purposes of ensuring the presence of the accused at the trial or for interrogating at the trial by the trial court is not possible, apparently such EIO's are sometimes issued by Dutch judicial authorities. A recent case-law overview refers to a number of published judgments that mention that the accused person participated in his trial via videoconference while present in another Member State, and to published judgments that mention EIO's for participating in the trial that were refused by the authorities of the executing Member State.³⁷⁶ And one of the interviewees referred to a case in which a Dutch court sent an EIO to Spain in order that the accused person could participate in the trial via videoconferencing.³⁷⁷

The EIO mutual evaluation report on the Netherlands notes that, reportedly, Dutch accused persons had to stand trial in other Member States, without issuing an EIO, and that the Netherlands does not agree with this practice.³⁷⁸ Apparently, the Dutch authorities only became aware of this practice after the fact.

³⁷⁵ *Kamerstukken II* 2024/25, 36636, nr. 3, p. 228.

³⁷⁶ Salverda, "Het gebruik van een videoconferentie bij de berechting van een in het buitenland verblijvende verdachte", *DD* 2024/35, paragraph 4. See also NL:RBAMS:2024:5373, an EAW-case: a Romanian accused person was heard by a Romanian court at the trial in appeal on the basis of an EIO, while she was in the Netherlands.

³⁷⁷ Interview with prosecutor 3.

³⁷⁸ *Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on the Netherlands*, Council document 5616/1/24 REV 1, 15 February 2024, p. 42.

Temporary transfer is hardly ever used in practice (*supra*, 2.2.2(b)(i)(aa)).³⁷⁹

- EU convention on Mutual Assistance

Since we are dealing with the trial stage, summoning the accused – and if he has a known address in another Member State: on the basis of this convention – is a prerequisite for conducting the trial. Accordingly, this convention is not an instrument *per se* to execute an interrogation by the court, but such an interrogation is of course made possible by summoning the accused for the trial (assuming that the accused subsequently appears at the trial).

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance
Not applicable, see in this section *supra* (Applicability according to national law).

Interplay of instruments

In this situation there is no interplay between different available instruments. It should be mentioned that sending and service of the summons on the basis of the EU Convention on Mutual Assistance cannot be considered to be an independent *a priori* alternative to any of the other instruments. As explained above ('The instruments separately'), if the accused person has a known address in another Member State he has to be summoned in accordance with the convention anyway.

Goals and instruments

In this situation there is nothing to observe from the point of view of choosing between goals and choosing between instruments.

(bb) Ensuring that the suspect is available

³⁷⁹ Evaluation report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO). Report on the Netherlands, Council document 5616/1/24 REV 1, 15 February 2024, p. 41 ('(...) temporary transfer is not often used').

Applicability (trial stage, **(b) Person concerned is present in another MS, (i) detention on remand possible but not ordered, (bb) Ensuring that the suspect is available)**)

- FD 2009/829/JHA (?)

Is it possible under national law to issue an ESO, when the person concerned is in the MS of his lawful and ordinary residence and detention is not ordered?

It is not possible under Dutch law to issue an ESO if detention remand is not ordered.

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transfer of proceedings to the MS where the person concerned is present. This is not an instrument that provides for ensuring that the suspect is available for executing investigative/prosecution measures nor for ensuring his availability for the trial in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to that MS may be an option. Is it possible 29 under national law to transfer proceedings that are at the trial stage, and if so, under what conditions?

No, it is not possible under national law to transfer proceedings that are at the trial stage.

See the remarks on applicability supra, 2.3(b)(i)(aa).

Application (trial stage, **(b) Person concerned is present in another MS, (i) detention on remand possible but not ordered, (bb) Ensuring that the suspect is available)**)

The instruments separately

- FD 2009/829/JHA (?)

Application not possible.

- EU Convention on Mutual Assistance in Criminal Matters

Since we are dealing with the trial stage, summoning the accused on the basis of this convention is a prerequisite for conducting the trial (assuming that the whereabouts of the accused are known). So, this convention is not an instrument *per se* to ensure that the accused is available for trial, but of course the accused is available when present after having been summoned.

- European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters
Transfer of proceedings is not possible at the trial stage.

Interplay of instruments

In this situation there is no interplay between different available instruments.

Goals and instruments

In this situation there is nothing to observe from the point of view of choosing between goals and choosing between instruments.

(cc) Ensuring the suspect's presence at trial

Applicability according to Dutch law (trial stage, **(b) Person concerned is present in another MS, (i) detention on remand possible but not ordered, (cc) Ensuring the suspect's presence at trial**)

- FD 2009/829/JHA (?)

Is it possible under national law to issue an ESO when the person concerned is in the MS of his lawful and ordinary residence and no detention on remand is ordered?

No, this is not possible.

- Directive 2014/41/EU

Is it possible under national law to employ an EIO for the purpose of ensuring presence at the trial (either through a videoconference or a temporary transfer)?

It is not possible under national law to employ an EIO for the purpose of ensuring presence at the trial (either through a videoconference or a temporary transfer). See *supra* (2.3(b)(i)(aa)).

- European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters

Transfer of proceedings to the MS where the accused is present. This is not an instrument that provides

for ensuring the suspect's presence at the trial in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to that MS may be an option. Is it possible under national law to transfer proceedings that are at the trial stage, and if so, under what conditions?

It is not possible under national law to transfer proceedings that are at the trial stage.
See *supra* (2.3(b)(i)(aa)).

Application (trial stage, **(b) Person concerned is present in another MS, (i) detention on remand possible but not ordered, (cc) Ensuring the suspect's presence at trial**)

The instruments separately

- FD 2002/584/JHA (?)

No application possible.

- Directive 2014/41/EU

No application possible.

- EU Convention on Mutual Assistance in Criminal Matters

This convention is not an instrument *per se* to ensure that the accused is present at the trial. See *supra* 2.3(b)(i)(aa).

- European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters

No application possible.

Interplay of instruments

In this situation there is no interplay between different available instruments.

Goals and instruments

In this situation there is nothing to observe when looking at the issue of choosing between goals and choosing between instruments.

(dd) Other?

No other goal was mentioned by the interviewees.

(ii) detention on remand ordered

(aa) executing investigative measures/prosecution such as interrogating the suspect;

Applicability according to Dutch law (trial stage, **(b) Person concerned is present in another MS, (ii) detention on remand ordered, (aa) Executing investigative/prosecution such as interrogating the suspect)**

- FD 2002/584/JHA

Prosecution-EAW. Is it possible under national law to issue a prosecution-EAW just to execute investigative measures, such as an interrogation? Pending the decision on the execution of a prosecution-EAW, the person concerned could be heard in the executing MS or be temporarily transferred to the issuing MS on the basis of Art. 18 and 19 FD 2002/584/JHA.

Regarding the possibility to issue a prosecution-EAW for the sole purpose of carrying out an investigation there is no reason to assume that national law deviates in this respect from EU law. See the applicability remarks on FD 2002/584/JHA (*supra*, 2.1.1.1).

Pending the decision on the execution of a Dutch prosecution-EAW, Dutch law provides for:

- the possibility of a request by the issuing examining magistrate to hear the person concerned in the *executing* Member State in his presence or in the presence of a representative designated by him (Article 57(a) of the Law on Surrender). This provision implements Article 18(1)(a) in combination with Article 19 of FD 2002/584/JHA. In the near future, at the latest sometime after 17 January 2028, as a result of EU instruments on the digitalisation of judicial cooperation the requested person will be able to be heard by videoconference;³⁸⁰

³⁸⁰ See Art. 6 of Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation, O.J. L 2023/2844, in combination with Art. 3 of Directive (EU) 2023/2843 of the European Parliament and of the Council of 13 December 2023 amending Directives 2011/99/EU and 2014/41/EU of the European Parliament and of the Council, Council

- the possibility of a request by the issuing examining magistrate to temporarily transfer the person concerned to the Netherlands (Article 57(b) in combination with Article 58 of the Law on Surrender). This provision implements Article 18(1)(b) of FD 2002/584/JHA.

- Directive 2014/41/EU³⁸¹ (?)

Temporary transfer³⁸²/videoconference

Under national law, is a videoconference possible with the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)?³⁸³ If not: is such a videoconference possible without issuing an EIO?³⁸⁴

The answer to both questions is ‘no’: see *supra* (2.3(b)(i)(aa)).

Under national law, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

See *supra* (2.3(b)(i)(aa)).

- European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters

Transfer proceedings to the MS where the accused is present. This is not an instrument that provides for executing investigative measures/prosecution in the issuing MS, e.g. an interrogation in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option. Is it possible under national law to transfer proceedings that are at the trial stage?

No, it is not possible to transfer proceedings that are at the trial stage. See *supra* (2.3(b)(i)(aa)).

Directive 2003/8/EC and Council Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, as regards digitalisation of judicial cooperation, O.J. L 2023/2843.

³⁸¹ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the “coherent and effective” application of the instruments.

³⁸² It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the executing MS.

³⁸³ Cf. Case C-285/23.

³⁸⁴ Cf. Case C-255/23.

Application (trial stage, **(b) Person concerned is present in another MS, (ii) detention on remand ordered, (aa) Executing investigative/prosecution such as interrogating the suspect**)

The instruments separately

- FD 2002/584/JHA

No application possible.

As to requests for a hearing or a temporary transfer pending the decision on the execution of the EAW (see Article 18 and 19 of FD 2002/584/JHA): with regard to the *mirror image* (the Netherlands as *executing* Member State) the government stated that Article 18(1)(a)(b) of FD 2002/584/JHA was included in the framework decision as a concession to those Member States that kept pushing for a time limit of 30 days for the decision on surrender by allowing the issuing judicial authority to already hear the requested person as a suspect or accused person pending the decision on surrender. The government did not expect many requests from foreign issuing judicial authorities for a hearing in the executing Member State or for a temporary transfer to the issuing Member State: it was to be expected that a requested person who does not consent to surrender would not be willing to answer questions as a suspect or accused person, either in the executing Member State or in the issuing Member State.³⁸⁵ That is why a condition to the execution of a foreign request for a temporary transfer was added: the requested person must consent to it (Article 54(2) of the Law on Surrender).³⁸⁶

The expectation that not many hearings or temporary transfer will be requested also seems valid for the issuing side. None of the interviewees mentioned the possibility of a Dutch request for a hearing or for a temporary transfer.

- Directive 2014/41/EU

No application possible.

³⁸⁵ *Kamerstukken II* 2002/03, 29042, nr. 3, p. 33. Recently, the government stated that the Netherlands has never effected a temporary transfer within the meaning of Art. 54: *Kamerstukken II* 2023/24, 36491, nr. 3, p. 50.

³⁸⁶ The European Commission is of the opinion that this condition is contrary to FD 2002/584/JHA. This defect was rectified when the recent amendments to the Law of Surrender entered into force (on 1 October 2024; see Chapter 1.1(a)).

- EU Convention on Mutual Assistance in Criminal Matters

This convention is not an instrument *per se* to execute an interrogation by the court at the trial. See *supra* 2.3(b)(i)(aa).

- European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters

No application possible.

Interplay of instruments

In this situation there is no interplay between different available instruments.

Goals and instruments

In this situation there is nothing to observe when looking at the issue of choosing between goals and choosing between instruments.

(bb) Ensuring that the suspect is available

Applicability according to Dutch law (trial stage, **(b) Person concerned is present in another MS, (ii) detention on remand ordered, (bb) Ensuring that the suspect is available**)

- FD 2009/829/JHA (?)

Is it possible under national law to issue an ESO when the person concerned is in the MS of his lawful and ordinary residence?

No, it is not possible under national law to issue an ESO when the person concerned is in the MS of his lawful and ordinary residence. See 2.2.2(b)(ii)(bb).

- European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters

Transfer of proceedings to the MS where the accused is present (in order for him to be present at the trial in that MS). This is not an instrument that provides for ensuring that a suspect is available for

executing investigative measures/prosecution in the issuing MS, e.g. interrogation, nor for ensuring his availability for the benefit of the trial in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to that MS may be an option. Is it possible under national law to transfer proceedings that are at the trial stage?

No, it is not possible under national law to transfer proceedings that are at the trial stage see *supra* (2.3(b)(i)(aa)).

Application (trial stage, **(b) Person concerned is present in another MS, (ii) detention on remand ordered, (bb) Ensuring that the suspect is available**)

The instruments separately

- FD 2002/584/JHA

No application possible.

- FD 2009/829/JHA (?)

No application possible.

- EU Convention on Mutual Assistance in Criminal Matters

This convention is not an instrument *per se* to ensure that the accused is available during the trial. See *supra* 2.3(b)(i)(aa).

- European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters

No application possible.

Interplay of instruments

In this situation there is no interplay between different available instruments.

Goals and instruments

In this situation there is nothing to observe when looking at the issue of choosing between goals and choosing between instruments.

(cc) Ensuring the suspect's presence at trial

Applicability (trial stage, **(b) Person concerned is present in another MS, (ii) detention on remand ordered, (cc) Ensuring the suspect's presence at trial**)

- FD 2002/584/JHA

No applicability issues

- FD 2009/829/JHA (?)

Is it possible under national law to issue an ESO when the person concerned is the MS of his ordinary residence?

No, it is not possible under national law to issue an ESO when the person concerned is the MS of his ordinary residence. See 2.2.2(b)(ii)(bb).

- DR 2014/41³⁸⁷ (?)

Is it possible under national law to employ an EIO for the purpose of ensuring the presence of the accused at the trial (either through a videoconference or a temporary transfer)?

See *supra* (2.3(b)(i)(aa)).

- European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters (?)

Transfer of proceedings. This is not an instrument that provides for ensuring the suspect's presence at the trial in the issuing MS. However, given that the person concerned is present in another MS and his statement is needed, transferring the proceedings to the MS of residence may be an option. Is it possible under national law to transfer proceedings that are at the trial stage?

No, it is not possible under national law to transfer proceedings that are at the trial stage. See *supra* (2.3(b)(i)(aa)).

Application (trial stage, **(b) Person concerned is present in another MS, (ii) detention on remand ordered, (cc) Ensuring the suspect's presence at trial**)

The instruments separately

³⁸⁷ Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the "coherent and effective" application of the instruments.

- FD 2002/584/JHA

This instrument is used in practice on a regular basis in order to ensure the presence of the accused at the trial. However, using this instrument presupposes that the goal is to ensure the presence of the accused while keeping him in remand detention in the Netherlands during the trial.³⁸⁸

- FD 2009/829/JHA (?)

Application not possible.

- DR 2014/41 (?)

Application not possible.

- EU Convention on Mutual Assistance in Criminal Matters

This convention is not an instrument *per se* to ensure that the accused is present at the trial. See *supra* 2.3(b)(i)(aa).

- European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters (?)

Application not possible.

Interplay of instruments

In this situation there is no interplay between different available instruments.

Goals and instruments

In this situation there is nothing to observe when looking at the issue of choosing between goals and choosing between instruments.

(dd) Other (?)

³⁸⁸ Of course, after being surrendered the goal of keeping the suspect in detention in the Netherlands may very well not be achieved because of decisions taken after the surrender. But this does not take away the intention with which the EAW was issued.

No other options mentioned by the interviewees.

3. The instruments and sentence enforcement

General introduction

The enforcement stage starts once the sentence imposed on the convicted person (custodial sentence/measure of deprivation of liberty, alternative sanction, probation decision) is final and enforceable.

As with Chapter 2, first, the instruments that are applicable to the enforcement stage *in abstracto* are listed (section 3.1), distinguishing between two situations: the person concerned is present in the issuing MS and he is present in another MS. Subsequently, in section 3.2 specific needs for judicial cooperation are tied to the various instruments. These needs are:

- (aa) enforcement in another MS;
- (bb) enforcement in the issuing MS (if the person concerned is present in another MS).

As with sections 2.2 and 2.3, the NAR will:

- describe which national authority is in charge of the enforcement stage and which national authority is competent to request judicial cooperation concerning enforcement of the sentence;
- address applicability issues according to national law if there are such issues;
- describe which considerations play a role when the competent national authority has to take a decision on requesting judicial cooperation and on which instrument(s) to employ.

In doing so, the NAR will take into account the list of considerations mentioned in the introduction to section 2.3 where applicable, *viz.* whether

- the impact on the right to liberty, if any, is taken into account and whether there are alternatives to (pre-trial) detention (cf. the Recommendation on the procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions);³⁸⁹
- the national attribution of competence hinders or impairs considering such alternatives;
- the impact on free movement rights, if any, is taken into account;
- the fact that a previous request for judicial cooperation was unsuccessful is taken into account when taking further decisions and, if so, in which way;
- the possibility that requesting judicial cooperation might prejudice future decisions on seeking judicial cooperation is taken into account and, if so, in what way;³⁹⁰
- the issuing authority engages in a dialogue with the executing authority before taking a decision and, if so, in what way and whether it uses videoconferencing (or other audiovisual transmission)/telephone conference to that end.

³⁸⁹ O.J. 2023, L 86/44.

³⁹⁰ This might require thinking of different scenarios. For instance, what if the sought-after instrument for judicial cooperation does not result in the desired outcome? To what alternative form(s) of judicial cooperation will the issuing authority resort to?

In addition to those considerations, the NAR will take into account whether ‘composite sentences’ (sentences composed of unconditional deprivation of liberty and conditional deprivation of liberty present problems.³⁹¹

3.1 Applicability of the instruments or conventions according to EU law

(a) Person concerned is present in issuing MS

- FD 2008/909/JHA

- FD 2008/947/JHA

- European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters

It is possible under EU law to ‘divide’ so-called composite sentences (also known as combined sentences) – *i.e.* sentences that are partly custodial and partly suspended –³⁹² and to deal with the custodial part under FD 2008/909/JHA and with the suspended part under FD 2008/947/JHA.³⁹³

None of the provisions of FD 2008/909/JHA and FD 2009/947/JHA exclude that composite sentences are ‘divided’, in the sense that the custodial part is dealt with under FD 2008/909/JHA and the suspended part under FD 2008/947/JHA. Indeed, although both framework decisions do not refer to composite sentences, the definition of ‘sentence’ in Article 1(b) of FD 2008/909/JHA excludes its applicability to suspended sentences³⁹⁴ and the definition of ‘judgment’ in Article 2(1) of FD 2008/947/JHA excludes its applicability to custodial sentences or measures involving deprivation of liberty *per se*.³⁹⁵ Moreover, according to Article 1(3)(a) FD 2008/829/JHA does not apply to ‘the execution of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty which fall within the scope of Framework Decision 2008/909/JHA’. The European

³⁹¹ In the Netherlands, e.g., the courts can impose the following sentence: a sentence of four years deprivation of liberty, of which two years will not be enforced as long as the person concerned complies with certain conditions during a probation period of three years.

³⁹² See the European Commission’s definition in *Handbook on the transfer of sentenced persons and custodial sentences in the European Union*, (European Commission, 2019), O.J. 2019, L 403/36.

³⁹³ Klip supposes that a Member State whose legal order provides for composite sentences might not be able to use FD 2008/909/JHA with regard to such sentences: *European Criminal Law. An integrative approach*, 4th ed. (Intersentia, 2021), p. 552.

³⁹⁴ “‘sentence’ shall mean any custodial sentence or any measure involving deprivation of liberty imposed for a limited or unlimited period of time on account of a criminal offence on the basis of criminal proceedings’ (emphasis added).

³⁹⁵ “‘judgment’ shall mean a final decision or order of a court of the issuing State, establishing that a natural person has committed a criminal offence and imposing:

- (a) a custodial sentence or measure involving deprivation of liberty, if a conditional release has been granted on the basis of that judgment or by a subsequent probation decision;
- (b) a suspended sentence;
- (c) a conditional sentence;
- (d) an alternative sanction’.

Commission has recognised the possibility of a combined application of both framework decisions to a composite sentence.³⁹⁶

(b) Person concerned is present in another MS

- FD 2002/584/JHA
- FD 2008/909/JHA
- FD 2008/947/JHA
- European Convention on Transfer of Proceedings in Criminal Matters/European Convention on Mutual Assistance in Criminal Matters

It is possible under EU law to 'divide' 'composite sentences' and to deal with the unconditional part under FD 2008/909/JHA and with the conditional part under FD 2008/947/JHA?

See the answer under (a).

3.2 Applicability and application of the instruments according to Dutch law

Introduction

After some preliminary remarks we will first describe which competent authorities are involved in the enforcement of judgments in criminal cases and the routing of sentences with regard to enforcement.

Following the structure of the Annotated Index we will then, depending on whether the person is in the Netherlands (paragraph 3.2.(a)) or in another Member State (paragraph 3.2.(b)), deal with the applicability and application of the instruments according to Dutch law in the context of two distinct goals, either enforcement in the Netherlands or enforcement in another Member State. Only if relevant, we will make remarks about issues concerning the applicability of the instruments according to Dutch law before going into the application of the instruments.

We will end with dedicating a separate section to the preliminary decision which goal to choose, enforcing the sentence/decision in the Netherlands or in another Member State.

³⁹⁶ *Handbook on the transfer of sentenced persons and custodial sentences in the European Union*, (European Commission, 2019), O.J. 2019, L 403/36.

Preliminary remarks

Specific goals

The Annotated identifies the following specific goals:

- (aa) executing investigative measures/prosecution such as interrogating the suspect or executing a confrontation (if he is present in another Member State);
- (bb) ensuring that the suspect is available to the competent authority for the purpose of investigative measures/prosecution (whether or not he is present in the issuing Member State). This means ensuring that the competent authority can reach the suspect for such measures as an interrogation, a confrontation *et cetera*;
- (cc) ensuring the suspect's presence at trial;
- (dd) other (?)
- (ee) enforcement in another Member State;
- (ff) enforcement in the issuing Member State (if the person concerned is present in another Member State).

The first four specific goals ((aa)-(dd)) are relevant to the investigation/prosecution and trial stages (see Chapter 2), the last two specific goals ((ee)-(ff)) are relevant to the enforcement stage.

Choosing between instruments and choosing between goals

The structure of the Annotated Index describes the specific goals that are pursued when trying to execute a sentence. These specific goals are: enforcement in another Member State when the sentenced person is present in the issuing State, enforcement in another Member State when the sentenced person is present in that other Member State and enforcement in the issuing Member State when the sentenced person is present in another Member State. After describing the specific goals the applicable instruments are mentioned.

Our general observation is that once the specific goal is set, there is not much left to choose, and, therefore, issues of coherence and effectiveness when deciding which instrument to apply play a relatively minor role. When, *e.g.*, the goal is to enforce a Dutch custodial sentence in the Netherlands and the sentenced person is present in another Member State, the

competent authority has to decide whether to issue an EAW or whether to ask the sentenced person to come to the Netherlands in order to serve his sentence here. Merely asking the sentenced person to come to the Netherlands on a voluntary basis does not seem to be a very realistic option at first sight. Therefore, in practice there might be no choice at all but to decide to issue an EAW. Equally, trying to get a Dutch custodial sentence executed in another Member State probably does not require a choice between different options. The transfer of the sentence to that other Member State is the logical way to go. The index mentions an alternative, to wit the transfer of proceedings to that other Member State. It is doubtful whether, in practice, this option is a realistic option when it is still possible to transfer the sentence. After all, why go to the trouble of prosecuting and obtaining a new sentence in another Member State when there is already a sentence that can possibly/probably be transferred. The option of transfer of proceedings seems to be more of a last resort in order to prevent impunity when other instruments, *i.e.* the transfer of the sentence, fail to achieve the desired result.

Issues of effectiveness and coherence seem to play a bigger role when answering the *preliminary* question which specific goal to pursue, *i.e.* whether to enforce the sentence in the Netherlands or to enforce the sentence in another Member State. We will deal with these issues inherent in choosing a specific goal in a separate paragraph, after having dealt with the issues inherent in choosing an instrument once a specific goal is set.

Informal arrangements

The index does not mention the option of making informal arrangements, *i.e.* arrangements not on the basis of a legal instrument. One can distinguish between informal arrangements with the person concerned, in which case the arrangements are carried out without the knowledge and consent of the authorities of the executing Member State, and informal arrangements with authorities of the executing Member State. At least in theory, informal arrangements are an option when trying to get a sentence executed in the Netherlands when the sentenced person is present in another Member State. Whether this option is applied in practice at all as an alternative to the much more intrusive option of issuing an EAW (choosing the instrument) or is taken into consideration when deciding beforehand whether to try to execute the sentence in the Netherlands or to transfer the sentence to the other Member State (choosing the specific goal), did not emerge in the interviews with practitioners.

Informal arrangements not only raise questions from the perspective of the sovereignty of the executing Member State (see *infra*) but also from the perspective of legal certainty, in particular safeguards for the sentenced person.

Sovereignty of the executing Member State

Making informal arrangements with the person concerned in order to enforce a sentence in a transnational context without the intervention of the authorities of the Member State where the person concerned is present, runs the risk of being considered to be an infringement of the sovereignty of that Member State. Simply calling, *e.g.*, a sentenced person who is present in another Member State to come to the issuing Member State to serve his sentence without the knowledge or consent of the executing Member State could be seen as an exercise of jurisdiction, *i.e.* (trying to effectuate) the enforcement of a sentence, which is carried out, at least in part, in the territory of another Member State.

Initiating cooperation by another Member State: entering into a dialogue beforehand

In the context of the Annotated Index, the issuing authority is the authority that seeks cooperation by applying one of the instruments or submitting a request to that end. Of course, authorities of another Member State than the issuing Member State can also initiate cooperation by, *e.g.*, proposing to transfer the sentence to that other Member State instead of the issuing Member State issuing an execution-EAW.³⁹⁷ In other words, the other Member State that will, in the end, execute the sentence – *i.e.* the executing Member State – may very well elicit a request by the issuing Member State to transfer the sentence to the executing Member State.

Enforcement: competent authorities in the Netherlands

³⁹⁷ Sentenced persons, present in another Member State, sometimes turn to the competent authority in the Netherlands in order to have the sentence (an alternative sanction or a probation decision), imposed in that other Member State, executed in the Netherlands. This authority then sends an empty certificate with instructions to that other Member State thereby proposing to transfer the sentence to the Netherlands. Also, this authority initiates the transfer of a sentence in the situation in which the sentenced person has already come to the Netherlands and reports to the authorities in the Netherlands in order to serve the sentence in the Netherlands. See: Beun, “Overdracht van vrijheidsbeperkende sancties binnen de EU”, (2019) *Strafblad*, 37-43, at 39.

Enforcement of sentences in general

As a rule, only a final judgment may be enforced. A judgment is final when all ordinary legal remedies against it – appeal or appeal in cassation – are exhausted (Article 6:1:16(1) Code of Criminal Procedure). There is an exception to this rule: if the defendant was not present at the pronouncement of the judgment and the requirement to notify him in writing of the judgment applies,³⁹⁸ the judgment may be enforced once that notification is served (Article 6:1:6(3) Code of Criminal Procedure). If that requirement does not apply, the judgment may be enforced from the pronouncement thereof (Article 6:1:6(3) Code of Criminal Procedure). In both cases, lodging an ordinary remedy against the judgment will suspend or postpone its enforcement.³⁹⁹

From 1 January 2020 onward, the Minister of Justice is responsible for enforcing judgments in criminal cases (Article 6:1:1(1) in combination with Article 127a of the Code of Criminal Procedure).

Prior to 2020, the Public Prosecution Service (*Openbaar Ministerie*) was responsible for the enforcement of judgments. Under the new regime, the Public Prosecution Service still has some tasks concerning the execution of judgments. Where a court is called upon to take a decision concerning the enforcement of a judgment, – e.g., the decision whether to revoke the suspension of a custodial sentence – it is the Public Prosecution Service that will request the court to take that decision. Other than that, the courts have no role in the enforcement stage. Importantly, it is the task of the Public Prosecution Service to forward judgments to the Minister of Justice and Security, at the latest fourteen days after they become enforceable (Article 6:1:1(2) Code of Criminal Procedure).

The Minister of Justice and Security may instruct civil servants in writing to exercise one or more of his competences in the area of the enforcement of judgments but the minister remains responsible for the exercise of those competences (Article 6:1:4 Code of Criminal Procedure).

³⁹⁸ This requirement does not apply, when the defendant was notified in person of the trial date, when he was present at the trial, or when it is otherwise established that the defendant had prior knowledge of the date of the trial (Article 366(2) Code of Criminal Procedure).

³⁹⁹ There are two exceptions (Art. 6:1:6(4) Code of Criminal Procedure). Decisions on pre-trial detention and some orders of the court that are part of the judgment are enforceable even if the judgment is not final yet. The other exception concerns appeals or appeals in cassation that were lodged out of time.

The *Centraal Justitieel Incassobureau* (CJIB; Central Judicial Collection Office), an agency of the Ministry of Justice and Security – is tasked with the coordination of the actual enforcement of judgments on behalf of the Minister of Justice and Security. To that end, it receives the judgments forwarded by the Public Prosecution Service pursuant to Article 6:1:1(2) Code of Criminal Procedure.

Judicial cooperation regarding the enforcement of sentences

Theoretically, four forms of judicial cooperation can be relevant to ensuring the enforcement of a judgment.

The first, of course, is forwarding a certificate and the judgment to another Member State pursuant to FD 2008/909/JHA or FD 2008/947/JHA. The Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences does not set out requirements as to the duration of a Dutch sanction involving deprivation of liberty, a Dutch probation order or a Dutch alternative sanction that is to be forwarded to another Member State. However, mutual recognition may be refused by the executing Member State if less than six months of a sanction involving deprivation of liberty remain to be served Article 9(1)(h) of FD 2008/909/JHA) or if the probation measure/alternative sanction is of less than six months' duration (Article 11(1)(j) of FD 2008/947/JHA).

The Minister of Justice and Security is the competent authority for forwarding a certificate concerning a sanction involving deprivation of liberty to another Member State (Article 2:28 in combination with Article 1:1 of the Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences). On behalf of the minister and under his responsibility, the powers of the minister are exercised by the *Afdeling Internationale Overdracht Strafvonnissen* (IOS; Department of Transfer of Judgments in Criminal Matters) of the *Dienst Justitiële Inrichtingen* (DJI; Custodial Institutions Agency) of the Ministry of Justice and Security.⁴⁰⁰

⁴⁰⁰ Ouwerkerk, "Van WOTS naar WETS: Overname en overdracht van strafexecutie in de Europese Unie", (2012) *Nederlands Tijdschrift voor Europees recht*, 219-228, at 220; Struyker Boudier, "Van WOTS naar WETS: de overdracht van de tenuitvoerlegging van straffen", (2012) *Ars Aequi*, 938-941, at 941.

The Public Prosecution Service is the competent authority for forwarding a judgement and a certificate concerning a probation decision or an alternative sanction to another Member State (Article 3:20(1) of the Law on the mutual recognition and enforcement of custodial and suspended sentences). The competences concerning forwarding a certificate are exercised by public prosecutors at the *Internationaal Rechtshulp Centrum Noord-Holland* (IRC Noord-Holland; International Centre for Mutual Legal Assistance Noord-Holland).

The second form of judicial cooperation is issuing an EAW for the purposes of executing a sentence involving deprivation of liberty (FD 2002/584/JHA). This option is only available if a sentence of at least four months was imposed (Article 2(1) of the Law on Surrender).

All examining magistrates at the District Courts are competent to issue an EAW (Article 44 of the Law on Surrender) upon request by a public prosecutor. In case of sanctions involving deprivation of liberty of which at least 120 days remain to be served, imposed on persons who do not have a known abode in the Netherlands or who do have a known abode in the Netherlands but who were not apprehended within three months after CJIB had ordered his arrest in order to carry out the sentence, the Fugitive Active Search Team of the National Office of the Public Prosecution Service (LP-FAST) will request that the examining magistrate in the District Court Overijssel issue an execution-EAW.⁴⁰¹ Where less than 120 days remain to be served, the Public Prosecution Service will not request that an execution-EAW be issued (see infra, (b)(ff)(‘*Custodial sentences*’, Application)).

The third form of judicial cooperation is transferring the proceedings to another Member State.

The competent authority to request a transfer of proceedings to another Member State depends on whether the applicable treaty provides for direct communication between judicial authorities. If the applicable treaty provides for direct communication, the public prosecutor is competent to request that another (Member) State take over the proceedings (Article 5.3.5 of the Code of Criminal Procedure). If not, the Minister of Justice and Security is competent to decide, on a proposal by the public prosecutor, whether to submit such a request (Article 5.3.1(1) of the Code of Criminal Procedure). The Council of Europe European Convention on

⁴⁰¹ *Aanwijzing kader voor tenuitvoerlegging* (Instruction on the framework for execution), *Stcrt.* 2020, 62545, para 6.2.1.

the Transfer of Proceedings in Criminal Matters does not provide for direct communication between judicial authorities. In practice, the basis for the majority of transfers of proceedings by the Netherlands is Article 21 of the European Convention on Mutual Assistance in Criminal Matters, in combination with Article 6 of the EU Convention on Mutual Assistance in Criminal Matters (which provides for direct communication between judicial authorities).

The fourth form of judicial cooperation is serving a notice on a person abroad to report in the issuing Member State to serve his sentence there. There are rules about notifying sentenced persons who have to serve a sanction involving deprivation of liberty, who are at liberty and who have a ‘reliable and usable address’, that they have to report to a place of detention to serve their sentence.⁴⁰² These rules are also applied to sentenced persons who have a ‘reliable and usable address’ in another (Member) State.⁴⁰³ As alternative sanctions are concerned, there are rules about notifying the sentenced person of the initial interview with the alternative sanctions organisation⁴⁰⁴ (it is not clear whether these rules on notifying also apply to sentenced persons who reside outside of the Netherlands).

Routing of sentences and judicial cooperation⁴⁰⁵

CJIB

As stated before, because of CJIB’s coordinating role (*supra*, ‘**Enforcement: competent authorities in the Netherlands**’, ‘Enforcement of sentences in general’) all final judgments of conviction are sent by the Public Prosecution Service to the CJIB.

Custodial sentences

⁴⁰² Art. 2(1) of the *Regeling tenuitvoerlegging strafrechtelijke beslissingen* (Ministerial Regulation on the execution of decisions in criminal cases).

⁴⁰³ Interview with Ministry of Justice and Security (CJIB).

⁴⁰⁴ Art. 3:14 of the *Besluit tenuitvoerlegging strafrechtelijke beslissingen* (Royal Decree on the execution of decisions in criminal cases).

⁴⁰⁵ Interview with Ministry of Justice and Security (CJIB). See also *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, 13190/1/22 REV 1, 2 December 2022, pp. 45-46.

Concerning sentences imposed on persons who are not detained in the Netherlands yet, the CJIB selects the cases to which the self-report procedure applies.⁴⁰⁶ In those cases, another division of the Ministry of Justice and Security will send a letter to the sentenced person, whether to an address in the Netherlands or to an address abroad, telling him to report at a certain date at a certain detention-facility and warning him that if he does not comply an alert for his arrest will be issued.⁴⁰⁷

In the remaining cases, the sentenced person is to be arrested. Those cases are sent to LP-FAST. If at least 120 days remain to be executed and the case meets the criteria for issuing an EAW, LP-FAST will request that the examining magistrate in the District Court Overijssel issues an EAW. CJIB gives the order to LP-FAST to proceed with requesting the issuing of an EAW, however LP-FAST is responsible for the content of the EAW.⁴⁰⁸ Requests to issue an EAW are rarely, if ever, refused by examining magistrates.⁴⁰⁹ Therefore, *de facto* the Ministry of Justice and Security (CJIB) determines whether an EAW is issued.

As yet there is no direct route from CJIB to IOS as part of the ‘supply chain process’ (*ketenwerkproces*), although in individual cases it is possible to make an exception. There are ongoing discussions about whether pro-active selection of cases that qualify for transfer is possible.⁴¹⁰ IOS is sometimes contacted about the possibility of a transfer of the sentence to the executing Member State by LP-FAST (if surrender is refused and the case meets the criteria of FD 2008/909/JHA),⁴¹¹ by the executing Member State (*e.g.* if it has refused surrender and the case meets the criteria of FD 2008/909/JHA) or by the sentenced person himself.

Because the categories of cases in which LP-FAST issues EAWs and the categories of cases in which IOS is contacted by the executing Member State or the sentenced person are not entirely mutually exclusive, the present set up cannot entirely exclude the possibility that an

⁴⁰⁶ On the basis of Art. 2:1 *et seq.* of the *Regeling tenuitvoerlegging strafrechtelijke beslissingen* (ministerial regulation on the execution of decisions in criminal cases).

⁴⁰⁷ Non-compliance does not constitute an offence under Dutch law.

⁴⁰⁸ LP-FAST will fill in the EAW form and provide the examining magistrate with the request to issue an EAW and the EAW form (the case-file or even the final judgment is never handed over to the examining magistrate): Glerum and Kijlstra, “Practice in the Netherlands”, in Barbosa *et al*, *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23 (Eleven, 2022), pp. 93-236, at 124

⁴⁰⁹ Glerum and Kijlstra, “Practice in the Netherlands”, in Barbosa *et al*, *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23 (Eleven, 2022), pp. 93-236, at 124.

⁴¹⁰ Statement by CJIB at the national meeting on 24 October 2024.

⁴¹¹ In particular whether at least six months remained to be executed (see Art. 9(1)(h) of FD 2008/909/JHA).

EAW is issued and, concurrently, a FD 2008/909/JHA-certificate is forwarded to the executing Member State, with regard to the same sentence. In the EAW-practice of the executing judicial authority for the Netherlands, the District Court of Amsterdam, different authorities from the same issuing Member State sometimes issue an EAW and forward a FD 2008/909/JHA (more or less) concurrently.⁴¹² Such practices are not conducive to an effective and coherent application of the instruments.⁴¹³

If the sentenced person already is detained in the Netherlands, is not a Dutch national and does not have the right to reside in the Netherlands, an official of the detention facility will contact IOS about the possibility of a possible transfer of the sentence. In practice, the possibility of transferring the sentence is not always used. In those cases, the execution of the sentence in the Netherlands will be interrupted and the sentence person will then be banned from re-entering the Netherlands on pain of serving the remainder of the sentence (see *infra*, (a)(ee)('Custodial sentences', *Application*)).

Alternative sanctions/probation decisions

The information systems automatically select those cases in which an alternative sanction or a probation decision was imposed on a person with an address abroad. CJIB will check whether the person concerned actually still has an address abroad, and whether

- the alternative sanctions has a duration of at least 80 hours of community service⁴¹⁴, or

⁴¹² See e.g. NL:RBAMS:2022:3762 (during the EAW proceedings, the Portuguese authorities issued a certificate; eventually the Dutch Ministry of Justice and Security declared that it did not see grounds for the recognition of the Portuguese judgment, referring to Art. 9(1)(b) of FD 2008/909/JHA, however the district court applied Art. 4(6) of FD 2002/584/JHA, refused surrender and ordered the enforcement of the sentence in the Netherlands). See also NL:RBAMS:2021:1218 (during the EAW proceedings the judgment on which the EAW was based became final and enforceable, whereupon the issuing judicial authority declared that a certificate would be forwarded and that the EAW would be withdrawn); NL:RBAMS:2023:8453 (the Belgian issuing judicial authority had issued an EAW but requested in the EAW that the Netherlands takes over the enforcement of the sentence; eventually the EAW was withdrawn and a certificate was forwarded).

⁴¹³ *Report on Eurojust's Casework in the Field of the European Arrest Warrant* (Eurojust 2021), pp. 59-60 and p. 67.

⁴¹⁴ Prior to 1 January 2020, according to Dutch law the period within which a penalty of community service of 80 hours or more had to be carried out was *twelve* months. As a result, with regard to Dutch penalties of community service of 80 hours or more the ground for refusal contained in Art. 9(1)(j) of FD 2008/947/JHA could not be invoked: Beun, "Overdracht van vrijheidsbeperkende sancties binnen de EU", (2019) *Strafblad*, 37-43, at 40. From 1 January 2020 the period for all penalties of community service, regardless of the amount of hours, is 18 months (Art. 6:3:1(1) of the Code of Criminal Procedure). Nevertheless, the issuing authority still uses the criterion of at least 80 hours of community service. Not using a minimum threshold would result in too

- the probation decision has a duration of at least six months.⁴¹⁵

If so, the case will be sent to IRC Noord-Holland. That authority checks whether the case meets the criteria for forwarding the judgment and a certificate to another Member State under FD 2008/947/JHA and national legislation. If so, the public prosecutor who handled the case will be asked to fill in the FD 2008/947/JHA-certificate, and IRC Noord-Holland will take care of forwarding the judgment and that certificate to the executing Member State.

(a) Person concerned is present in the issuing Member State (NL)

(ee) Enforcement in another Member State

Custodial sentences

Applicability according to Dutch law

Is it possible under national law to transfer proceedings once the sentence is final and enforceable and the other MS refuses to recognise the sentence?

The relevant provisions of the Code of Criminal Procedure do not address this issue explicitly.⁴¹⁶ However, the *travaux préparatoires* address the relationship of the transfer of proceedings and the transfer of the sentence, albeit in the (reverse) situation in which the person is not in the Netherlands (the issuing Member State). They refer to Article 8(2) of the European Convention on the Transfer of Proceedings in Criminal Matters – which convention, from the perspective of EU law, is to be regarded as part of domestic law – and state that a transfer of proceedings is possible in the event of a final Dutch sentence that cannot be enforced in the Netherlands because the sentenced person fled abroad and his extradition cannot be obtained. Nevertheless, it was remarked that a transfer of proceedings in such

many ‘small’ cases and would be too labour intensive: statement by public prosecutor 2 at the national meeting of practitioners on 24 October 2024.

⁴¹⁵ Art. 9(1)(j) of FD 2008/947/JHA contains a ground for refusal for situations in which the duration of the probation decision is less than six months.

⁴¹⁶ However, some provisions of the Code of Criminal Procedure implicitly recognise the possibility of a transfer of proceedings once there is a final sentence. Pursuant to Art. 5.3.3(1), once the public prosecutor has proposed that the Minister of Justice and Security submits a request for a transfer of proceedings to another State, in principle he may not bring the case to trial *nor enforce the sentence resulting from those proceedings*. And pursuant to Art. 6:1:24 of the Code of Criminal Procedure, *the right to enforce a final sentence* expires after a transfer of proceedings (unless the State that took over the proceedings backs out of that decision or halts those proceedings). See also Baaijens-Van Geloven, *Overdracht en overname van strafvervolging* (Gouda Quint, 1996), p. 238.

circumstances would and should be *exceptional*. For that reason, it was not considered necessary to explicitly deal with this issue in the national provisions on the transfer of proceedings.⁴¹⁷ Moreover, doctrine points out that the transfer of enforcement of the sentence would be the more logical solution. Consequently, a transfer of proceedings should only be allowed if transfer of the enforcement of the sentence is not possible.⁴¹⁸ Because paragraph 3.2(a) concerns situations in which the sentenced person is present in the Netherlands, usually enforcement of the sentence in the Netherlands will not present any difficulties. As discussed above, a transfer of proceedings is only allowed if the sentence cannot be enforced in the Netherlands. For that reason, transfer of proceedings necessarily is not an *a priori* alternative. Transfer of proceedings can only come into view *after* another instrument has failed. Pursuant to the proposal for a new Code of Criminal Procedure it will not be possible to transfer proceedings once there is a final judgment *on the merits of the case* (*i.e.* a final judgment holding a conviction, an acquittal or a finding that the acts, although proven, do not constitute an offence or that the person concerned is not punishable),⁴¹⁹ unless an applicable treaty expressly provides otherwise (Article 8.4.2(2)). In this regard, the explanatory memorandum refers to Article 8(2) of the European Convention on the Transfer of Proceedings in Criminal Matters and Article 54 of the Convention implementing the Schengen Agreement (CISA)⁴²⁰ and states that a transfer is only allowed if the execution of the Dutch sentence is not possible. Such a transfer, therefore, will be and should be highly exceptional.⁴²¹

It is possible under national law to 'divide' 'composite sentences' and to deal with the unconditional part under the national transposition of FD 2008/909/JHA and with the conditional part under the national transposition of FD 2008/947/JHA?

As a preliminary remark, it should be noted that Dutch penal law provides for the possibility of imposing composite sentences. Pursuant to Article 14a(1) of the Penal Code, if the court imposes a custodial sentence of up to two years, it may order that the sentence, or a part thereof, is suspended during a probationary period. Regarding sentences from two years up to

⁴¹⁷ *Kamerstukken II* 1983/84, 15791 (R 1133) and 15972, nr. 14, pp. 26-27.

⁴¹⁸ Baaijens-van Geloven, *Overdracht en overname van strafvervolgning* (Gouda Quint, 1996), pp. 238-239; De Jonge, *T&C Internationaal strafrecht en strafrechtelijke samenwerking*, 10th ed. (Wolters Kluwer, 2023), art. 5.3.1 Sv, aant. 1c.

⁴¹⁹ *Kamerstukken II* 2024/25, 36636, nr. 3, p. 228.

⁴²⁰ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, *Trb.* 1990, 145.

⁴²¹ *Kamerstukken II* 2024/25, 36636, nr. 3, p. 229.

four years the court may order that a part (not exceeding two years) is suspended (Article 14a(2) of the Penal Code). That said, there is nothing in the national provisions that precludes ‘dividing’ composite sentences and dealing with the respective ‘parts’ under the respective national rules.

Application

Once, having regard to the applicable criteria,⁴²² the decision is taken that the sentenced person has to serve the sentence in another Member State, there seems to be only one way to reach this goal: transferring the sentence on the basis of FD 2008/909/JHA. In most cases, the transfer is initiated when the sentenced person is already serving the custodial sentence in the Netherlands.⁴²³ The definition of ‘custodial sentence’ includes substitutive detention, *i.e.* detention in case of non-payment of a fine or not carrying out a sentence of community service.⁴²⁴

The Annotated Index mentions transfer of proceedings as an option, but, as stated before,⁴²⁵ this option does not seem to be an alternative, *ab initio*, to transferring the sentence but rather a last resort for preventing impunity in case the sentence cannot be transferred (and cannot be executed in the Netherlands). Furthermore, the option of the transfer of the proceedings is not applicable in the situation in which the custodial sentence is already being executed.⁴²⁶ We have tried to establish whether in practice transfer of proceedings is used as an alternative beforehand to transferring a sentence when the sentenced person is not serving the sentence in the Netherlands yet. None of the interviewees mentions the transfer of proceedings as an alternative beforehand to the transfer of the custodial sentence. In practice, the transfer of a sentence has a relatively high prospect of success and is more or less business as usual.⁴²⁷

⁴²² See for the criteria: *Aanwijzing kader voor tenuitvoerlegging (2020A007)* (*Staatscourant*, 2020, 62545).

⁴²³ Pro Facto, *Eindrappport Aanpak van de voorraad openstaande vrijheidsstraffen*, Groningen, mei 2020, p. 37. See for a description of the procedure: *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, 13190/1/22 REV 1, 2 December 2022, p. 45 ff.

⁴²⁴ *Kamerstukken II* 2010/11, 32885, nr. 3, p. 27.

⁴²⁵ See 3.2 Introduction.

⁴²⁶ See Art. 8(2) of the European Convention on the Transfer of Proceedings in Criminal Matters ‘(…) only if it cannot itself enforce the sentence, even by having recourse to extradition, and if the other Contracting State does not accept enforcement of a foreign judgment as a matter of principle or refuses to enforce such sentence’).

⁴²⁷ Interview with the Ministry of Justice and Security (IOS).

Consequently, once the specific goal (enforcing the sentence in another Member State) is set, there is nothing left to choose. The only option is the transfer of the sentence on the basis of FD 2008/909/JHA. In practice, the number of outgoing cases is many times smaller than the number of incoming cases.⁴²⁸

If the transfer of the sentence fails, which does not happen often,⁴²⁹ and if the sentenced person does not have the right to reside in the Netherlands, the execution of the sentence in the Netherlands will be interrupted when at least 1/2 or 2/3 (if the sentence exceeds three years) of the sentence is served.⁴³⁰ The sentenced person will then be banned from re-entering the Netherlands on pain of serving the remainder of the sentence.⁴³¹ This cannot be qualified as an alternative beforehand to transferring the sentence, but rather as a last resort when transferring the sentence turns out to be not successful.

Although the transfer of a custodial sentence to another Member State is not often refused, there might be problems in transferring *in absentia* sentences to other Member States. Several Member States have transposed the refusal ground of Article 9(1)(i) of FD 2008/909/JHA as a mandatory refusal ground, where it should have been transposed as an optional refusal ground.⁴³² In any case, the fact that the Netherlands is one of those Member States causes many problems when acting as *executing* Member State. There is no possibility to take into account the wishes of the sentenced person. It may be that recognition has to be refused – and the sentenced person consequently has to serve his sentence in another Member State than the Netherlands – even though the sentenced person does not want to invoke the *in absentia*

⁴²⁸ See the statistics in *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, 13190/1/22 REV 1, 2 December 2022, p. 60:

‘The Netherlands as the executing State

Incoming persons: 2017 – 208; 2018 – 177; 2019 – 248; 2020 – 157.

Incoming judgments: 2017 – 65; 2018 – 40; 2019 – 66; 2020 – 103.

Actual incoming transfers under WETS: 2014 – 54; 2015 – 80; 2016 – 207; 2017 – 208; 2018 – 222; 2019 – 211; 2020 – 185.

The Netherlands as the issuing State

Outgoing persons: 2017 – 8; 2018 – 5; 2019 – 8; 2020 – 11.

Outgoing judgments: 2017 – 16; 2018 – 12; 2019 – 17; 2020 – 15.

Actual outgoing transfers under WETS: 2014 – 5; 2015 – 3; 2016 – 5; 2017 – 6; 2018 – 3; 2019 – 11; 2020 – 15¹.

⁴²⁹ Interview the Ministry of Justice and Security (IOS).

⁴³⁰ Art. 40a of the Ministerial Regulation on temporarily leaving the prison (*Regeling tijdelijk verlaten van de inrichting*), (Staatscourant, 2023, 15543). According to the Court of Appeal Arnhem-Leeuwarden, the Minister of Justice and Security even has the power to decide whether to transfer the sentence to another Member State or to interrupt the sentence (NL:GHARL:2024:2009).

⁴³¹ Art. 40a(4) of the Ministerial Regulation on temporarily leaving the prison.

⁴³² Interview with Ministry of Justice and Security (IOS).

ground for refusal. In practice, a margin of discretion with regard to that ground for refusal is needed.⁴³³ It seems safe to assume that other Member States that have a mandatory ground for refusal experience similar problems.

The practice with regard to ‘composite sentences’ (see Applicability *supra*) is that usually two separate certificates are sent to the executing Member State and that the competent authority for the custodial part (under FD 2008/909/JHA) ‘has the lead’.⁴³⁴ Interestingly, a Dutch composite sentence of 12 months, to wit eight months custodial sentence and four months suspended sentence with a probation period of two years, was recognised by the German authorities undivided (*i.e.* as a whole) on the basis of a 2008/909/JHA certificate only,⁴³⁵ and was adapted pursuant to Article 8(4) of FD 2008/909/JHA.⁴³⁶

Measures involving deprivation of liberty: entrustment order ((a) Person concerned is present in the issuing Member State (NL), (ee) Enforcement in another Member State)

Applicability

See the applicability remarks concerning custodial sentences (*supra*).

Application

The entrustment order (*terbeschikkingstelling*) entails compulsory intramural treatment of a person who at the time of the commission of the offence suffered from a mental disease as a result of which he cannot (fully) be held responsible for his actions. The objective of the entrustment order is to protect the safety of others or the general safety of persons or goods.⁴³⁷

Again, there is no choice of instruments once the decision has been made to try to execute the entrustment order in another Member State. The only option in practice is the transfer of the sentence on the basis of FD 2008/909/JHA.

⁴³³ Interview with judge 5; interview with legal support staff 1.

⁴³⁴ Interview with prosecutor 2.

⁴³⁵ *Oberlandesgericht Karlsruhe*, 31 January 2017, 1 WS 235/16, (2018) *Strafverteidiger*, 576-579.

⁴³⁶ German law does not allow the imposition of a composite sentence: *Oberlandesgericht Karlsruhe*, 31 January 2017, 1 WS 235/16, (2018) *Strafverteidiger*, 576-579, para II(2)(c).

⁴³⁷ Art. 37a of the Penal Code.

Contrary to what is said about the transfer of custodial sentences - to wit requests for transfers of custodial sentences are not often refused - the transfer of entrustment orders by the Netherlands to another Member State is often problematic. Poland was mentioned as one of the Member States that do not recognise Dutch entrustment orders. That Member State has altogether excluded, on the basis of Article 9(1)(k) of FD 2008/909/JHA, the recognition and enforcement of security (protective) measures involving deprivation of liberty in a medical (psychiatric) facility. Recently, a solution was found.⁴³⁸ Poland is prepared to take over and has taken over the enforcement of entrustment orders on the basis of the CoE Convention on the Transfer of Sentenced Persons.⁴³⁹ This solution, however, raises questions. According to Article 26(1) of FD 2008/909/JHA, between the Member States that framework decisions replaces, *inter alia*, the CoE convention.⁴⁴⁰ Although Member States may continue to apply 'the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011' (Article 26(2)), these instruments must be *other* instruments than those mentioned in Article 26(1).⁴⁴¹ How then can Poland and the Netherlands continue to apply the CoE convention between themselves? From the Dutch perspective, the Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences is applicable. This law transposed FD 2008/909/JHA and replaced, as of 1 November 2012, the Law on the Transfer of Enforcement of Judgments in Criminal Matters (Article 5:2(1)). That replaced law allowed and still allows for a transfer of enforcement on the basis of, *inter alia*, the CoE transfer convention, but from 1 November 2012 only to a non-EU Member State. Consequently, there does not seem to be a sufficient legal basis in EU or national law⁴⁴² for a transfer of an entrustment order to Poland on the basis of the CoE transfer convention. Since that

⁴³⁸ Statement by Ministry of Justice and Security (IOS) at the national meeting with practitioners on 24 October 2024.

⁴³⁹ Strasbourg 21 April 1983, ETS No. 112. See also District Court of Midden-Nederland, 26 February 2024, NL:RBMNNE:2024:7588 and District Court of Midden-Nederland, 18 March 2025, NL:RBMNNE:2025:1159. Both judgments concern the same case and refer to transferring the execution of an entrustment order to Poland on the basis of the Law of the Transfer of the Enforcement of Judgments in Criminal Matters (*Wet overdracht tenuitvoerlegging strafvonnissen*) which, in effect, means transferring that entrustment order on the basis of that law in combination with the Convention on the Transfer of Sentenced Persons.

⁴⁴⁰ *Handbook on the transfer of sentenced persons and custodial sentences in the European Union*, O.J. 2019, L 403/34.

⁴⁴¹ Cf. Case C-296/08 PPU, *Santesteban Goicoechea*, EU:C:2008:457, para 55, with regard to Article 32(1) of FD 2002/584/JHA.

⁴⁴² Pursuant to Art. 5:2(2) of the Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences, that law does not apply to relations with a Member State *insofar as and for as long as that Member State has not taken the necessary measures to comply with the provisions of FD 2008/909/JHA*. Perhaps one could argue that since the blanket exclusion of security measures by Poland does not comply with FD 2008/909/JHA, the Netherlands could invoke Art. 5:2(2) and apply the legal regime for non-EU States to Poland with regard to security measures.

convention requires consent to the transfer by the sentenced person (Article 3(1)(d)), it is not likely that a sentenced person on whom an entrustment order was imposed will feel the need to challenge the legal basis for his transfer to Poland.

In other cases concerning entrustment orders, the other Member State often argues that enforcing the sanction in that Member State would not serve the purpose of facilitating the social rehabilitation of the sentenced person.⁴⁴³ In this respect it should be noted that national legislation and national practice concerning sanctions involving deprivation of liberty in the context of compulsory psychiatric treatment differ to a rather great extent throughout the European Union,⁴⁴⁴ which could be a factor that contributes to the difficulties in transferring the enforcement of such sanctions.

When the transfer of an entrustment order is not successful, Dutch authorities try to find a way out by arranging a compulsory treatment in the ‘executing’ Member State on the basis of civil law in combination with a conditional termination of the treatment and detention in the Netherlands.⁴⁴⁵ Pursuant to Article 6.2.18 of the Code of Criminal Procedure, the Minister of Justice and Security may end the execution of an entrustment order if the sentenced person is a foreign national who does not have the right to reside in the Netherlands, but only if the minister has organised adequate provisions for the person concerned in his country of origin, aimed at reducing the mental disorder and the risk of re-offending connected thereto and if the person concerned has actually been expelled. Attached to the decision to end the execution of the entrustment order are two conditions: the person concerned must leave the Netherlands and he must not return to the Netherlands (Article 6.2.18(3) of the Code of Criminal Procedure).⁴⁴⁶

⁴⁴³ The other way around, one of the interviewees mentioned problems with executing measures pertaining to intra-mural treatment with Belgium and Germany as issuing Member States. The root of problems seems to be that these measures are ordered in the issuing Member State as part of a conditional release. FD 2008/947/JHA does not provide for the transfer of conditional measures involving *deprivation* of liberty in the context of a conditional release, only for conditional measures involving *restriction* of liberty. At the same time, FD 2008/909/JHA does not provide for the transfer of conditional measures taken in the context of a conditional release. Interview with prosecutor 2.

Compare a recent request for a preliminary reference by a Belgian court with regard to a Belgian judgment granting the convicted person supervised release with a special condition requiring the convicted person to undergo inpatient treatment in the Netherlands for his sexual problems and to be transferred from prison to a closed institution in the Netherlands (C-391/24 (*Nolgers*)).

⁴⁴⁴ Interview with Ministry of Justice and Security (IOS).

⁴⁴⁵ Interview with Ministry of Justice and Security (IOS).

⁴⁴⁶ According to the Instruction on entrustment orders and foreign nationals (*Aanwijzing TBS bij vreemdelingen*), *Stcr.* 2020, 62568, the public prosecutor should not request the imposition of an entrustment order, if it is established or is plausible that the accused person will not have the right to remain in the Netherlands, provided that not requesting the imposition of that measure is justified in view of the importance of protecting society.

**Probation decisions ((a) Person concerned is present in the issuing Member State (NL),
(ee) Enforcement in another Member State)**

Applicability according to Dutch law

In the Netherlands courts can impose a custodial sentence or a measure involving deprivation of liberty, the *execution* of which is conditionally suspended,⁴⁴⁷ *i.e.* a suspended sentence.

Dutch law does not provide for a conditional sentence, *i.e.* a sentence the *imposition* of which is deferred.⁴⁴⁸ Dutch law also provides for a decision on conditional release.

Pursuant to Dutch law both suspended sentences and decisions on conditional release can be transferred to another Member State (Article 3:1 (1)(a-b) in combination with Article 3:2(1) of the Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences).

Is it possible under Dutch law to transfer proceedings once the sentence is final and enforceable? See the applicability remarks concerning custodial sentences/measures involving deprivation of liberty (*supra*).

The probationary period starts running once a judgment imposing a suspended sentence is final⁴⁴⁹ (Article 6:1:18(1) of the Code of Criminal Procedure)⁴⁵⁰ or once a decision granting conditional release is effected (Article 6:1:18(2) of the Code of Criminal Procedure). During that period the sentenced person is under the obligation to comply with the general and special conditions set by the judgment or the decision. Consequently, since the judgment or decision is being enforced during the probationary period, one of the conditions for a transfer of proceedings is not met (see *supra*, the applicability remarks concerning custodial sentences).

It is possible under Dutch law to ‘divide’ ‘composite sentences’ and to deal with the unconditional part under the national transposition of FD 2008/909/JHA and with the

⁴⁴⁷ Art 2(1)(b) and 2(2) of FD 2008/947/JHA.

⁴⁴⁸ Art. 2(1)(c) and 2(3) of FD 2008/947/JHA.

⁴⁴⁹ The court may even order that the sentence is immediately enforceable, in which the case the probationary period starts running on the day of the pronouncement of the judgment (Art. 6:1:18(1) of the Code of Criminal Procedure).

⁴⁵⁰ Unless the sentenced person is deprived of his liberty (Article 6:1:18(5) of the Code of Criminal Procedure).

conditional part under the national transposition of FD 2008/947/JHA? See the applicability remarks concerning custodial sentences (*supra*).

Application

Again, also with regard to FD 2008/947/JHA, the conclusion is that, once the decision is taken to enforce the suspended sentence or the decision on conditional release in another Member State, there is not much left to choose. The only way to achieve this goal is to transfer the sentence/decision on the basis of FD 2008/947/JHA and national law that implements that framework decision.⁴⁵¹

However, there can be a choice, but that is a choice between applying the formal instrument of transferring a sentence/decision and using *informal* ways. We quote the report on the ninth round of mutual evaluations on mutual recognition:

‘The practice of informal transfers and remote supervision appears to be continuing, particularly in border areas of neighbouring jurisdictions and between the services there. Remote supervision, by telephone for example, can take place over great distances. These practices can have implications for enforcement and implementation of orders. In some cases, it was commented that the behaviour arose from lack of familiarity with FD 2008/947/JHA and ‘old habits’’.⁴⁵²

The question is whether these ‘old habits’ could constitute ‘best practices’. Though it might seem tempting to use informal solutions because of their informality, such solutions, *e.g.* using a telephone-call to supervise a sentenced person who is present in another Member State, might constitute, in the eyes of that other Member State, an infringement of its sovereignty.⁴⁵³ Besides, informal solutions raise questions from the point of view of legal certainty and the sentenced person’s rights.

Transferring proceedings to another Member State instead of enforcing the probation sentence in that other Member State is not mentioned by the interviewees as an *a priori* option in

⁴⁵¹ See for some procedural details: *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, 13190/1/22 REV 1, 2 December 2022, pp. 67 ff, and Beun, *Overdracht van vrijheidsbeperkende sancties binnen de EU*, (2019) *Strafblad*, 37-43, at 37 ff.

⁴⁵² *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, 13190/1/22 REV 1, 2 December 2022, p. 69.

⁴⁵³ See 3.2, Preliminary remarks.

practice.⁴⁵⁴ However, transferring to another Member State proceedings that have already led to a final probation decision in the issuing Member State would run counter to the principle *ne bis in idem*, as laid down in Article 54 of the CISA, read in the light of Article 50 of the Charter. In accordance with the former provision the prohibition of a criminal prosecution of the same person for the same offences applies, *inter alia*, ‘if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party’. Pursuant to the case-law of the Court of Justice, a suspended custodial sentence qualifies as a ‘penalty’ within the meaning of Article 54 of the CISA.⁴⁵⁵ Accordingly, ‘(t)hat penalty must be regarded as “actually in the process of being enforced” as soon as the sentence has become enforceable and during the probation period. Subsequently, once the probation period has come to an end, the penalty must be regarded as “having been enforced” within the meaning of that provision’.⁴⁵⁶ National case-law has extended these *dicta* to cover decisions granting conditional release.⁴⁵⁷ Consequently, once a conviction imposing a suspended custodial sentence or a decision granting conditional release has become enforceable, that sentence or decision is ‘actually in the process of being enforced’ within meaning of Article 54 of the CISA and blocks prosecution of the sentenced person in another Member State for the offences that have led to that sentence or decision.

As far as the result is concerned, there is no difference between probation decisions and custodial sentences. In both cases, a transfer of proceeding is not possible (see *supra*, ‘Custodial sentences’, ‘Applicability according to Dutch law’). However, the legal bases differ. Where the person concerned has already been sentenced to a custodial sentence, a transfer of proceedings is only possible if that sentence cannot be enforced in the Netherlands (Article 8(2) of the European Convention on the Transfer of Proceedings in Criminal Matters). Since the sentenced person is in the Netherlands, that condition is not complied with.

Alternative sanctions ((a) Person concerned is present in the issuing Member State (NL) (ee) Enforcement in another Member State)

⁴⁵⁴ See the previous section under: Applicability.

⁴⁵⁵ Case C-288/05, *Kretzinger*, EU:C:2007:441, para 42.

⁴⁵⁶ *Idem*.

⁴⁵⁷ District Court of Amsterdam, 2 June 2021, NL:RBAMS:2021:8170.

Applicability according to Dutch law

Dutch law provides for imposing on, among others, adult offenders,⁴⁵⁸ alternative sanctions in the form of community service (Article 22c of the Penal Code).

According to Dutch law a community service order can be transferred to another Member State (Article 3:1(1)(c) in combination with Article 3:2(1)(j) of the Law on the Mutual Recognition and Enforcement of Custodial and Suspended Sentences).

Is it possible under Dutch law to transfer proceedings once the sentence is final and enforceable? See the applicability remarks concerning custodial sentences (*supra*).

Application

What has been pointed out with regard to probation sentences more or less applies to transferring alternative sanctions, *i.e.* community service, to another Member State. Once the decision is made to enforce the community service order in another Member State there is no choice left, that is to say using FD 2008/947/JHA is the only way.⁴⁵⁹ Unlike transferring probation sentences, there does not seem to be an alternative in the form of an informal arrangement of executing the community service in another Member State. Furthermore, transfer of proceedings is not a real option in practice. See also the previous sections on custodial sentences, measures involving deprivation of liberty and probation decisions.

For a time, transfer of community service to Germany appeared to be problematic, since German legislation does not provide for ordering community service as a separate sanction. Dutch authorities and German authorities from the *Länder* that share a border with the

⁴⁵⁸ The Annotated Index does not require dealing with the sanctions that may be imposed on minors or juvenile offenders.

⁴⁵⁹ See for some procedural details: *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty: Report on the Netherlands*, 13190/1/22 REV 1, 2 December 2022, pp. 64 ff, and Beun, *Overdracht van vrijheidsbeperkende sancties binnen de EU*, (2019) *Strafblad*, 37-43.

Netherlands developed a ‘workaround’⁴⁶⁰. This workaround entails adapting⁴⁶¹ the community service order into a conditional/suspended sentence with the condition of community service attached. A judgment of the *Oberlandesgericht Hamm* appears to solve this problem, by deciding that a community service can be taken over without adapting it since German law does provide for the duty to carry out community service (but only in the context of a conditional/suspended sentence). In other words, the *Oberlandesgericht Hamm* ruled that a (separate) sanction of community service is not incompatible with German law and, therefore, may not be adapted by German authorities.⁴⁶² It is not clear whether all other German courts follow this case-law.

Another problem with regard to the transfer of the penalty of community service by the Netherlands to other Member States is that some Member States apply a wrong interpretation of the minimum threshold of 6 months.⁴⁶³ This threshold refers to the period within which the community service has to be performed by the sentenced person. It does not refer, as some Member States seem to think, to the period of detention that replaces the community service in case the sentenced person fails to perform the community service.⁴⁶⁴ One Member State refuses to recognise Dutch community service if the duration of the substitutive sanction of deprivation of liberty in case of non-performance of the community service⁴⁶⁵ is longer than it would have been in the Netherlands.

(b) Person is present in another Member State

(ee) Enforcement in another Member State

⁴⁶⁰ *Erläuterung zur Übertragung der Vollstreckung niederländischer gemeinnützige Leistung an Deutschland auf Basis des EU-Rahmenbeschlusses 2008/947 Juli 2017, Update November 2021*. This workaround was developed by an ‘Arbeitsgruppe’ of the Dutch issuing authority together with its German counterparts from the border-Länder.

⁴⁶¹ Cf. Art. 9(1) of FD 2008/947/JHA: adaptation of an alternative sanction is allowed, *inter alia*, if its nature is incompatible with the law of the executing Member State.

⁴⁶² *OLG Hamm* (2. Strafsenat), Beschluss vom 30.03.2021 – 2 Ws 217/20. In the same vein *OLG Köln*, Beschluss vom 04.03.2021, 2 Ws 45/21. This rather abstract approach to incompatibility seems to correspond to the approach espoused by AG Y. Bot under Art. 8(3) of FD 2008/909/JHA: opinion of 6 September 2018, Case C-514/17, *Sut*, EU:C:2011:389, paras 93-95.

⁴⁶³ Art. 11 FD 2008/947/JHA.

⁴⁶⁴ Beun, “Overdracht van vrijheidsbeperkende sancties binnen de EU”, (2019) *Strafblad* 37-43, at 40; *Evaluation report on the 9th round of mutual evaluations on mutual recognition legal instruments in the field of deprivation or restriction of liberty. Report on the Netherlands*, 13190/1/22 REV 1, 2 December 2022, p. 72.

⁴⁶⁵ Statement by public prosecutor 2 at the national meeting of practitioners.

Custodial sentence ((b) Person is present in another Member State, (ee) Enforcement in another Member State)

Applicability according to Dutch law

Is it possible under national law to transfer proceedings once the sentence is final and enforceable and the other MS refuses to surrender the person concerned and refuses to recognise the sentence?

See the applicability remarks concerning custodial sentences/measures involving deprivation of liberty (*supra*, paragraph 3.2(a)(ee)). Because paragraph 3.2(b) concerns situations in which the sentenced person is in the executing Member State, a transfer of the enforcement of the sentence to that Member State should be tried first.

It is possible under national law to ‘divide’ ‘composite sentences’ and to deal with the unconditional part under the national transposition of FD 2008/909/JHA and with the conditional part under the national transposition of FD 2008/947/JHA?

It is possible under Dutch law to ‘divide’ ‘composite sentences’ and to deal with the unconditional part under the national transposition of FD 2008/909/JHA and with the conditional part under the national transposition of FD 2008/947/JHA. See the applicability remarks concerning custodial sentences/measures involving deprivation of liberty (*supra*, paragraph 3.2(a)(ee)).

Application

The situation in which the sentenced person is present in another Member State and the custodial sentence is to be executed in that other Member State does not differ significantly, from the perspective of effectiveness and coherence, from the situation in which the person is present in the Netherlands and his sentence is to be executed in another Member State. We refer to section under paragraph 3.2(a)(ee).

In most cases transfer of the sentence comes into play after an EAW was issued for the purpose of executing the sentence in the Netherlands (see *supra*, ‘**Routing of sentences and judicial cooperation**’, ‘*Custodial sentences*’). In practice, there are two variants:

- either the executing Member State will request that the procedure under FD 2008/909/JHA is followed instead of EAW-proceedings. This will result in a withdrawal of the EAW and in sending a certificate and the judgment to the executing Member State;
- or the executing judicial authority applies the ground for refusal of Article 4(6) of FD 2002/584/JHA. These cases can be divided into cases in which the executing Member State
 - o demands a certificate under FD 2008/909/JHA (without following the procedure of FD 2008/909/JHA; the certificate is needed to make sure that the executing Member State has enough information). Belgium and France, *e.g.*, demand a certificate for this purpose;
 - o does not demand a certificate but is satisfied with just the EAW (just as the Netherlands does as executing Member State).⁴⁶⁶

The practice of demanding a certificate when applying Article 4(6) of FD 2002/584/JHA raises the question what should be the consequence if a certificate is not sent in. Belgium will start the enforcement even though the certificate is not there yet.⁴⁶⁷

It should be noted that in a recent opinion AG Richard de la Tour has stated that the executing judicial authority may not refuse to execute an EAW on the basis of Article 4(6) of FD 2002/584/JHA if the issuing Member State has not consented to execution in the executing Member State (by sending in a certificate and the judgment).⁴⁶⁸ If that Member State refuses to send in a certificate and the judgment and thus withholds consent to execution in the executing Member State, the executing judicial authority

⁴⁶⁶ Interview with Ministry of Justice and Security (IOS).

⁴⁶⁷ Interview with Ministry of Justice and Security (IOS). See also Barbosa, Glerum, Kijlstra, Klip & Peristeridou, *Improving the European Arrest Warrant*, Maastricht Law Series 27 (Eleven Publishers, 2023), pp. 28-29 and Neveu, *Mandat d'arrêt européen*, Répertoire Pratique du Droit Belge. Législation, Doctrine, Jurisprudence: Droit Pénal (Larcier Intersentia, 2024), pp. 99-100.

⁴⁶⁸ Case C-305/22, *C.J. (Enforcement of a sentence further to an EAW)*, EU:C:2024:508.

must surrender the requested person. Should the Court of Justice follow this opinion, Dutch law and practice would have to be amended.⁴⁶⁹

In some cases the sentenced person requests to serve the custodial sentence in the Member State where he is present (lives/resides) when confronted with an EAW. In few cases, the sentenced person asks for the transfer of the sentence to the Member State where he is present without an EAW having been issued.⁴⁷⁰

Apparently, issuing the EAW in cases in which the whereabouts of the sentenced person is unknown serves the purpose, or at least also serves the purpose, of locating the sentenced person. Once the location/address of the sentenced person is known, transferring the sentence can come into play.

It seems as though transferring the sentence to another Member State when the sentenced person is present in that other Member State is not decided by Dutch authorities of their own accord and *ab initio*, but only after an EAW has been issued (unsuccessfully) or when a request from the sentenced person or from the executing Member State is received (whether in response to an EAW or not). The execution of the sentence in the other Member State will then be effectuated on the basis of FD 2008/909/JHA by sending a certificate by the Netherlands or on the basis of a refusal to execute the EAW by the executing Member State pursuant to Art. 4(6) of the FD 2002/584/JHA.

As a result of the routing of custodial sentences (see *supra*, ‘**Routing of sentences and judicial cooperation**’, ‘*Custodial sentences*’), in most cases in which the sentenced person is in another Member State no decision is taken upfront whether to enforce in the Netherlands or to transfer the sentence to another Member State. Rather, the EAW-route seems to be predetermined in those cases.

⁴⁶⁹ After Case C-305/22 was referred to the Grand Chamber together with another case, the AG rendered another opinion in which he confirmed and repeated his previous opinion: Case C-305/22, *C.J. (Enforcement of a sentence further to an EAW)* and Case C-595/23, *Cuprea*, EU:C:2024:1030. The preliminary reference in Case C-595/23 (*Cuprea*) was subsequently removed from the register because the referring court had informed the CJEU that the national proceedings had ended: Case C-595/23, *Cuprea*, EU:C:2025:76. The issue was also raised in Case C-583/24 (*Tagu*) and Case C-91/24 (*Aucroix*).

⁴⁷⁰ Interview with Ministry of Justice and Security (IOS).

Using the EAW in order to enforce the sentence has much more impact on the person concerned than forwarding the judgment and a certificate. Although this is recognised by practitioners, nevertheless there seems to be a preference for issuing an EAW over sending a certificate under FD 2008/909/JHA. There is no central EU wide registration of addresses of sentenced persons. The latter instrument does not provide for a mechanism to locate the sentenced person. Issuing an EAW and entering an alert in the SIS⁴⁷¹ is seen as an easy way to establish the whereabouts of a sentenced person.⁴⁷² Apparently, this not just a Dutch opinion.⁴⁷³ In addition, FD 2002/584/JHA provides for immediate arrest of the sentenced person, if found. In short, issuing an EAW is seen as more efficient than sending a certificate.⁴⁷⁴

Nevertheless, one can wonder whether the present practice is really efficient in terms of time, effort and costs, especially when the executing Member State demands that the procedure under FD 2008/909/JHA is followed. This topic is under discussion (see supra, '**Routing of sentences and judicial cooperation**', 'Custodial sentences').⁴⁷⁵

Incidentally, In the near future another 'tool' to establish the whereabouts of a sentenced person will be added to the EU toolkit.⁴⁷⁶

⁴⁷¹ Art. 9(2)-(3) of FD 2002/584/JHA and Art. 26(1) of Regulation (EU) 2018/1862.

⁴⁷² Of course, Art. 34(1)(c) of Regulation (EU) 2018/1862 provides for an alert in the SIS for the purpose of communicating the place of residence or domicile of persons who are to be served with a criminal judgment, but arguably this provision does not apply at this stage. At the enforcement stage, the judgment is already final and enforceable. Therefore, from the perspective of Dutch law there is no need any more to serve the sentenced person with the judgment.

⁴⁷³ See *Report on Eurojust's Casework in the Field of the European Arrest Warrant* (Eurojust 2021), p. 59 and p. 60. Indeed, according to the final report on the tenth round of mutual evaluations, '(...) the EIO is sometimes transmitted for the sole purpose of locating a person, while the EAW requests that the person be arrested. Most Member States, however, consider this to be unnecessary and argue that the EAW also allows for measures to locate a person for the purposes of apprehension (executing the EAW). Furthermore, police channels may be used to that end': *Final report on the 10th round of mutual evaluations on the implementation of the European Investigation Order (EIO)*, Council document 15834/1/24 REV 1, 10 December 2024, p. 18. However, it should be stressed that the purpose of EIO's is *gathering evidence*: Case C-583/23, *Delda*, EU:C:2025:6.

⁴⁷⁴ Interview with Ministry of Justice and Security (IOS).

⁴⁷⁵ Interview with Ministry of Justice and Security (IOS).

⁴⁷⁶ Pursuant to Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings, O.J. 2023, L 2023/1543, it will be possible to issue European Preservation Orders and European Production Orders to locate a sentenced person who has absconded from justice, in order to execute a custodial sentence or detention order of at least four months (that was not imposed *in absentia*). The regulation will apply from 18 August 2026 (Art. 34(2)).

Measure involving deprivation of liberty: entrustment order ((b) Person is present in another Member State, (ee) Enforcement in another Member State)

Applicability according to Dutch law

See the applicability remarks concerning custodial sentences (*supra*).

Application

It seems unlikely that an accused person is present in another Member State when an entrustment order is imposed on him by a Dutch court. An entrustment order may only be imposed on the basis of extensive psychiatric and psychological assessments with regard to the accused person's mental condition and the danger for society resulting from this condition. All of this presupposes that the accused person is in detention during the pre-trial and trial stages, including at the sentencing stage. Furthermore, for the same reasons it seems unlikely that an entrustment order will be imposed in *in absentia* proceedings.

Probation decisions ((b) Person is present in another Member State, (ee) Enforcement in another Member State)

Applicability according to Dutch law

See paragraph 3.2(a)(ee) with regard to probation sentences under Dutch law.

Is it possible under Dutch law to transfer proceedings once the sentence is final and enforceable? See the applicability remarks concerning probations decisions (*supra*, paragraph 3.2(a)(ee)).⁴⁷⁷

⁴⁷⁷ It is important to note that even though the probationary period will run whether or not the sentenced person is in the Netherlands it may be that the mere fact that the sentenced person is not in the Netherlands constitutes non-compliance with a special condition, such as the condition not to leave the Netherlands (Article 6:2:11(3)(k) of the Code of criminal Procedure) or, at least, makes compliance with certain special conditions difficult, such as a duty to be present at a certain time at a certain location (Article 14c(2)(7) of the penal Code; Article 6:2:11(3)(4) of the Code of Criminal Procedure). Non-compliance with general or special conditions can lead to a revocation of the suspended sentence or conditional release.

It is possible under Dutch law to ‘divide’ ‘composite sentences’ and to deal with the unconditional part under the national transposition of FD 2008/909/JHA and with the conditional part under the national transposition of FD 2008/947/JHA? See the applicability remarks concerning custodial sentences (*supra*, paragraph 3.2(a)(ee)).

Application

Again, the conclusion is that there is not much left to choose once the decision is taken that the probation decision should be enforced in another Member State. We refer to section under (a)(ee).

Under Dutch law, the conditions set by the court in the context of imposing a suspended sentence must at least consist of the ‘general’ condition that the sentenced person will not commit any offences before the end of the probation period (Article 14c(1) of the Penal Code). In addition, the court can set so-called ‘special’ conditions with which the sentenced person has to comply during (part of) the probation period (Article 14c(2) of the Penal Code). The same applies, *mutatis mutandis*, to conditions set in the context of a decision to grant conditional release (Article 6:2:11(1)-(2) of the Code of Criminal Procedure). Although a condition that a legal obligation not to commit a new criminal offence during a probation period be complied with, such as the ‘general condition’ within the meaning of Dutch legislation falls within the scope of FD 2008/947/JHA⁴⁷⁸ and of the legislation that transposes that framework decision, at present CJIB does not send judgments or decisions granting conditional release to IRC Noord-Holland, if the only condition set is the condition not to commit an offence before the end of the probation period.⁴⁷⁹ However, according to IRC Noord-Holland it does forward such judgments to other Member States.⁴⁸⁰ It is not clear how such judgments reach IRC Noord-Holland.

Alternative sanctions ((b) Person is present in another Member State, (ee) Enforcement in another Member State)

Applicability according to Dutch law

⁴⁷⁸ Case C-2/19, *A.P. (Probation measures)*, EU:C:2020:237.

⁴⁷⁹ Interview with Ministry of Justice and Security (CJIB).

⁴⁸⁰ Statement by public prosecutor 2 at the national meeting with practitioners on 24 October 2024.

See for alternative sanctions under Dutch law paragraph 3.2(a)(ee).

Is it possible Dutch law to transfer proceedings once the sentence is final and enforceable?
See the applicability remarks concerning custodial sentences (*supra*, paragraph 3.2(a)(ee)).

Application

We refer to section under paragraph 3.2(a)(ee).

(b) Person is present in another Member State
(ff) Enforcement in issuing Member State (NL)

Custodial sentence **((b) Person is present in another Member State, (ff) Enforcement in issuing Member State (NL))**

Applicability according to Dutch law

Of course Dutch law provides for issuing a EAW in order to enforce a Dutch custodial sentence – of at least four months – in the Netherlands when the sentenced person is present in another Member State (Article 44 of the Law on surrender). The four months' requirement refers to the duration of the sentence as it was imposed not to the duration of the remaining sentence.⁴⁸¹ The notion of a 'custodial sentence' includes substitutive custodial sentences (see *supra*, under (a)(ee) custodial sentences, application).⁴⁸²

Nevertheless, competent authorities could call upon a sentenced person who is present in another Member State to serve the sentence in the Netherlands without having recourse to a judicial cooperation instrument.

In this respect it is important to note that Dutch law provides for a so called 'self-report' procedure ('*zelfmeld*' procedure): certain categories of sentenced persons who are not in

⁴⁸¹ NL:RBAMS:2007:BC9797.

⁴⁸² Instruction on the framework for execution (*Aanwijzing kader voor tenuitvoerlegging*), *Stcrt.* 2020, 62545, para 6.2.1; NL:RBAMS:2009:9042.

detention and who have a ‘reliable and usable address’ may present themselves at the indicated detention facility to undergo a custodial sentence without coercive measures being used upfront.⁴⁸³ This procedure is also applied when the sentenced person is not residing in the Netherlands but has a ‘reliable and usable address’ in another State.⁴⁸⁴ The rules on the ‘self-report’ procedure inherently require sending such a letter to the sentenced person. Since the EU Convention on Mutual Assistance in Criminal Matters supplements, *inter alia*, the Additional Protocol of 17 March 1978 to the European Mutual Assistance Convention⁴⁸⁵ (Article 1(b) of the EU convention) and since the Additional Protocol applies to ‘documents concerning the enforcement of a sentence’ (Article 3(a) of the Additional Protocol), it would appear that the provisions of the EU Convention on Mutual Assistance in Criminal Matters on the sending and serving of ‘procedural documents’ (Article 5) apply to such a letter (see also 2.2.1(b)(aa)). Therefore, sending a letter concerning the ‘self-report’ procedure directly by post to a sentenced person who has an address in another Member State would not seem to infringe that Member State’s sovereignty. Incidentally, if the person concerned reports himself at the prison he will be subjected to a prison regime that is more favourable than the regime that is applicable to persons who were arrested.

Other than the ‘self-report’ procedure, there are no other provisions in Dutch law regulating a situation in which the execution of a custodial sentence starts without using coercive measures.

Application

In this situation there seems to be little choice as well. As far as legal instruments go, issuing an execution-EAW is the only way to go or, if the ‘self-report’ procedure is applicable, sending a letter to the sentenced person directing him to report at the detention facility. In practice, an execution-EAW will not be issued unless at least 120 days of the sentence *remain to be served*.⁴⁸⁶ Although the legal requirement is that a sentence of at least 4 months (120

⁴⁸³ Art. 2:1 of the Ministerial Regulation on the execution of decisions in criminal cases (*Regeling tenuitvoerlegging strafrechtelijke beslissingen*).

⁴⁸⁴ Interview with Ministry of Justice and Security (CJIB).

⁴⁸⁵ Strasbourg, 17 March 1978, ETS No. 099.

⁴⁸⁶ *Aanwijzing kader voor tenuitvoerlegging* (Instruction on the framework for execution), *Stcrt.* 2020, 62545, para 6.2.1. See on the (im)possibilities of enforcing sentences of less than 120 days; Pro Facto, *Eindrapport Aanpak van de voorraad openstaande vrijheidsstraffen*, Groningen, mei 2020.

days) *is imposed*, this practice obviously is the result of considerations of efficiency and proportionality. Apparently, such considerations weigh heavier than preventing impunity.

An alternative option could be to call upon the sentenced person to come to the Netherlands of his own volition to serve a custodial sentence. None of the interviewees mentioned this as a possibility. With the exception of situations in which the ‘self-report’ procedure applies, this option might constitute, in the eyes of that other Member State, an infringement of its sovereignty.⁴⁸⁷

Measure involving deprivation of liberty: entrustment order ((b) Person is present in another Member State, (ff) Enforcement in issuing Member State (NL))

See the applicability remarks concerning custodial sentences (*supra*).

Probation decisions ((b) Person is present in another Member State (ff) Enforcement in issuing Member State (NL))

Applicability according to Dutch law

Dutch law contains no provisions that can be used to ensure that the sentenced person who is present in another Member State complies with the general and special conditions set in the probation decision in the Netherlands.

Application

As a preliminary remark it should be noted that, according to IRC Noord-Holland, probation decisions in which only the general condition (not to commit any offences during the probation period) is imposed on the sentenced person are forwarded, although it is not clear

⁴⁸⁷ See 3.2, Preliminary remarks. Interestingly, a report about the (im)possibilities concerning the executing of short sentences mentions an experiment with respect to sentences of less than 120 days. Letters were sent to sentenced persons residing in Belgium and Germany, telling them that they had to serve a sentence in the Netherlands, that they would be arrested if they left the country but that they could avoid that result by reporting at the prison facility: Pro Facto: *Eindrapport Aanpak van de voorraad openstaande vrijheidsstraffen*, Groningen, mei 2020, pp. 25-26.

how such decisions reach that authority (see *supra*, 3.2(b)(ee)('Probation decision', 'Application')).

In situations in which special conditions were imposed and the sentenced person is present in another Member State, the reason for not transferring a probation decision to another Member State could be that resocialisation of the sentenced person is better served by supervision in the Netherlands than supervision in that other Member State. Such situations might be uncommon. In any case, the only available option would be to call upon the sentenced person informally to come to the Netherlands in order to comply with the special conditions.

Alternative sanctions ((b) Person is present in another Member State, (ff) Enforcement in issuing Member State (NL))

Applicability according to Dutch law

Dutch law contains no provisions that can be used in order to ensure that the sentenced person who is present in another Member State carries out an alternative sanction in the Netherlands.

Application

See the remarks on application with regard to probation sentences (*supra*, paragraph 3.2(a)(ff)).

Choosing a specific goal: enforcement in the Netherlands or enforcement in another Member State?

As we saw, once one of those two specific goals is chosen there is not much choice left between applicable instruments. Turning to the preliminary decision which specific goal to pursue, enforcement in another Member State or enforcement in the Netherlands, a different picture presents itself. In deciding which goal to pursue we came across various considerations that play a role in taking this decision, *e.g.*:

- staff shortages;

- costs in terms of time and money;
- the duration of the (remaining part of the) custodial sentence (if transferring the sentence takes longer than serving the remaining part of the sentence in the Netherlands, transferring the sentence is no option);⁴⁸⁸
- the prospect of resocialisation;
- problems in applying an instrument;⁴⁸⁹
- the interest of the sentenced person;
- knowledge of and experience with applying the applicable instruments.

To illustrate this, we will give two examples of the way choosing between enforcing a sentence in the Netherlands and enforcing in another Member State comes into play.

Choosing upfront

One of the interviewees (the competent authority for FD 2008/947/JHA) mentioned that sentences that qualify for a transfer to another Member State are automatically selected on the basis of certain criteria. The selected sentences will then be verified manually (*inter alia* with regard to existing ties to the other Member State and consent of the sentenced person). As a result of this verification the competent authority may decide not to transfer the sentence to the other Member State.

At first sight, this may look as a choice between using the instrument of transferring the sentence to another Member State or not using it. In fact it is, in our eyes, a choice between enforcing the sentence in the Netherlands or in another Member State. Furthermore, this can be called a choice upfront, since enforcement in the Netherlands is taken into account as an option beforehand and not as a last resort when a transfer fails.

Choosing afterwards

When the sentenced person is present in another Member State, in most cases a transfer of the custodial sentence comes into play after an EAW issued for the purpose of executing the

⁴⁸⁸ Unless the detention in the Netherlands is suspended awaiting the transfer of the sentence to the other Member State.

⁴⁸⁹ *E.g.*, with regard to transferring an entrustment order to Poland or an alternative sanction to Germany (*supra*). Also locating the sentenced person when his whereabouts are unknown can be problematic with regard to transferring sentences.

sentence in the Netherlands fails to achieve the intended result. The Public Prosecution Service (LP-FAST) informs the Ministry of Justice and Security (CJIB and IOS) about this failure. A certificate will then be sent to the executing Member State by the Ministry. See section 3.2(b)(ee). When the EAW is issued without taking into account the option of enforcing the sentence in the other Member State, then a choice has to be made *after* applying one of instruments, i.e. FD 2002/584/JHA, without achieving the goal of enforcing the sentence in the Netherlands. In this situation we have three options:

- transferring the sentence to the other Member State;
- ‘putting the case on the shelf’ but maintaining the alert in the SIS, which means waiting either for a voluntary return of the sentenced person to the Netherlands and his arrest here or for his arrest in another Member State on the basis of the alert and his subsequent surrender to the Netherlands;
- accepting impunity.

Sentenced person present in the Netherlands

When the sentenced person is present in the Netherlands, choosing between enforcement in the Netherlands and enforcement in another Member State is in fact choosing between enforcement without (the need for) cross-border cooperation and enforcement through cross-border cooperation using FD 2008/909/JHA or FD 2008/947/JHA. This is relevant from the perspective of effectiveness and coherence, since one can presume that enforcement without cross-border cooperation is ‘easier’ and involves less costs in terms of money, time and human resources than enforcement through cross-border cooperation, at least in the short run. In the long run, this is probably not the case, since enforcement in another Member State also means having to spend less money, time and human resources on enforcing (together with the sentence/decision the costs of executing are ‘transferred’ to the executing Member State).⁴⁹⁰ In other words, efficiency comes into play since these costs should be taken into account in assessing whether it is efficient to seek to enforce the sentence in another Member State or in the Netherlands.⁴⁹¹ Other factors that are or can be relevant from a perspective of

⁴⁹⁰ The executing Member State bears the costs of executing the sentence and the issuing Member State bears the costs of transferring the sentenced person to the executing Member State. See art. 24 FD 2008/909/JHA and art. 22 FD 2008/947/JHA.

⁴⁹¹ Also effectiveness comes into play in a sense. Choosing to enforce a Dutch sentence/decision through cross-border cooperation if sufficient resources are not available will not have the desired effect, i.e. will not lead to enforcement in the other Member State. One might argue that this is not an appropriate approach. Costs should

effectiveness and coherence are of course the prospect of resocialisation of the sentenced person, the possibility of reducing the risk of re-offending, the preference of the sentenced person, whether the offence caused serious upset to the Dutch legal order,⁴⁹² whether there are ongoing criminal proceedings in the Netherlands against the sentenced person⁴⁹³ and whether the sentenced person has complied with a measure to pay to the State an amount of money for the benefit of the victim of the offence.⁴⁹⁴

Sentenced person present in another Member State

When the sentenced person is present in another Member State the choice between enforcing a custodial sentence/measure involving deprivation of liberty in the Netherlands or in that other Member State is in fact a choice between issuing a EAW and sending a ‘certificate’, that is a choice between using FD 2002/584/JHA (or using informal ways) or using FD 2008/909/JHA (or using informal ways). Here there is a real choice between different instruments instead of, as we have encountered previously, situations in which there is no choice at all (given a certain specific goal) or a choice not between different instruments but between cross-border cooperation or no cross-border cooperation. Relevant in choosing is that issuing an EAW results in detention and, furthermore, that ‘self-reporting’ (see para 3.2(b)(ff)) entails a more favourable detention-regime from the start of the detention. Relevant in choosing whether to execute the sentence in the Netherlands or in another Member State (i.e., to issue a EAW or transferring the sentence to another Member State) is also the optional refusal ground of FD 2008/909/JHA with regard to the duration of the remaining sentence to be served (at least six months; Article 9(1)(h)). Where the Netherlands do not use this refusal ground for incoming requests, other Member States do.⁴⁹⁵ This means that if less than six months remain to be served of a custodial sentence/measure involving deprivation of liberty but that sentence or measure, as imposed, has a duration of at least four months of which at least 120 days remain to be served, execution in the Netherlands (i.e. issuing an execution-EAW) remains the only option when a refusal by the other Member State to take over the enforcement is expected beforehand.

not be taken into account for each Member State individually, but on a transnational/EU level. But this is not ‘how it works’ in practice.

⁴⁹² Statement by IOS at the national meeting with practitioners on 24 October 2024.

⁴⁹³ Statement by IOS at the national meeting with practitioners on 24 October 2024.

⁴⁹⁴ Statement by IOS at the national meeting with practitioners on 24 October 2024.

⁴⁹⁵ Pro Facto: *Eindrapport Aanpak van de voorraad openstaande vrijheidsstraffen*, Groningen, mei 2020, p. 66.

As explained above, although there is a real choice between different instruments when the sentenced person is present in another Member State, the present routing of custodial sentences in most cases implies the issuing of an EAW and, if that route is successful, in effect cancels the FD 2008/909-route.

A refusal to surrender a sentenced person for the purposes of executing the sentence in the issuing Member State and, instead, executing that sentence in the executing Member State on the basis of Article 4(6) of FD 2002/584/JHA is a rather common occurrence. In fact, in 2022 that ground for refusal was the most common ground for refusal.⁴⁹⁶ The question arises whether Dutch issuing judicial authorities, when issuing a EAW, take into account beforehand the possibility of refusal of the EAW and the subsequent execution of the Dutch sentence in the executing Member State. If such a refusal is likely, authorities could also decide not to execute the sentence in the Netherlands and, therefore, refrain from issuing a EAW and instead decide to transfer the execution of the sentence to another Member State by sending a certificate. In that way the procedure would be less cumbersome for the sentenced person and also for the issuing and executing Member States. An argument against this approach could be that it would disregard the duty to execute sentences as soon as possible (Article 6:1:2 of the Code of Criminal Procedure), as proceedings to transfer a sentence take longer than EAW proceedings. Nevertheless, the EU law duty of applying the instruments in an effective and coherent manner would seem to outweigh the national law duty of executing sentences as soon as possible. In none of the interviews this approach is mentioned. Again, the present routing of sentences in most cases prevents that approach from even being considered.

With regard to probation decisions and alternative sanctions the choice between enforcement in the Netherlands or in the Member State where the sentenced person is present is a choice between using FD 2008/947/JHA with a view to enforcement in the Member State where the sentenced person is present and using informal ways in order to achieve that the sentenced person comes to the Netherlands to undergo supervision or carry out his community service. Relevant with regard to this choice are, of course, the goal of resocialisation of the sentenced person but also the chances that a request for transferring the sentence to another Member State will likely be refused (*e.g.* because the duration is less than 6 months) and the chances that the sentenced person will come to the Netherlands voluntarily.

⁴⁹⁶ Statistics on the practical operation of the European arrest warrant – 2022, SWD(2024) 137 final, p. 16 (384 cases of refusal; Germany 72 cases, the Netherlands 85 cases, Poland 24 cases and Spain 0 cases).

4. Anticipating the application of instruments: sentencing

This Chapter is the odd one out. It concerns a stage in which cooperation is not yet necessary. However, at the sentencing stage decisions will be made that subsequently will lead to a need for cooperation, either automatically or on the basis of a specific decision. Unlike the previous two chapters, the focus is on a stage of criminal proceedings in which there is no need for judicial cooperation yet and, therefore, no need for the application of instruments yet: the sentencing stage (the determination by a court of the sentence to be imposed on an accused person who has been found guilty of the offence he was charged with).

The object of this chapter is to establish whether in sentencing an accused person who is a national of another Member State or who resides in another Member State, judges take into account the (im)possibilities of judicial cooperation with regard to enforcement of that sentence, should the need arise. In other words, whether in sentencing judges anticipate possible needs and problems related to judicial cooperation,⁴⁹⁷ as well as whether national law allows them to do so.

At least two issues are of interest here:⁴⁹⁸

- *Conditional sentences and probation decisions*⁴⁹⁹ and *alternative sanctions*.⁵⁰⁰ Is the fact that the accused person resides in another Member State a factor in determining whether to impose a specific sanction, especially if a person residing in the issuing Member State would receive a similar sanction for comparable offences?
- *composite sentences* (see the introduction to Chapter 3). Does the fact that such sentences are governed by two different judicial cooperation regimes – and, consequently, that enforcing such sentences in another Member State may cause difficulties – play a role in deciding whether or not to impose such a sentence?

4.1 Introduction

This chapter concerns the sentencing stage: the stage in which the court determines which sentence to impose, if any, on an accused person who has been found guilty. Although the sentencing stage is part of the trial stage, in the context of this chapter the term ‘sentencing’ does not include any other activities than determining and imposing the sanction.

⁴⁹⁷ So this chapter is, unlike the chapters 2 and 3, not about applying instruments itself but about anticipating possible problems in the future with applying instruments.

⁴⁹⁸ We invite the NARs to identify and include other issues.

⁴⁹⁹ See the definition of both in Art. 2(3) and (5) of FD 2008/947/JHA.

⁵⁰⁰ See the definition in Art. 2(4) of FD 2008/947/JHA.

At the sentencing stage, the court will take decisions that, subsequently, can lead to a need for cooperation. When a sentence is imposed on a person who is a national or a resident of another Member State, cooperation may be needed to enforce that sentence, either in the issuing Member State or in the executing Member State (see chapter 3). In contrast to chapters 2.2, 2.3 and 3, the present chapter concerns a stage of the proceedings in which cooperation is not yet necessary. In deciding whether to impose a sentence, and, if so, which sentence to impose, the court is not dependent on cooperation with an authority from another Member State. The objective of the present chapter is to examine whether in sentencing a person who is a national or a resident of another Member State, the court takes into account the (im)possibilities of cooperation with regard to the enforcement of the sentence, should that be necessary.

In this context, enforcement of the sentence can refer either to enforcement of the sentence in the issuing Member State or to enforcement in the executing Member State. This means that only FD 2008/909/JHA (custodial sentences and measures involving deprivation of liberty) or FD 2008/947/JHA (probations decisions and alternative sanctions) and FD 2002/584/JHA (custodial sentences and measures involving deprivation of liberty) are relevant. The first two framework decisions provide a basis for enforcement in the executing Member State, while the third framework decision provides a basis for enforcement in the issuing Member State.⁵⁰¹

4.2 Sentencing and anticipating the instruments: the national legal framework

Traditionally, Dutch courts have a very wide discretion with respect to sentencing.⁵⁰² With only a few exceptions,⁵⁰³ national law does not restrict a court in its choice of the type and severity of the sanction. There are no mandatory sentences. The rules on minimum and maximum sentences are very broad.⁵⁰⁴ The court may even refrain from imposing a sentence if it considers it advisable, having regard to the lack of gravity of the offence, the character of the offender, or the circumstances attendant upon the commission of the offence or thereafter.⁵⁰⁵

⁵⁰¹ Although pursuant to art. 4(6) of FD 2002/584/JHA the executing judicial authority may decide to refuse surrender if the executing Member State undertakes to execute the sentence itself.

⁵⁰² P.J.P. Tak, *The Dutch criminal justice system*, (Wolf Legal Publishers, 2008), p. 129.

⁵⁰³ *E.g.*, community service cannot be imposed for certain serious crimes: Art. 22b of the Penal Code.

⁵⁰⁴ For all crimes (*misdrijven*), the minimum sentence of imprisonment is one day, the maximum sentence of imprisonment is specified for each crime.

⁵⁰⁵ Art. 9a of the Penal Code.

A number of factors determines the sentence, *e.g.* the gravity of the offence, the circumstances attendant upon the commission of the offence and the personal circumstances of the accused person. Within the limits of the applicable maximum sentence, the courts have discretion to choose the sanction, and to assess the factors that they deem relevant to that choice.⁵⁰⁶ The choice of relevant factors for sentencing is entirely up to the court. As a rule, the court does not have to justify this choice,⁵⁰⁷ although the court must state the reasons in its judgment for imposing a sentence.⁵⁰⁸ Consequently, when deciding what sentence to impose, courts may, but they are not obliged to, take into account the manner in which a particular sanction will be executed.⁵⁰⁹

From the perspective of the project, the case-law on imposing a custodial sentence on accused persons residing in another Member State instead of a penalty of community service is interesting. According to that case-law, the mere fact that the accused person does not reside in the Netherlands but in another Member State does not prohibit the court from imposing the penalty of community service. After all, the Netherlands transposed FD 2008/947/JHA.⁵¹⁰ Where the person concerned is a national of another Member State, this line of case-law is in line with the case-law of the Court of Justice. After all, not imposing community service solely on the grounds that the accused person is a national of another Member State and does not reside in the Netherlands would amount to indirect discrimination based on nationality: non-residents would be denied the penalty of community service (and instead receive a more severe penalty) whereas persons residing in the Netherlands would not be denied that penalty. Such a distinction is likely to operate mainly to the detriment of nationals of other Member States, since in the majority of cases non-residents are foreigners.⁵¹¹ Such a difference in treatment could only be objectively justified in the absence of EU rules on the enforcement of such a sanction.⁵¹² In the absence of such rules, a difference in treatment could be deemed necessary to avoid impunity.

⁵⁰⁶ Supreme Court, 15 January 2019, ECLI:NL:HR:2019:46, para 3.5.

⁵⁰⁷ Supreme Court, 21 November 2006, ECLI:NL:HR:2006:AY7805, para 3.3.

⁵⁰⁸ The court is obliged to state in its judgment the reasons that determined the sentence (Art. 359(5) of the Code of Criminal Procedure). Where the court imposes a sanction involving deprivation of liberty, the court must also state the reasons which led to the choice of this type of sanction and indicate the circumstances taken into account in the determination of the length of the sanction (Art. 359(6) of the Code of Criminal Procedure).

⁵⁰⁹ Supreme Court, 23 March 2010, ECLI:NL:HR:2010:BK9252, para 2.5.

⁵¹⁰ Supreme Court, 15 January 2019, ECLI:NL:HR:2019:46, para 3.5.

⁵¹¹ Case 29/95, *Pastoors and Trans-Cap v Belgische Staat*, EU:C:1997:28, para 17.

⁵¹² Case 29/95, *Pastoors and Trans-Cap v Belgische Staat*, EU:C:1997:28, paras 19-22.

Even where EU rules on recognition of foreign sanctions exist no rule of law prohibits the court taking into account whether there is a real prospect of executing the penalty of community service in another Member State.⁵¹³ After all, the legal regime governing the recognition and execution of alternative sanctions, such as community service, does not oblige the competent Dutch authority to forward a judgment imposing community service to the Member State where the person concerned is lawfully and ordinarily residing.⁵¹⁴ And the competent authority of that Member State may invoke the grounds for refusal mentioned in Article 11 of FD 2008/947/JHA, including the ground for refusal concerning the minimum duration of the alternative sanction.

However, any conclusion that recognition of a sentence of community service in another Member State has no real prospect of success must have a sufficient basis in the facts. The mere fact that that Member State has in the past refused to recognise a Dutch sentence of community service does not suffice to draw such a conclusion.⁵¹⁵

The Supreme Court's case-law that allows taking into account the prospects of execution in another Member State has been criticised. It is said that it unduly discourages the court from imposing community service on accused persons from other Member States. Unduly, because once a sentence of community service is imposed on an accused person who resides in another Member State the competent Dutch authority will check whether forwarding the judgment to that Member State would be appropriate. That authority will not forward a judgment where it is expected that the executing Member State will refuse recognition.⁵¹⁶ However, this criticism seems beside the point. An assessment *post sententiam* as to whether a sentence of community service can be recognised by another Member State cannot prevent the *imposition* of a non-executable sentence of community service whereas taking into account the prospects of execution when deciding on the sentence can.⁵¹⁷

⁵¹³ Supreme Court, 15 January 2019, ECLI:NL:HR:2019:46, para 3.5.

⁵¹⁴ See Art. 5 of FD 2008/947/JHA ('The competent authority of the issuing State may forward a judgment (...)') and Art. 3:18 of the Law on the mutual recognition and enforcement of custodial and suspended sentences ('A Dutch judgment can be forwarded to the executing Member State (...)').

⁵¹⁵ Supreme Court, judgment of 23 March 2021, ECLI:NL:HR:2021:428, para 2.3.2.

⁵¹⁶ Beun, "Overdracht van vrijheidsbeperkende sancties binnen de Europese Unie. De praktijk gezien vanuit de Centrale Autoriteit", (2019) *Strafblad* 2019, 37-43, at 39. The author is a public prosecutor at the International Legal Assistance Centre Noord-Holland, which is the competent Dutch authority under FD 2008/947/JHA.

⁵¹⁷ Also critical Ouwerkerk, "Selectie in cassatie in strafzaken: Begrenzing door Europeanisering?", *DD* 2019/36, paragraph 2. According to her, the Supreme Court should have examined what the purpose of FD 2008/947/JHA is, as it is not self-evident that FD 2008/947/JHA aims at preventing unequal treatment of residents from other

4.3 Sentencing and anticipating the instruments: practice

4.3.1 *Need for cooperation: sentencing*

We have not come across any situations in which a court, when sentencing, that is when imposing a sentence (see paragraph 4.1), had to decide whether to apply an instrument that is in scope, let alone had to make a choice between the application of two or more of the instruments that are in scope.⁵¹⁸ In other words determining the sanction when the suspect has been found guilty does not seem to require cooperation with other Member States on the basis of those instruments.

But does this mean that future needs for cooperation with other Member States, i.e. needs that arise after the sentence has been imposed, do not affect the imposition of a sentence? We will go into this in the next subparagraph.

4.3.2 *Need for cooperation: executing a sentence*

So, the question is whether the court, when *sentencing*, turns a blind eye to a future need for cooperation with other Member States in the stage of *enforcing* the sentencing and the problems that may occur at that stage or does it take into account these future needs and problems. Does the court have the possibility and/or is it required to take into consideration, when sentencing, whether cooperation with other Member States is required and possible in order to enforce the sentence?

As outlined in chapter 3.1, in the Netherlands the Minister of Justice and Security is responsible for enforcing a sentence. The starting point is therefore that the court is responsible for sentencing and not responsible for enforcing the sentence. Consequently, the court is also not responsible for any choices to be made when enforcing the sentence, *e.g.* issuing a request for cooperation from another Member State.

Member States concerning the (non-)imposition of alternative sanctions and probation decisions. Her criticism, which is in itself correct, ignores that primary EU law (Art. 18 TFEU) already prohibits such unequal treatment irrespective of the purpose of FD 2008/947/JHA (see *supra*, main text).

⁵¹⁸ Interview with judge 1; interview with judge 2.

In dealing with this issue we will not go into problems related to the enforcement of a sentence without cross-border implications, *i.e.* the enforcement of a Dutch sentence in the Netherlands concerning a Dutch national or resident. In such cases there is no need for cross-border cooperation when enforcing the sentence and any problems in the enforcement of the sentence are therefore not relevant to our research. Against this background one can observe different approaches.

To begin with, it is not uncommon for the court to be unaware of the possibility that enforcing its sentence may require cooperation from other Member States. In that case, of course, it is also not aware of any problems that may arise in cooperating with other Member States for the purpose of enforcing the sentence.

With regard to courts that are aware of the possibility of the need for cooperation in order to enforce their sentences, different approaches can be observed.

The most extreme approach is the ‘we don’t care’ or ‘none of my business’ approach. When it comes to enforcement-issues with cross-border implications our hypothesis is that this approach, or at least an approach that comes close to it, is not uncommon.

One of the judges who was interviewed pointed out that in some cases the court imposes a serious sentence of imprisonment being aware that this sentence will probably never be executed because the necessary cross-border cooperation will not yield the desired result. This may be the case where the sentenced person is at large and has no fixed abode either in his own Member State or elsewhere in the Union.⁵¹⁹ In such a case the objective of the sentence is to prevent the sentenced person from returning to the Netherlands in the future.⁵²⁰ Apparently, the enforcement of the sentence is deemed less important.

At this point we would like to point out that this approach is not limited to cases with (possible) cross-border implications for executing sentences. Even in purely ‘national’ cases a sentencing judge may be aware of enforcement problems, *e.g.* due to a lack of resources in prisons or in the probation service, and nevertheless impose a sentence that is possibly or even

⁵¹⁹ Typical cases in this context are cases of human trafficking.

⁵²⁰ Interview with judge 1.

probably unenforceable.

A more moderate approach is that the sentencing judge, being aware of the possible needs for cooperation with other Member States, tries to take into consideration whether the sentence is enforceable at all when sentencing.

Accused persons who are nationals or residents of another Member State often also have some ties to the Netherlands resulting from work, family etc., although less ties than with their own Member State. In such circumstances, in most cases enforcing the sentence in the Member State of the sentenced person is the best option. In such cases a failure to transfer the sentence to the Member State of the sentenced person is less problematic than in situations in which the sentenced person has no ties to the Netherlands at all. After all, there is still the possibility to enforce the sentence in the Netherlands. So, being aware of possible problems in realising the best option, that is enforcing the sentence in the Member State of the sentenced person, the court may choose to take the risk, because there is an acceptable alternative.

In many cases, in particular in minor cases in which an accelerated procedure is applied, the procedure of transferring the enforcement of the sentence may take longer than the duration of the prison sentence imposed. In these cases, accused persons are often sentenced while still in pre-trial detention. Because the duration of the pre-trial detention is deducted from the duration of the prison sentence (pursuant to Article 27(1) of the Penal Code), transferring the enforcement of the (remaining part of the) sentence will be even more unfeasible. The court, even if considers that serving the sentence in another Member State would be the best option, nevertheless imposes a prison sentence of which the enforcement will not be transferred to the Member State of the sentenced person. This also holds true for cases in which the imposed sentence does not meet the threshold for transferring its enforcement to another Member State.

Even more moderate is the approach in which the court tries to facilitate the enforcement of the sentence by taking into account the possible need for cooperation with other Member States.⁵²¹

Illustrative is a case in which both the first instance court and the appeal court considered

⁵²¹ Interview with judge 1.

which measure involving deprivation of liberty should be imposed on an accused person who, at the time of committing the offence, could not be held criminally responsible by reasons of mental disease or defect. According to expert testimony, a return to his Member State (Italy) would reduce the risk of reoffending. The court of first instance imposed the measure of treatment in a psychiatric hospital for the duration of one year, after having previously contacted an Italian judge through the European Judicial Network to discuss the possibility of a transfer of such a measure. It assumed that the enforcement of this measure could and would be transferred to Italy on the basis of FD 2008/909/JJHA. The appeal court however considered that the most appropriate measure would be a suspended entrustment order (*'terbeschikkingstelling onder voorwaarden'*) (if imposed, the accused person would be set free under the obligation to comply with conditions aimed at reducing the danger he poses to the safety of others or the general safety of persons or property). During the appeal proceedings, the Dutch issuing authority was asked to state its opinion on the possibility of transferring such a measure to Italy. It concluded that the transfer was possible in principle, but was highly uncertain. According to the appeal court, this uncertainty could have a negative impact on the mental stability of the accused person. Therefore, the appeal court decided, like the first instance court, to impose the measure of treatment in a psychiatric hospital for the duration of one year, after which the accused person would return to Italy to undergo further treatment in a clinical setting, *i.e.* outside of the context of recognition of the Dutch measure. This is an example of how courts try to facilitate in an informal way, *i.e.* without using an instrument of cooperation, the enforcement of a sentence abroad.⁵²²

Of course, in many cases it is evident at the moment of sentencing that no cross-border cooperation is possible even if the sentenced person is a national or resident of another Member State, *e.g.* because the sentence does not meet the minimum threshold. However, we would like to point out that, even in these cases, there is a difference between a court that is not aware of this because it is unaware of possible cross-border implications at all and a court that is aware of these implications but draws the conclusion that no cross-border cooperation is possible in enforcing the sentence.

All these approaches have, of course, to fit into the legal framework: see chapter 4.1.

⁵²² District Court of Amsterdam, 19 September 2016, ECLI:NL:RBAMS:2016:5909; Court of Appeal of Amsterdam, 10 October 2018, ECLI:NL:GHAMS:2018:3636.

5. Miscellaneous: whereabouts unknown and *in absentia*

This Chapter is also an odd one out. It concerns stages in which cooperation is not sought or in which it is not necessary yet. When making decisions about going to trial and informing the suspect of the date and place the whereabouts of the accused may be unknown. When the whereabouts are known and he is abroad, whatever a Member State does may have consequences for asking for cooperation now or at a later stage. At the sentencing stage decisions will be made that subsequently will lead to a need for cooperation, either automatically or on the basis of a specific decision. As in the previous Chapter, the focus of this last one is on stages of criminal proceedings in which there is no need for judicial cooperation yet and, therefore, no need for the application of instruments yet: the stage of preparations for the trial and the sentencing stage (the determination by a court of the sentence to be imposed on an accused person who has been found guilty of the offence he was charged with).

The object of this chapter is to establish what decisions authorities take in seeking the whereabouts of the accused. Not knowing the whereabouts of the suspect is a problem, because it means that the authorities do not know what measures are possible and with whom cooperation must be sought. Do they ask for information from other states, do they introduce a Schengen-alert, do they issue an EAW or do they simply wait? There is very little known at this early stage and especially not on whether and if so, what instruments of cooperation are used.

Depending on national criminal procedure, a Member State may or may not have the possibility to conduct trials in the absence of the accused. It would be relevant to know to what extent judges consider the pros and cons of asking for cooperation when taking a decision on the summons of the accused as well as on whether or not to proceed to trial without the accused present.

At least two issues are of interest here.⁵²³

The summons to an accused abroad may be sent directly by mail without any assistance from the Member State in which the accused resides. It may also be sent with the assistance of its authorities. The former may be faster, the latter may give more certainty about whether the accused received the summons and wishes to be present at the trial. Is this a matter that is considered by courts? To what extent does the choice for one or the other relate to the (im)possibility the national system may have to conduct proceedings in the absence of the accused? Is it considered that if the accused is in the other Member State, whether a transfer of proceedings might be more appropriate in this case?

There is a follow-up question to that. When taking the decision to allow *in absentia* proceedings to be held, does the judge consider that the *in absentia* character of the proceedings may have consequences when later international cooperation is needed? For example: FD 2002/584/JHA applies other, more severe, conditions to such judgements than to other judgments.

⁵²³ We invite the NARs to identify and include other issues.

5.1 Introduction

As with Chapter 4, this chapter addresses another issue that, strictly speaking, is not in scope. Both chapters concern the questions whether national authorities, when taking decisions in criminal proceedings, recognise that those decisions may create the need for judicial cooperation and, if so, whether they take into consideration the (im)possibilities of such cooperation.

As we understand it, the Annotated Index identifies two areas of interest: decisions concerning persons whose whereabouts are unknown during the early stages of the pre-trial stage and decisions whether or not to proceed *in absentia* during the trial stage when the accused is not present but has a known address in another Member State.

5.2 Whereabouts unknown

With one exception, none of the interviewees had anything to say on this subject. The only interviewee who made remarks on this issue, a public prosecutor, did so from the perspective of the relationship between the EIO and the EAW.⁵²⁴ If the whereabouts of the suspect are unknown, it is not possible to issue an EIO whereas it is possible to issue an EAW in such circumstances.⁵²⁵ Of course, one could submit a mutual assistance request for establishing the whereabouts of a suspect, if it is known in which Member State he is present.⁵²⁶ Once the place of residence is established, one can issue an EIO. However, this requires two steps, whereas issuing an EAW is just one step. As for the first step: establishing the place of residence can be problematic as not all Member States have a central registration system of addresses.⁵²⁷ Moreover, the person concerned cannot be forced to cooperate when executing the investigative measure sought by the EIO.

5.3 *In absentia*

⁵²⁴ Interview with prosecutor 3.

⁵²⁵ An EIO must be directed against a specific Member State. Unlike FD 2002/584/JHA (Art. 9(2)), Directive 2014/41/EU does not provide for an alert to establish the whereabouts of the person concerned.

⁵²⁶ Article 34(1)(a) of Regulation (EU) 2018/1862 provides for an alert in the SIS for the purpose of communicating the place of residence or domicile of persons 'summoned or persons sought to be summoned to appear before the judicial authorities in connection with criminal proceedings in order to account for acts for which they are being prosecuted'. However this possibility is limited to persons who are (sought to be) *summoned* before judicial authorities.

⁵²⁷ Interview with prosecutor 3.

5.3.1 Legal framework

As discussed before, the Public Prosecution Service is responsible for the service of documents. If the accused person does not appear at trial,⁵²⁸ as a preliminary issue the trial court must first examine the validity of the summons, which includes the examination whether the summons was served in accordance with national law, and, if applicable, treaty law. If the trial court finds that the summons is valid, and the accused person is not represented by a lawyer mandated by the accused person, it must consider whether or not to proceed *in absentia*. This is a separate issue. When deciding this issue, the manner in which the summons was served is relevant: given the right to be present at the trial, the court must examine whether the manner in which the summons was served sufficiently guarantees that the accused is aware of the trial and whether it is necessary to adjourn the trial in order to summon the accused person again.

With regard to accused persons who have a known residence in another Member State, Article 36e(3) of the Code of Criminal Procedure stipulates that the summons shall be served by sending it to the addressee, either directly or by way of the competent foreign authority, and, if a treaty is applicable, in accordance with its provisions.

As to applicable treaties, Article 5 of the EU Convention on Mutual Assistance in Criminal Matters is relevant. Pursuant to Article 5(1), each Member State *shall send* ‘procedural documents intended for persons who are in the territory of another Member State to them directly by post’. A summons is such a procedural document (see *supra*, 2.2.1(b)(aa)). In accordance with Article 5(2), procedural documents may only be sent via the competent authorities of the requested Member State, *inter alia*, if ‘the address of the person for whom the document is intended is unknown or uncertain’ or ‘it has not been possible to serve the document by post’. Therefore, there is no duty, in general, to seek the assistance of the authorities of the Member State where the accused person has a known address.⁵²⁹ And seeking that assistance is only possible in the situations listed in Article 5(2).

⁵²⁹ HR, 11 June 2024, ECLI:NL:HR:2024:842, para 253.

Therefore, if the accused person has a known address in another Member State of the EU Article 36e(3) read in combination with Article 5(1) directs the public prosecutor to send the summons directly by post to that address,⁵³⁰ unless one of the situations of Article 5(2) is present and the public prosecutor decides to apply that provision.

The mere act of sending the summons directly by post (or by way of the competent foreign authority) constitutes a valid service of the summons.⁵³¹ Its validity does not depend on evidence that the accused person actually received the summons. Indeed, even if the summons is returned because it cannot not be delivered, the service of the summons is still valid.⁵³²

However, in the context of the question whether to proceed *in absentia* if the summons is valid and the accused does not appear at trial or is not represented by a mandated lawyer, the court must examine whether the manner in which the summons was served sufficiently guarantees that the accused person is aware of the proceedings, and whether it is necessary to adjourn the trial in order to summon the accused again (see *supra*).

In this respect, it is relevant whether the authorities were diligent in serving the summons and whether the accused person was diligent in receiving the information that was addressed to him. Diligence on the part of the authorities requires that, if the summons was returned as undeliverable, they must try to reach the accused by having recourse to Article 5(2) of the convention. The court may only rely on the presumption that an accused person who does not appear at trial has voluntarily waived his right to be present, if the summons has been sent to him in accordance with Article 5(2) or if it establishes that the accused has otherwise been informed about or is actually aware of the trial. Therefore, in the context of the validity of the summons, there is no duty to apply Article 5(2), whereas in the context of whether or not to proceed *in absentia* there is.

5.3.2 Practice

⁵³⁰ Thus avoiding unnecessary demands on the available resources in the Member States to render mutual assistance: opinion of AG Harteveld, 28 March 2023, ECLI:NL:PHR:2023:302, para 3.11.

⁵³¹ HR, 12 March 2002, ECLI:NL:HR:2002:AD5163, para 3.19.

⁵³² HR, 11 June 2024, ECLI:NL:HR:2024:842, para 24-2.5.2.

The idea of anticipating the (im)possibilities of judicial cooperation with regard to *in absentia* convictions when confronted with an accused person who does not appear at trial and who has a known address in another Member State does not seem to resonate with the judges who were interviewed. None of them mentioned anticipating those (im)possibilities as something they usually do or would consider doing in the future. However, this is not because they adhere to the ‘we don’t care’ or ‘none of our business’ approach identified in Chapter 4. It is simply that they seem to view the issue not from the perspective of future difficulties in enforcing an *in absentia* conviction, but rather from the perspective of ensuring the accused person’s right to be present at trial. Indeed, the judges said that, depending on the circumstances of the case,⁵³³ they would probably not be satisfied with a summons that is sent directly to the address of the accused person without any indication that he actually received the summons.

⁵³³ *E.g.* the severity of the offences or whether or not the lawyer argued for an adjournment of the trial.

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