Extradition and the European Arrest Warrant in the Netherlands

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I. Introduction

About ten years ago, the Netherlands changed its extradition procedure governing the relationship with other EU Member States. Since 11 May 2004, extradition with other EU Member States is regulated under the Surrender of Persons Act (Overleveringswet).[1] Since that date, requests for extradition by other EU Member States that have implemented the Framework Decision on the European Arrest Warrant[2] fall under a specific structure that is different from the classic structure laid down in the Dutch Extradition Act (Uitleveringswet).[3] Under this classic structure, a request for extradition is dealt with by the Dutch Minister of Safety and Justice. The request can only be granted if it refers to criminal acts that have been punished with a minimum of four months in the requesting state or that have given probable cause for criminal investigation, based on suspicion of criminal acts that may be punished with a minimum of twelve months according to the law in the requesting state as well as according to Dutch law (double criminality). In addition, the request may be denied if there are certain grounds for refusal such as an existing death penalty in the requesting state for the criminal acts referred to in the request, discrimination, *ne bis in idem*, or interference with an ongoing Dutch criminal investigation. These grounds for refusal are reviewed by the Court of Justice, in appeal by the High Court, then by the Minister of Safety and Justice, and possibly by the judge in interlocutory proceedings. This review in four instances reflects the protection of the legal rights of the requested person, but it is obvious that the extradition procedure as a whole can take many years. This observation is also at the core of the introduction of the Framework Decision on the European Arrest Warrant.[4] The objective of this decision is to simplify and speed up the procedure by replacing complete political and administrative phases in the classic extradition procedure with a judicial mechanism. Within this mechanism, the European Arrest Warrant is the basic instrument requiring each executing national judicial authority to recognize – with a minimum of formalities – requests for the surrender of a person made by the judicial authority of another EU Member State. This executing national authority must take a final decision on execution of the European Arrest Warrant no later than 60 days after the arrest of the person mentioned in the warrant. To ensure the implementation of this new method of extradition in the EU, the Dutch government has replaced the Uitleveringswet by the Overleveringswet. Since then, the Uitleveringswet is only applicable in extradition procedures with states outside the European Union. According to the Overleveringswet, the executing judicial authority is the Extradition Chamber of the Court of Justice in Amsterdam. Because of the 60-day time limit, the decision of this court is final and not subject to review. There is a possibility to appeal to the High Court in cases in which questions of law are at stake, but the decision of the High Court has no direct effect on the final decision of the Court of Justice Amsterdam. During the first ten years of the Overleveringswet, there have been many rulings on the implementation of the European Arrest Warrant in the Netherlands. In this contribution, the focus will be on the issues that have been dealt with in these rulings.

II. Implementation under the Overleveringswet

Because the Framework Decision on the European Arrest Warrant is not self-executing, the extradition of persons by the Netherlands to other EU Member States is regulated by the Overleveringswet. And because the framework decision has replaced the European Convention on Extradition[5] and the Benelux Treaty on Extradition,[6] the extradition of persons by the Netherlands to other EU Member States is regulated exclusively by the Overleveringswet.[7] According to the Overleveringswet, the issued European Arrest Warrant is dealt with by the receiving Dutch public prosecutor. The person referred to in the warrant can agree with his immediate surrender to the issuing state. If he does not agree with this surrender, the public prosecutor requests his surrender before the Court of Justice Amsterdam within three days following the receipt of the warrant. There is no sanction if this period is exceeded, but the request for surrender may be inadmissible if

a period of two years has passed since receipt of the warrant.[8] The court decides whether or not the surrender should take place within sixty days after the apprehension of the person referred to in the warrant (Arts. 39 par.1, 23 par. 2 and 22 par. 1 Overleveringswet). In its decision, the court is bound by the general objectives of the Framework Decision on the European Arrest Warrant, which means that its decision should conform with these objectives as much as possible.[9] This means that each European Arrest Warrant that meets the required standards of the framework decision, does not give rise to any grounds for refusal (see hereafter 4.-6. below), and leads to the surrender of the person referred to in the warrant. These required standards are such that the warrant contains the information on the identity of the person for whom surrender is requested, the identity of the issuing judicial authority, and the final decision that is at the core of the warrant, including the sanction, the qualification, and the circumstances of the criminal acts mentioned in the warrant (Art. 2 Overleveringswet). In short, the European Arrest Warrant is dealt with by the public prosecutor and by the Court of Justice Amsterdam in case the person does not agree with his immediate surrender to the issuing state. Unlike the procedure under the Uitleveringswet, the Dutch Minister of Safety and Justice has no direct influence on the surrender of persons on the basis of a European Arrest Warrant. The public prosecutor also plays a central role in the reverse situation in which the Netherlands request the surrender of a person by means of a European Arrest Warrant. He is the judicial authority that issues a European Arrest Warrant, and he can request that the apprehension of the person referred to in the warrant involves the seizure of (his) goods, the interrogation of this person in his presence by the competent judicial authorities in the state dealing with the warrant, and the temporary transfer of this person to the Netherlands in order to give that person the opportunity to make statements. He may also request consent for the transit of the person referred to in the European Arrest Warrant to a third EU Member State (Arts. 44 and 55-58 Overleveringswet). After the apprehension of a person referred to in the European Arrest Warrant, the decision on pre-trial detention is taken by the executing judicial authority (Art. 12 of the Framework Decision on the European Arrest Warrant). Since it has been left open what is meant by “judicial authority,” it is up to the Member States to arrange which authority is in charge of this decision according to their own national law. As a consequence, the Dutch legislator has been entitled to arrange this decision to be taken by the public prosecutor who is not a part of the judiciary according to Dutch law.[10] The public prosecutor may apprehend the person referred to in the European Arrest Warrant and order the pre-trail detention of this person for six days and for the period during which the trial proceedings are conducted at the Court of Justice Amsterdam. The public prosecutor can also order the seizure of goods of the apprehended person, preparation of the interrogation of this person by the officials that issued the European Arrest Warrant, and the temporary transfer of this person to the state that issued this warrant in order to give that person the opportunity to make statements. In addition, the public prosecutor can give his consent to the transit of a person referred to in the European Arrest Warrant on behalf of a third EU Member State (Arts. 17, 21 and 49-54 Overleveringswet). As the public prosecutor is the central judicial authority dealing with European Arrest Warrants, he is also the deciding official in cases in which warrants are issued by several Member States for the surrender of a certain person. The public prosecutor decides which warrant will be treated first on the basis of a fair administration of justice (Art. 26 par. 3 Overleveringswet).[11]

III. The Criminal Acts in the Framework Decision

The surrender of the person referred to in the European Arrest Warrant can be granted if it involves a criminal act listed in Art. 2 of the Framework Decision on the European Arrest Warrant that may be sentenced with imprisonment of at least three years, according to the criminal law of the issuing state. This list constitutes a breach of the principle of double criminality that was/is significant for the classic extradition structure. The choice of the 32 criminal acts listed in Art. 2 of the decision is based on the principle of mutual recognition in combination with the high level of trust and solidarity between the Member States of the European Union. This justifies the abolition of the principle of double criminality for these listed acts.[12] Besides, looking at the

contents of this list, it seems safe to assume that the criminal acts therein can be punished with at least three years imprisonment according to the criminal law provisions in all EU Member States. This means that the abolishment of the double criminality principle for these criminal acts can be seen as an obvious step because the use of this principle by the judicial authorities in the Member States dealing with a European arrest warrant would commonly lead to the conclusion that the criminal acts referred to in the warrant are in line with this principle. Apart from the listed acts, surrender of a person referred to in a European Arrest Warrant can be granted if the criminal act has already been sentenced in the issuing state with a minimum of four months imprisonment. According to Art. 26 of the Framework Decision on the European Arrest Warrant the issuing state – after surrender of the person referred to in the warrant – has the obligation to lower the length of the sentence by any period spend in pre-trail detention because of the issuing of this warrant. Also, surrender can be granted if the warrant involves a criminal act that, according to the law of the issuing state as well as that of the Netherlands, may be sentenced with a period of twelve months or more (Arts. 2 par. 1 and 7 par. 1 Overleveringswet). For these criminal acts, the principle of double criminality still applies. Problems do arise, however, when the national criminal provision is not fully compatible with the terms and qualification of a certain listed criminal act. If the facts of a certain case only refer to the possession of a vast amount of money and the person referred to in the European Arrest Warrant can give no indication of its origin, it is not clear that the criminal act constituted money laundering (number 9 on the list). According to the Court of Justice Amsterdam, money laundering includes the knowledge on the part of the perpetrator of the illegal origin of the money. On the basis of the warrant, this required knowledge was lacking and, as a consequence, the surrender of the person referred to in the warrant was denied because the warrant contained neither a listed criminal act nor any criminal act that was punishable according to Dutch criminal law.[13] Therefore, the court found it necessary that the warrant include the text of the relevant criminal provisions in the issuing state.[14] It seems, however, that the approach of the Court of Justice Amsterdam has changed in recent years. The new approach of the court seems to be more Europhile in the sense that it no longer investigates in detail anymore the contents of a European Arrest Warrant. That means that the claim of the defense that the qualification of the criminal acts mentioned in the warrant are unjustified can only have success in extraordinary circumstances.[15] This new approach seems to be more in line with the relevant provisions of the Framework Decision on the European Arrest Warrant. The Court of Justice of the EU as well as the High Court have stressed that the Overleveringswet should be implemented in light of the meaning and objective of this framework decision.[16] Neither Art. 2 nor Art. 8 of this framework decision prescribe that the European Arrest Warrant should contain the contents of the relevant criminal provisions of the issuing state. This promotes the objective of the decision, which is the result of a high degree of trust between the Member States that surrender of a person referred to in the European Arrest Warrant should be possible without complications and loss of time. Therefore, the opinion that the warrant should contain the contents of the relevant legal provisions of the issuing state is unjustified.[17]

IV. Grounds for Refusal and the ECHR

As a general rule, the surrender of a person referred to in a European Arrest Warrant meeting the standards of the Framework Decision on the European Arrest Warrant is granted, except in cases where there are grounds for refusal. These grounds may involve a situation in which the criminal act has already been prosecuted in the Netherlands, if there is a case of *ne bis in idem*, if the criminal act mentioned in the warrant gives rise to immunity from prosecution through lapse of time,[18] if the person referred to in the European Arrest Warrant was younger than twelve years of age at the time of the criminal act, if this person claims to be innocent of the criminal acts mentioned in the warrant and this claim is self-evident, or if surrender of this person would be a flagrant denial of justice under the European Convention on Human Rights (ECHR) (Arts. 9-11 and 28 par. 2 Overleveringswet). Since the implementation of the Overleveringswet, the last two grounds for refusal have been the subject of review several times. According to the European Court of

Justice, Art. 6 par. 1 ECHR is not applicable to the surrender of a person referred to in a European Arrest Warrant because it is not a criminal charge as meant in Art. 6 ECHR. The implementation of this warrant has the objective of bringing the suspect or convicted person before the competent authorities of the issuing state. The judicial authority that receives the warrant only investigates if the warrant complies with its own relevant legislation and is only entitled to refuse the surrender on grounds laid down in this national legislation.[19] Nevertheless, there are two situations in which Art. 6 par. 1 ECHR can be of relevance to the surrender of a person referred to in a European Arrest Warrant: first, the surrender carries the risk of a flagrant denial of justice of the right to a fair trial and, secondly, the surrender has the objective of implementing a sentence in the issuing state. In the latter case, it is necessary that the surrendered person has the right to a new trial in the issuing state.[20] In several cases under the Overleveringswet, the right to be tried within a reasonable time as guaranteed in Art. 6 par. 1 ECHR has been at stake. According to the Court of Justice Amsterdam, this right is not applicable if the offender referred to in the European Arrest Warrant has already been sentenced in the issuing state with a minimum of four months imprisonment and the issuing state has not implemented this sentence for a period of four years. Also, the right to a fair and public hearing according to Art. 6 par. 1 ECHR does not include the right of implementation of a sentence within a certain limited time. As long as the lack of implementation of the sentence does not give rise to immunity through lapse of time, the surrender of the person referred to in the warrant should be granted. [21] If, however, the issuing state did not undertake any investigative or prosecutorial action for a period of more than seven years, the surrender of the person referred to in the European Arrest Warrant is contrary to the right to be tried within a reasonable time as guaranteed in Art. 6 par. 1 ECHR.[22] The same applies for the issuing state where there is not an "effective remedy" against the claim of the defense that, after surrender, the right to be tried within a reasonable time will be frustrated.[23] It appears that this approach has been reviewed recently by the Court of Justice Amsterdam itself. On the basis of rulings of the European Court of Justice, the Court of Justice Amsterdam bears in mind the fact that the issuing state is a member to the ECHR and that this fact should have implications for the judgment of the threat of a flagrant denial of justice. This means that the postponement of prosecution in the issuing state as such is not contrary to the right to a fair trial in the issuing state. And if the person referred to in the European Arrest Warrant claims otherwise, he is entitled to bring his claim before the competent authorities of the issuing state and ultimately the European Court of Justice.[24]

V. Claim of Innocence

As underlined by the Framework Decision on the European Arrest Warrant, the principle of trust between the Member States means that the person referred to in the European Arrest Warrant is suspected of the criminal acts mentioned in the warrant and that this suspicion is justified. This principle rules out the need for an evaluation of this suspicion. Nevertheless, the Overleveringswet recognizes the grounds for refusal of the surrender of the person referred to in the European Arrest Warrant if this person claims to be innocent of these acts and this claim is self-evident. This ground for refusal of the surrender seems questionable as it is not foreseen in the framework decision and therefore it can be argued – as has been done by the European Commission – that this ground for refusal is contrary to the framework decision, since it requires an examination of the substantive case, and it is also contrary to the principle of trust between the Member States.[25] This argument is also supported in the Netherlands itself because, basically, this ground for refusal is contrary to the idea of mutual trust and mutual recognition of judicial decisions in the European Union.[26] However, it should be stressed that this ground for refusal is designed for cases in which there is an obvious alibi. The case law makes clear that this ground for refusal can only be relevant if the physical absence at the scene of the crime(s) of the person referred to in the European Arrest Warrant is obvious. Simply denying the criminal acts referred to in the warrant is not sufficient; there can only be a convincing alibi if the person was hospitalized or in pre-trial detention during these acts and this can be immediately proven beyond any doubt.[27] This claim of innocence should be put forth during trial proceedings before the Court of Justice

Amsterdam (Art. 26 par. 4 Overleveringswet). If this claim is convincing, there can be reason for further investigation or refusal of the surrender of the person referred to in the warrant.[28] Within the framework of this claim, however, there is no room to request the issuing state for further information on the criminal acts mentioned in the European Arrest Warrant.[29] Furthermore, Art. 26 par. 4 Overleveringswet is not in conflict with Art. 6 ECHR because it does not involve a criminal charge.[30]

VI. Optional Grounds for Refusal

In addition, the European Arrest Warrant may be refused if the warrant involves the implementation of a sentence in the issuing state and the person referred to in the warrant has not been able to exercise his defense rights during trial proceedings in the issuing state (Art. 12 Overleveringswet). This ground for refusal is denied if the person referred to in the European Arrest Warrant has been informed about the date and place of trial proceedings in the issuing state and this person has not appeared during these proceedings.[31] Also, refusal is possible if the criminal act has been committed within the jurisdiction of the Netherlands or outside the jurisdiction of the issuing state if, in a similar case, the Netherlands would not have jurisdiction. If the public prosecutor decides not to claim the surrender of this person, the Court of Justice Amsterdam reviews whether this decision has been taken on reasonable grounds (Art. 13 Overleveringswet). At first, the Court of Justice Amsterdam took the stance that the public prosecutor takes this decision without any underlying criminal policy, which meant that the court could only review this decision if the public prosecutor is expected to have an aggravated duty to explain why he has decided to give up this ground for refusal.[32] And in this review, grounds of humanity could lead to the refusal of the surrender of the person referred to in the European Arrest Warrant. However, this approach of the Court of Justice Amsterdam has been waived by the High Court on several occasions. The High Court has made it clear that the Court of Justice Amsterdam, when reviewing the decision of the public prosecutor under Art. 13 Overleveringswet, is only entitled to a test of reasonableness of this decision. This means that the surrender of the person referred to in the European Arrest Warrant cannot be judged on the basis of aggravated duty in order for the public prosecutor to explain why he has claimed to give up this ground for refusal, and it cannot be refused on humanitarian grounds.[33] Besides, the Court of Justice Amsterdam has taken the position that the surrender of a person referred to in the European Arrest Warrant must be postponed awaiting the decision of the Court of Justice on a notice of objection from this person against the decision of the public prosecutor not to prosecute the criminal act mentioned in the warrant.[34] This approach seems questionable. The procedure after the notice of objection regarding the decision of whether or not to surrender lacks any legal basis in the Overleveringswet and is contrary to the sixty-day limitation of the Framework Decision on the European Arrest Warrant and the choice of the Dutch legislator for judicial review of a claim to surrender a person at one instance only.[35]

VII. Conditions for Surrender and Detention

The surrender of the person referred to in the European Arrest Warrant takes place under the condition that this person will only be prosecuted or punished for criminal actions mentioned in the warrant. If this person is a Dutch national or a foreigner with permanent resident status in the Netherlands, the surrender will only be for the benefit of criminal investigations and the subsequent trial in the issuing state. The surrender of this person is granted under the condition that, if this trial leads to the implementation of a sentence involving imprisonment, this person will be re-surrendered to the Netherlands in order to serve this prison sentence (Arts. 6 and 14 Overleveringswet). If the court has decided that the person referred to in the warrant can be surrendered, this person can be held in detention for ten days until the actual surrender takes place. This period can be prolonged each time by a period of 30 days (Arts. 34 and 35 Overleveringswet). This detention cannot be suspended unless there is a breach of the rights to freedom as guaranteed in Art. 5

ECHR. Such a breach exists if the issuing state is not able to point out when trial proceedings in the issuing state will start and if this person had already been undergoing detention before surrender for a period of eleven to even twenty months.[36] If the surrender of the person referred to in the European Arrest Warrant is refused and he has undergone detention because of this warrant, he can claim for damages at the Court of Justice Amsterdam (Art. 67 par. 1 Overleveringswet). This claim does not include the situation in which detention has been exercised and the issuing state has withdrawn the warrant.[37]

VIII. Conclusion

Several issues have been reviewed since the implementation of the Overleveringswet. Much can be learned from these reviews because they show how the judiciary in the Netherlands has interpreted provisions of the Overleveringswet that needed further clarification. Also, in the rulings of the Court of Justice Amsterdam, a development can be seen in the review of certain issues concerning double criminality, the claim that surrender would be a flagrant denial of justice under the ECHR, and the decision of the public prosecutor under Art. 13 Overleveringswet. In the early years of implementation of the Overleveringswet, there seemed to be a tendency to stress the national Dutch approach towards these issues. In more recent years, the reviews of these issues appear to have become more Europhile, following the approaches of both European judges and the High Court.

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1. Law of 29 April, Stb. 2004, 195.↩
2. High Court 9 June 2009, NBStraf 2009, 214, ECLI: BH9946.↩
3. Law of 9 March 1967, Stb. 1967, 139.↩
4. Framework Decision 2002/584/JBZ (PbEG 2002, L 190).↩
5. Paris 13 December 1957.↩
6. Brussels 27 June 1962.↩
7. Court of Justice Amsterdam 13 September 2005, LJN: AU2813.↩
8. Court of Justice Amsterdam 17 October 2006, NBStraf 2007, 311, LJN: BD2936.↩
9. Court of Justice EG 16 June 2005, C-105/03 (Pupino-case).↩
10. Court of Justice Amsterdam 3 September 2004, NJ (Dutch Jurisprudence) 2005, 156, LJN: AS3861.↩
11. Court of Justice Amsterdam 14 January 2005, NJ 2005, 157, LJN: AS2613.↩
12. Court of Justice EG 3 May 2007, C-303/05, NJ 2007, 619, LJN: BA8983.↩
13. Court of Justice Amsterdam 1 March 2005, NJ 2005, 220, LJN: AS8842.↩
14. Court of Justice Amsterdam 4 March 2005, NJ 2005, 475, LJN: AU0467.↩
15. Court of Justice Amsterdam 19 November 2011, ECLI: BU2954.↩
16. Court of Justice EG 16 June 2005, Case-105/03, NJ 2006, 500, LJN: AU2335.↩
17. High Court 8 July 2008, NJ 2008, 594, ECLI: BD2447.↩
18. This lapse of time may be interrupted but only if it involves the interruption of the prosecution according to the law of the issuing state and not – by transformation – the law of the Netherlands: Court of Justice Amsterdam 24 October 2006, NBStraf 2006, 433.↩
19. European Court of Justice 7 October 2008, NJ 2009, 523, LJN: BI4795.↩
20. European Court of Justice 4 October 2007, appl. No. 12049/06, par. 2.↩
21. Court of Justice Amsterdam 16 July 2004, NJ 2004, 563, LJN: AQ6071.↩
22. Court of Justice Amsterdam 1 July 2005, NJ 2005, 341, LJN: AT8580.↩
23. Court of Justice Amsterdam 4 January 2006, NJFS 2006, 55, LJN: AU9280 and 12 September 2006, LJN: AY8670.↩
24. Court of Justice Amsterdam 19 October 2011, ECLI: BU2954.↩
25. Brussels 23 February 2005, COM(2005)63 final, p. 8.↩
26. Hanneke Sanders, Het Europees aanhoudingsbevel, Antwerpen: Intersentia 2007, p. 97.↩
27. Court of Justice Amsterdam 10 February 2006, LJN: AV3966 and 24 April 2009, LJN: BJ0726.↩
28. Court of Justice Amsterdam 6 April 2007, NBStraf 2007, 268.↩
29. Court of Justice Amsterdam 20 January 2006, NJFS 2006, 71, LJN: AV0496.↩
30. Court of Justice Amsterdam 25 October 2005, NJFS 2006, 41, LJN: AU4909.↩
31. Court of Justice Amsterdam 16 July 2004, NJ 2004, 563, LJN: AQ6071.↩
32. Court of Justice Amsterdam 1 April 2005, NJ 2005, 278, LJN: AT3380.↩
33. High Court 28 November 2006, NJ 2007, 487, NJ 2007, 488 and 2007, 489.↩
34. Court of Justice Amsterdam 18 August 2006, NBStraf 2006, 348.↩

35. Andre Klip, Explanatory note under High Court 28 November 2006, NJ 2007, 489.↩
36. Court of Justice Amsterdam 14 June 2012, NJFS 2012, 190, LJN: BX7057 and 29 August 2011, NJFS 2011, 235, LJN: BR7056.↩
37. Court of Justice Amsterdam 7 November 2012, ECLI: BY3282, BY 3290 and BY4702.↩

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