This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

DT 2.1

DUTCH NATIONAL REPORT

Grant Agreement nº:	<101089634>
Project Acronym:	FACILEX
Project Title:	Facilitating mutual recognition: Analytics and Capacity building Information LEgal eXplainable tool to strengthen cooperation in the criminal matter
Website:	FACILEX - Facilitating mutual recognition: Analytics and Capacity building Information LEgal eXplainable tool to strengthen cooperation in the criminal matter (unibo.it)
Contractual delivery date:	M20
Contributing WP	WP2
Dissemination level:	OPEN ACCESS
Deliverable leader:	UNIBO
Contributors:	UM

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Document History

Version	Date	Author	Partner	Description
1.0		Camila Ugaz Heudebert Teddy Zwackhalen Gijs van Dijck Menno Dolman	UM	First draft
2.0		Camila Ugaz Heudebert Teddy Zwackhalen Gijs van Dijck Menno Dolman	UM	Second draft
3.0		Nicolò Gibelli/Giulia Lasagni/Antonio Pugliese	UNIBO	Feedback
6.0		Camila Ugaz Heudebert Teddy Zwackhalen Gijs van Dijck Menno Dolman	UM	Final survey

1 Contributors

Partner	Name	Role	Contribution
UM	Camila Ugaz Heudebert	Contributor	Author

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

UM	Teddy Zwackhalen	Contributor	Author
UM	Gijs van Dijck	Contributor	Author
UM	Menno Dolman	Contributor	Feedback
UNIBO	Nicolò Gibelli/Antonio Pugliese	Reviewer	Feedback
UNIBO	Giulia Lasagni	Reviewer	Feedback

On behalf of the UM, the present deliverable has been drafted by Camila Ugaz Heudebert Teddy Zwackhalen, Gijs van Dijck, Menno Dolman.

2 Table of Contents

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

3 List of Acronyms

CCP Criminal Code of Procedure
CFR Charter of Fundamental Rights of the European Union
CISA Convention Implementing the Schengen Agreement
CJEU Court of Justice of the European Union
CPT European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
EAW European Arrest Warrant
ECHR European Convention on Human Rights
ECtHR European Court of Human Rights
EPPO European Public Prosecutor's Office
EU European Union
FD Framework Decision
ICCPR International Covenant on Civil and Political Rights
SPA Surrender of Persons Act
UNCRC United Nations Convention on the Rights of the Child

4 Executive Summary

This report aims to analyze the implementation of three cooperation instruments based on the principle of mutual recognition – the European Arrest Warrant (EAW), the European Investigation Order (EIO) and the freezing and confiscation order – in Dutch domestic law. The transposition measures adopted by the legislature, their evolution over time and, most especially, any critical issues emerging from the comparison with European legislation will then be examined. From this perspective, it is necessary to examine how, especially in cases of divergence between (national and European) legislation, the effectiveness of judicial cooperation can equally be ensured and this will be addressed in the report by following up on the implementation and application of the three judicial cooperation instruments, including through an in-depth look at some case law. We developed a natural language processing (NLP) pipeline to identify relevant case-law for a given input case summary, with the goal of enhancing legal research. This system processes case summaries from multiple EU Member States and retrieves the most similar case summaries based on the input summary provided.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

5 The implementation of criminal mutual recognition instruments in the Netherlands

5.1 Introduction

This country report provides a comprehensive overview of the transposition and application of the EAW FD, the EIO D, and the Regulation 1805/2018 in The Netherlands. Below, the EAW FD (*section 2*), the EIO D (*section 3*), and the Regulation 1805/2018 (*section 4*) will be discussed. The analysis brings together and builds on previous work on the EAW FD[541], the EIO D[542], and the Regulation 1805/2018[543] as well as insights from case law. For each of the three instruments, the implementation, scope and issuance, execution and cooperation between judicial authorities, fundamental rights, grounds for non-recognition and non-execution, and remedies are discussed. The analysis is followed by concluding

[541] R Da Silva Athayde Barbosa, V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak, *European Arrest Warrant: Practice in Greece*, *The Netherlands and Poland* (Boom Juridisch 2022); E G Kurtovic, P M Langbroek, 'The EAW in The Netherlands' in B de Santos Sousa (eds), *The European Arrest warrant in law and in practice: A comparative study for the consolidation of the European Law-enforcement Area* (Coimbra 2010); S Buisman, 'First Periodic Country Report: The Netherlands' https://stream-eaw.eu/wp-content/uploads/2022/01/STREAM-Country-Report_The-Netherlands.pdf accessed 17 July 2024; V H Glerum, N Rozemond, 'Overlevering', in R van Elst, E van Sliedregt (eds.), *Handboek Internationaal strafrecht. Internationaal en Europees strafrecht vanuit Nederlands perspectief* (3rd edn, Wolters Kluwer 2022); W R Jonk, R Malewicz, 'Het Europees arrestatiebevel' [2020] 6 TvBS&H 324; A M Timorason, R Malewicz, 'De evolutie van het begrip, rechterlijke autoriteit'' in 'de overleveringsprocedure' [2019] 102 TPWS 262; V Glerum and K Rozemond, 'Overlevering van Nederlanders: copernicaanse revolutie of uitlevering in overgang?' (2008) 58 DD; J W van der Hulst, 'De uitleg van het begrip rechterlijke autoriteit bij de uitvaardiging van een Europees arrestatiebevel' [2019] 5-6 NtEr 158; H Sanders, 'Overlevering' [2012] 3 DD 247; V Glerum, K Rozemond, 'Een evaluatie van de Nederlandse Overleveringswet' [2006] 9 DD 187.

[542] W Geelhoed, J W Ouwerkerk, 'Wederzijdse rechtshulp in strafzaken 2.0' [2017] NtEr 16; T M de Groot, P van Glabbeek, 'Het Europees onderzoeksbevel: vergaande Europese samenwerking op basis van het beginsel van wederzijdse erkenning' [2022] 3 NTS 140; J van Eekelen, A Schild, 'Rechtsbescherming na beslag gelegd ter uitvoering van een Europees Onderzoeksbevel' [2018] NJB 2153; M van Noorloos, J Ouwerkerk, P Verrest, 'Kroniek van het Europees strafrecht' [2023] 33 NJB 2917; P Geelhoed, J Ouwerkerk, 'The role and position of public prosecutors in the application of the European Investigation Order: A view from The Netherlands', in M Luchtman, F de Jong, F Kristen, K Ligeti, J Lindeman, S Tosza, *Of swords and shields: due process and crime control in times of globalization* (Eleven International Publishing 2023); B de Jonge, 'Grensoverschrijdende misdaad. Wanneer moeten opsporing en vervolging de grens over' [2022] 3 Boom Strafblad 78.

[543] S Bollens, D van Daele, 'De wederzijdse erkenning van confiscatiebevelen: de innovatieve aspecten van Verordening (EU) 2018/1805' [2022] 3 Boom Strafblad 98; M van Noorloos, J Ouwerkerk, P Verrest, 'Kroniek van het Europees strafrecht' [2023] 33 NJB 2917.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

remarks (*section 5*). This chapter will reveal that compliance with the three instruments has incrementally increased.

5.2 The implementation of Framework decision 2002/584

The EAW FD was first transposed in The Netherlands in 2004 through the *Surrender of Persons Act* (SPA) (*Overleveringswet*)[544][545].

Since its entry into force in 2004, the SPA has been substantively amended several times due to EU legislation strengthening the rights of suspects. The most relevant amendments occurred in response to rulings by the CJEU: the first through emergency legislation in 2019, and the second with more comprehensive amendments (re-implementation) in 2021.

The Act of 10 July 2019 amended the SPA in response to the CJEU's judgment in the joined cases *C-508/18 OG* and *C-82/19 PPU PI*[546]. Prior to this amendment, the Amsterdam public prosecutor was authorized to both issue and execute an EAW under Arts 1(f)[547] and Chapter III[548] of the SPA. The amendment modified these provisions to comply with the CJEU ruling, which emphasized that a prosecutor must be able to exercise their responsibilities objectively and free from external influence, particularly from the executive

[544] Overleveringswet 2004. A full-text version can be accessed at https://wetten.overheid.nl/BWBR0016664/.
[545] The SPA is divided into five chapters: Chapter I (Arts 1-4) covers general provisions, key terms, principles, and the law's applicability concerning the EAW. Chapter II (Arts 5-43a) outlines procedures for handling EAWs received by The Netherlands, judicial review processes, and the rights of individuals, including legal representation and appeals. Chapter III (Arts 44-48a) details the issuance of EAWs by Dutch authorities to other Member States of the European Union, securing surrenders, and cooperation mechanisms. Chapter IV (Arts 49-58) addresses broader legal cooperation in criminal matters beyond the scope of the EAW, such as the rules for transferring criminal proceedings between The Netherlands and other jurisdictions, and the conditions for executing foreign judicial decisions in The Netherlands. Chapter V (Arts 59-76) includes provisions for pending cases, amendments, repeals, and implementation details. Additionally, there are two appendices which provide standardized forms and supplementary guidelines to apply the law.
[546] Cases C-508/18 and C-82/19 PPU *Public Prosecutor's Office in Lübeck v OG*, *Public Prosecutor's Office in Zwickau v PI* EU:C:2019:456.
[547] Art 1(f) before 2019 amendment: "In this Act the following terms shall have the following meanings: (…) f. Examining magistrate: the examining magistrate, responsible for the handling of criminal cases, at the District Court of Amsterdam."
[548] Before the 2019 amendment, Chapter II of the Surrender of Persons Act, encompassing Arts 44 to 48b, governed the process of surrender to The Netherlands and designated the public prosecutor as the issuing judicial authority for a European Arrest Warrant (EAW). For instance, Art 44 stated: "Any public prosecutor in The Netherlands can act as an issuing judicial authority."

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

branch. In the Dutch case, following the CJEU ruling in *Case C-510/19*[549], it was determined that the Amsterdam public prosecutors do not meet these requirements, as they may receive instructions from the Minister of Justice and Security in exercising their decision-making powers.

The April 1, 2021, amendments to the SPA encompassed several significant changes, with particular emphasis on those made to Art 6, which regulates the procedures and conditions under which persons may be surrendered from one jurisdiction to another for the purposes of a criminal investigation against them or the enforcement of sentences. Notably, the requirement for a Dutch residence permit of unlimited duration to qualify as a national for the purposes of the SPA was replaced with a mandate for five-year continuous residence. Furthermore, Art 6a was introduced, granting judicial authorities the discretion in assessing refusal grounds, considering factors like reintegration. Moreover, these amendments introduced provisions allowing for the postponement of surrender in cases of fundamental rights violations, with surrender being refused if risks are not mitigated, as outlined in Art 11 of the SPA.

Nevertheless, in June 2021 the European Commission issued a letter of formal notice to The Netherlands, stating that it "incorrectly transposed the provisions related to, amongst others, the obligation to execute an EAW, the grounds for non-execution, the competent executing judicial authority, and the time-limits for surrender of the person"[550]. This notice has led to draft legislation in June 2024, which addresses the issues pointed out by the European Commission[551]. At the time of the writing of this chapter, the draft is under consideration at the senate and therefore in the final stages of the legislative process. The proposed modifications will be detailed in their respective sections.

5.2.1 Scope

The issuing and scope of the EAW FD in the Netherlands continues to evolve in line with both national reforms and EU obligations. An EAW can be issued for two main purposes: to prosecute a person or to execute a custodial sentence, as set out in Article 2(1) in conjunction with Article 7(1) of the SPA. These provisions reflect amendments prompted by the Amsterdam District Court (Rechtbank Amsterdam), which corrected earlier problems

[549] See Case C-510/19 *Belgium v AZ* EU:C:2020:953.
[550] INFR (2021) 2004, 9 June 2021.
[551] Kamerstukken I 2023-2024, 36491, A.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

with the transposition of the EAW FD[552]. Designed to deal with serious offences, the EAW FD is subject to strict issuing criteria: for prosecution purposes, the offence in question must carry a minimum custodial sentence of at least twelve months in the issuing Member State, while for enforcement purposes the custodial sentence must not be less than four months.

The principle of proportionality plays a crucial role in determining whether an EAW should be issued. The Dutch authorities must ensure that the seriousness of the offence justifies the recognition and the ensuing obligation to comply with the EAW, thus avoiding its use for minor offences. Previous judicial decisions of the District Court of Amsterdam[553] have emphasised the need for a nuanced approach to proportionality, distinguishing between general and case-specific proportionality assessments. Although the EAW system is based on the principle that enforcement should not exceed what is necessary to achieve its objectives, in practice, the issuance of an EAW can impose significant burdens on individuals. Claims of disproportionality, although rare, may succeed only in exceptional circumstances, as will be discussed elsewhere in this report.

Since the 2019 amendments, only the investigating judges of each of the eleven District Courts in the Netherlands are authorised to issue EAWs, as stipulated in article 44 of the SPA. Previously, Dutch prosecutors had the authority to issue EAWs at District Court level. However, the judgment of the CJEU in the case OG and PI[554] led to significant changes, transferring the issuing power exclusively to the judicial authorities[555]. This decentralised approach allows local judicial bodies to quickly issue EAWs as needed. By transferring jurisdiction to investigating judges, Dutch practices are now more in line with the CJEU's insistence on safeguarding fundamental rights and upholding the rule of law. This amendment minimises the risk of misuse of EAWs, as judicial authorities are obliged to base their decisions on thorough legal assessments rather than relying solely on prosecutorial discretion.

[552] This was incorrectly transposed in Art 7 of the SPA but was later amended by the District Court of Amsterdam, which aligned its interpretation with the EAW FD.
[553] See as examples District Court of Amsterdam, judgement of 23 August 2011, ECLI:NL:RBA:2011:BR5804; and District Court of Amsterdam, judgement of 1 March 2013, ECLI:NL:RBAMS:2013:BZ3203.
[554] See joined cases C-508/18 and C-82/19 PPU, *OG* and *PI,* ECLI: EU:C:2019:456.
[555] Originally, pursuant to Art 44 of the Surrender of Persons Act, all Dutch prosecutors in District Court level were considered to have competence to issue an EAW, this until the CJEU ruling in joined cases C-508/18 and C-82/19 PPU, *OG and PI*, ECLI:EU:C:2019:456, after which this article was amended. The new article Art 44 reads: "Any examining magistrate may act as an issuing judicial authority."

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Although the formal power to issue EAWs has been taken away from prosecutors, they still play a key role in initiating the process[556]. A prosecutor can issue a national arrest warrant against the wanted person, which often serves as a precursor to the issuance of an EAW[557]. Such a domestic warrant helps to demonstrate the seriousness of the offence and the need to pursue surrender through an EAW. Once the national warrant has been launched, the competent District Court judicial authority can assess whether the issuance of an EAW is justified. This collaborative process between the prosecution and the judiciary ensures that EAWs are used appropriately and that the rights of the persons involved are duly protected.

5.2.2 Grounds for non-recognition and non-execution

5.2.2.1 Transposition

In The Netherlands, the implementation of the EWA FD included all refusal grounds and guarantees, with one notable exception: Amnesty (Art 3, paragraph 1 EAW FD), which conflicts with Dutch law[558].

Art 122(1) of the Dutch Constitution (‘*Grondwet*’) explicitly mentions that pardon is granted by royal decree after advice from a court designated by law and in compliance with established regulations. On the other hand, Art 122(2) recognizes that amnesty is granted by or pursuant to law, but there is no provision or established procedure within Dutch law that allows for the declaration of amnesty. Consequently, the absence of such legal mechanisms or regulations means amnesty cannot be declared under Dutch law. Therefore, this ground for refusal does not apply to The Netherlands as a requested State. Additionally, it was decided not to include the guarantee related to a possible life sentence (Art 5, paragraph 2 of the EAW FD).

In assessing these differences, it appears that the Netherlands gives priority to maintaining the integrity and specificity of its legal system while adhering to the EAW FD. The lack of an amnesty provision could be seen as a limitation in providing full legal safeguards. However, it also underlines the importance of adhering to national constitutional principles. Similarly, the exclusion of the guarantee of life imprisonment

[556] For further information as to which information is provided by the Prosecution to the competent District Court, go see V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak, (n 2) 124.
[557] See V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak, (n 2) 126.
[558] V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak (n 1) 97.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

reflects the commitment of the Netherlands to its established legal procedures, which already include robust safeguards and procedures in place concerning the imposition and review of life sentences.

Originally, all grounds for refusal and guarantees were transposed in the SPA as mandatory[559]. However, the 2021 reform made most of the grounds for non-recognition provided for in Arts 4 and 4a of the Decision as optional under Dutch law[560]. It should be noted that optional grounds should not be applied when mandatory grounds are applicable. This ensures no overlap or conflict between the grounds under Dutch law. This approach is compliant with the EAW FD, as it respects the hierarchy and application of mandatory grounds while allowing flexibility for the optional ones.

As to the transposition of Art 4a EAW FD, the Dutch Government explained that the proposal to partially amend it was made because they were previously of the belief that, except in the specific situations described in Art 4a(1)(a-d), there could be no circumstances in which surrender could be permitted if the requested person did not appear in person at the trial which gave rise to the decision (the latter was transposed in Art 12 of the SPA) [561]. This position was erroneous[562]. The Dutch Government's approach seemed to overlook other possible scenarios in which the requested person might not have been present at his or her trial and yet his or her rights might still be sufficiently protected. For example, there may be valid reasons for a person's absence that do not prevent a fair trial, such as being properly informed of the proceedings or having legal representation. Accordingly, we are of the opinion that the change of this ground of refusal from mandatory to optional was correct.

The mandatory grounds for non-execution of the European Arrest Warrant, set out in Art 3 of the EAW FD, have been integrated into the SPA. Art 9(2)(b)(1) of the SPA, which mirrors Art 3(1) of the EAW FD, provides that surrender shall not be granted if the requested person has been convicted by a final judgment of a Dutch court or a court of another Member State of the European Union provided the sentence or measure imposed has been executed in its entirety. This provision maintains the *Erledigungsprinzip* (*ne bis in idem*), which ensures that persons are not punished several times for the same offence within the EU, underlining the importance of the finality and integrity of judicial decisions in all

[559] V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak (n 1) 98.
[560] V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak (n 1) 98.
[561] V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak (n 1) 134.
[562] V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak (n 1) 134.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Member States. This raises the question of the standing of cases where a person has been convicted but has not yet served their sentence or are simply being prosecuted in The Netherlands. In such cases, optional grounds for refusal come into play, allowing Dutch authorities to consider whether surrender should be postponed or refused depending on the specific circumstances, ensuring a balance between the rights of the person and the interests of justice.

Furthermore, Art 9(2)(b)(1-4) of the SPA, transposing Art 3(2) of the EAW FD, outlines additional circumstances under which surrender is prohibited. Specifically, surrender is not allowed if the punishment or measure imposed has been fully served, is no longer subject to execution, involves a judicial pardon, or if the punishment is being served in The Netherlands. These clauses ensure that once a person has been dealt with legally in one Member State, they are not subjected to repetitive legal actions elsewhere within the EU.

Moreover, Art 9(1)(d) of the SPA, which transposes Art 3(2) of the EAW FD, allows for refusal of surrender if a court in a third country has given a final decision. This provision recognizes the judicial authority of non-EU countries in specific cases, such as when the person has been acquitted, convicted, or has served their sentence or been pardoned in that third country. This ensures respect for the *ne bis in idem* principle and prevents people from being tried or punished several times for the same offence, including outside the EU. Finally, Art 10 of the SPA, in line with Art 3(3) of the EAW FD, provides that surrender shall not be granted if the person was under twelve years of age at the time of the commission of the offence[563]. It is worth mentioning that this is in line with Art 486 CCP, which stipulates that no one may be criminally prosecuted for an offence committed under the age of twelve. This provision reflects the commitment to the principles of juvenile justice and the protection of children during court proceedings.

The SPA explicitly transposes the optional grounds for non-execution provided for in Art 4 of the EAW FD. Art 4(1) of the EAW FD has been transposed into Art 7(1)(a)(2) of the SPA, which allows surrender to be authorized in cases where the issuing Member State

[563] Through case sampling, we have not found any court rulings where an EAW was denied because the requested person was under the age of twelve at the time of the offense. However, we have encountered several rulings where Art 10 was invoked by the defense counsel, but without success, as the court determined that the requested person had already reached the legal age at the time of the crime. See as an example District Court of Amsterdam, Judgement of 23 September 2021, ECLI:NL:RBAMS:2021:5377; District Court of Amsterdam, Judgement of 11 June 2020, ECLI:NL:RBAMS:2020:2969.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

or the European Public Prosecutor's Office (EPPO) has initiated a criminal investigation. This provision is significant as it allows the executing judicial authority to consider requests for surrender in situations where the requested person is suspected of having committed another offence punishable under both the law of the issuing Member State and the law of The Netherlands with a minimum custodial sentence of twelve months. In such cases, surrender may also be refused, which gives the executing authority the discretion to refuse surrender depending on the specific circumstances of the case.

Likewise, Art 4(2) of the EAW FD is mirrored in Art 9(1)(a) of the SPA, which refers to the refusal of surrender for a requested person if criminal proceedings are ongoing against them in The Netherlands for the same offense as specified in the EAW. This prevents double jeopardy or simultaneous legal actions across jurisdictions. Art 4(3) of the EAW FD has been transposed into two provisions under the SPA. Firstly, Art 9(1)(b) allows for refusal if the person has been prosecuted in The Netherlands for the same offence and it is not possible to prosecute him anew. This includes cases where renewal of prosecution is excluded under Art 255 (1-2)[564], or Art 255a (1-2)[565] CCP. It also includes situations where the right to prosecute has lapsed because the individual has fulfilled the conditions set by the prosecutor prior to trial to avoid prosecution. Similarly, Art 9(1)(c) allows for refusal if the individual cannot be prosecuted in another Member State due to a final decision having been rendered. These provisions ensure legal certainty and respect for judicial decisions across borders. These provisions are in line with the EAW FD, as they uphold the principles of avoiding double criminality, respecting ongoing national proceedings, and recognising final judicial decisions, thereby aligning with the objectives of the framework.

Art 4(4) of the EAW FD manifests in Art 9(1)(f) of the SPA, which allows for the refusal of surrender if jurisdiction could be exercised under Dutch law for the offense, but a statute of limitations prevents prosecution. Additionally, if surrender is requested for the purpose of executing a punishment or measure, and punishment can no longer take place due to a

[564] Art 255 (1) states that: "The accused may not be charged again in respect of the same offence after his acquittal, after the order served on him declaring that the case has ended, or after the notification of no further prosecution, in the latter case subject to Art 12i or Art 246, unless new objections have become known". Art 255 (2) refers to: "New objections can only include statements by witnesses or the accused and documents, records and minutes that have come to light later or have not been examined."

[565] Art 255a (1) declares that: "If an order of punishment has been issued against the accused, which has been fully enforced, he cannot, subject to the provisions of Art 12i, be charged again in respect of the same offence." Meanwhile Art 255a (2) indicates that: "The first paragraph applies mutatis mutandis if the public prosecutor withdraws a penal order."

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

statute of limitations, surrender may also be refused. This ensures individuals are not surrendered for time-barred offenses, maintaining legal certainty and fairness.

These provisions are in compliance with the EAW FD, as they uphold the principles of legal certainty and fairness by ensuring that individuals are not surrendered for offenses that are time-barred under Dutch law, thereby aligning with the framework's objectives.

Art 4(5) of the EAW FD is integrated into Art 9(1)(d) and Art 9(2)(b)(1-4) of the SPA, aligning with the transposed mandatory ground provided in Art 3(2) of the EAW FD. Art 4(6) of the EAW FD has been transposed into three provisions in the SPA. First, Art 6(1) of the SPA permits the refusal of surrender of Dutch citizens if the court is satisfied that the enforcement of the custodial sentence imposed will be taken over by The Netherlands. In such cases, if surrender is refused, the court simultaneously orders the enforcement of the custodial sentence. This provision ensures that Dutch citizens are not surrendered for enforcement of sentences if alternative arrangements for serving the sentence can be made, promoting the efficient administration of justice, and safeguarding the rights of citizens. Additionally, Art 6(2)(a-c) mandates the court to assess whether grounds as referred to in Art 2 exist when evaluating a surrender request for surrender. Art 6(3) stipulates that if the duration of the custodial sentence imposed exceeds the maximum sentence applicable for the offense under Dutch law, the duration of the sentence is reduced to match the maximum sentence. These provisions ensure that requests for surrender are evaluated comprehensively, and that the duration of the sentence aligns with Dutch legal standards. These measures are in line with the EAW FD, ensuring respect for the principles of fairness, protection of citizens and legal consistency.

Finally, aligning with the EAW FD, Art 4(7)(a) of the EAW FD is mirrored in Art 13(1)(a) of the SPA, allowing for refusal of surrender for offenses committed wholly or partly within Dutch territory or on Dutch vessels or aircraft. This upholds Dutch jurisdiction and sovereignty over such offenses. Correspondingly, Art 4(7)(b) of the EAW FD is reflected in Art 13(1)(b) of the SPA, allowing for refusal of surrender for offenses committed outside the issuing State’s territory if not prosecutable under Dutch law. This safeguards individuals from surrender for offenses falling outside Dutch jurisdiction.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

5.2.2.2 Surrender of nationals and equivalent to nationals

5.2.2.2.1 Requirements for equivalence to nationals

Art 6 of the SPA is a pivotal piece of legislation as it establishes the conditions under which nationals or individuals deemed equivalent to nationals can be surrendered to the issuing Member State.

Initially, Art 6, paragraph 5 (currently paragraph 3) of the SPA stated the conditions for being considered equivalent to a national, being one of them being a residence permit of indefinite duration in The Netherlands[566]. However, prompted by CJEU judgments like *Wolzenburg*[567], this requirement was removed through the 2021 amendment of the SPA. Instead, the requested person must only prove a continuous residence of at least five years in accordance with Art 8, under a) to e) and l), of the Aliens Act 2000, ensuring sufficient integration in the executing Member State[568].

In current national case law[569], the Amsterdam District Court considers sufficient information provided by the defence counsel proving a continuous residence of five years, as well as information provided by the Immigration and Naturalization Service (hereinafter: IND) corroborating the above and issuing an opinion as to whether the person's residency status would be affected by an eventual sentence. This change reflects the EU's non-

[566] The three conditions stated by Art 6(5) were: 1) that the requested person held a residence permit of an indefinite period in The Netherlands; 2) that they could be prosecuted in The Netherlands for the same offenses as requested in the EAW; and 3) that there was no risk of the requested person losing their residence status as a result of a punishment or measure imposed after the surrender.

[567] A question was raised by the District Court of Amsterdam to the CJEU in 2008 in the *Wolzenburg* case. The CJEU, Case C-123/08 Wolzenburg EU:C:2009:616, [2009] ECR I-09621, concluded that, to ensure that the person from another Member State in respect of whom the EAW was issued is sufficiently integrated in the executing Member State, it is required that they have resided for an uninterrupted period of five years. To this effect, the CJEU underlined that the EU rules on the right of residence have expressly established this time limit as a condition for Union citizens to acquire a permanent right of residence in the host Member State. It emphasized that this aligns with Art 12 of the EC Treaty (principle of non-discrimination).

[568] Through the amendment of the law of 2021, Art 6(5) was removed, and 6(3) was introduced, which maintained requirements two and three (prosecution possible in The Netherlands and no risk of losing the right of residence because of the potential punishment), but modified the first requirement, establishing that the requested person must only prove a continuous residence of at least five years in accordance with Art 8, under a) to e) and l), of the Aliens Act 2000 "and because that provision also encompasses third country nationals with a Dutch residence permit of limited duration, they are no longer obliged to be in possession of a Dutch residence permit of unlimited duration". V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak, (n 1) 116-117.

[569] As an example, see District Court of Amsterdam, Judgement of 30 March 2023, ECLI:NL:RBAMS:2023:3713.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

discrimination principle and highlights the responsiveness of Dutch law to the evolving jurisprudence of the CJEU.

5.2.2.2.2 Judicial discretion in cases final judgments' enforcement

The legislative amendments, particularly between the SPA 2004 and its updated version in 2021, mark a notable shift in approach. The surrender of Dutch nationals for the execution of a custodial sentence previously was strictly prohibited unless the executing state expressed a willingness to undertake the sentence's enforcement, without providing a concrete guarantee.[570] This provision conflicted with Art 4(6) of the EAW FD, which requires an undertaking as an exception to refusal. Therefore, through its 2021 amendment, Art 6a was introduced, outlining the factors that Dutch magistrates must consider for taking over the enforcement of judgements. These factors include whether there are grounds for refusal as specified in relevant articles of the Mutual Recognition and Enforcement of Custodial and Conditional Sanctions Act (para. 2a), whether the offense is also punishable under Dutch law (para. 2b), and whether the sentence needs adjustment to align with Dutch legal standards (para. 2c).

5.2.2.2.3 Dual criminality in cases of final judgments' enforcement

The principle of dual criminality, established in Art 2(2) of the EAW FD, is another significant consideration in cases of surrender of nationals or equivalent to nationals. While the EAW FD allows for the execution of sentences for offenses punishable in the issuing Member State without verifying double criminality, it also allows for execution for offenses not listed, provided they are punishable in both issuing and executing Member States. In instances where the offense is not punishable under Dutch law, the District Court of Amsterdam has the discretion to refuse surrender of a national to the issuing Member State and undertake enforcement[571]. The execution of this discretion is crucial for protecting the claimed person's social reintegration interest.

However, the new draft amendment to Art 6(3) of the SPA proposes the deletion of the clause "insofar as he or she may be prosecuted in The Netherlands for the facts on which

[570] V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak, (n 1) 103-104.
[571] As an example, see District Court of Amsterdam, Judgement of 18 November 2021, ECLI:NL:RBAMS:2021:6776.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

the European Arrest Warrant is based"[572]. The justification for this change is to simplify and speed up the surrender process. The deletion of this clause is intended to avoid unnecessary legal complications and delays related to determining whether the person can be prosecuted in The Netherlands for the same facts. This change is intended to facilitate more efficient execution of European Arrest Warrants, thereby improving judicial cooperation, and ensuring a smoother surrender process within the EU.

5.2.2.2.4 Guarantee for return in cases of surrender for criminal prosecution

Another critical aspect addressed by the SPA is the condition for the issuing Member State to provide a guarantee of return in cases where surrender for criminal prosecution is requested. This guarantee ensures that nationals, if sentenced, will return to serve their sentence in the executing Member State. The objective behind this provision is, again, to protect the requested person's interest in reintegrating into their own Member State while serving a custodial sentence. This guarantee can be found in the District Court of Amsterdam rulings, which consistently show that a written submission of the guarantee by the issuing Member State is considered sufficient for the Dutch magistrates[573].

5.2.2.2.5 Recommendations for improvement

While the recent amendments to the SPA have brought it closer in line with European law, there may be room for improvement by focusing on protecting the reintegration interests of claimed persons in surrender decisions, including their social ties and rehabilitation prospects. To achieve this, the SPA could explicitly require the consideration of these factors rather than leaving it to judicial discretion. This applies equally to both cases of requests for criminal prosecution and enforcement of sentences. Assessment of factors such as family connections, employment history, community involvement, and participation in rehabilitation programs would then be integral to surrender decisions.

The current draft to modify the SPA has adopted this position, specifically adding to Art 6(1) that "the court shall assess in particular whether serving the sentence in The

[572] Art 6 is amended as follows: "(…) 2. In the third paragraph, the words 'insofar as he can be prosecuted in The Netherlands for the facts on which the European arrest warrant is based and' are deleted."
[573] As an example, see District Court of Amsterdam, Judgement of 27 December 2022, ECLI:NL:RBAMS:2022:8453.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Netherlands will contribute to the social reintegration of the Dutch national [574] ." Furthermore, the draft proposes adding a new subparagraph b) to Art 6a(2), which requires the court to assess, when considering a request for the surrender of a Dutch national, "whether the transfer of the execution of the custodial sentence will contribute to the social reintegration of the Dutch citizen [575] ." These modifications align with the previous recommendations.

5.2.2.2.6 Double criminality

Originally, Art 7, paragraph 1 of the Dutch SPA aimed to transpose Art 2, paragraphs 1 and 4, in conjunction with Art 4, paragraph 1 of the EAW FD. However, this transposition was flawed. The most significant omission was the treatment of double criminality. The Dutch law mistakenly established the lack of double criminality of non-listed offenses as a mandatory ground for refusal, contrary to the intention of the EAW FD.

The issue was addressed in *Case C-665/20 PPU*, in which the CJEU emphasized that Member States cannot require judicial authorities to categorically refuse to execute EAWs based on optional grounds for non-execution without allowing them to consider the specific circumstances of each case[576]. This ruling clarified the discretionary nature of grounds for non-execution under the EAW FD . To rectify the transposition errors, the Dutch legislator made amendments. The language of Art 7(1) of the SPA was changed from mandatory ("may only be permitted for") to optional ("may be authorized for"). This change clarified that the lack of punishability under Dutch law for non-listed offenses is an optional ground for refusal. Additionally, the Amsterdam District Court interpreted the amended Art 7(1) as

[574] Art 6 is amended as follows: "(…)1. The first paragraph shall read: 1. Surrender of a Dutch national may be permitted insofar as it has been requested for the purposes of a criminal investigation against him. In the event that the Dutch national is sentenced to an unconditional custodial sentence in the issuing Member State for the acts for which surrender may be permitted, the court may impose the condition that the requested person may serve his sentence in The Netherlands. In doing so, the court shall assess in particular whether serving the sentence in The Netherlands will contribute to the social reintegration of the Dutch national."
[575] Art 6a is amended as follows: "1. In the second paragraph, a subparagraph is inserted, renumbering parts b and c to parts c and d, worded as follows: b. whether the transfer of the execution of the custodial sentence will contribute to the social reintegration of the Dutch citizen."
[576] Case C-665/20 PPU *Local Court Tiergarten v X* EU:C:2021:339.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

an optional ground for refusal[577]. The court stated that even if the double criminality requirement is not met, surrender may not be refused if the circumstances warrant it[578].

5.2.2.2.7 Resolving cumulative conditions for non-listed offenses

Another issue with the transposition was found in Art 7(1) of the SPA, which outlined two cumulative conditions for refusing surrender in EAW cases for non-listed offenses: i) the sentence must be at least four months in the issuing Member State, and ii) the offense must carry a maximum sentence of at least twelve months. However, this conflicts with Art 2(1) of the EAW FD, which sets these conditions as alternatives for both criminal prosecution and execution of a custodial sentence.

Furthermore, Art 7 of the SPA incorrectly required that for an EAW involving a non-listed offense - either for the prosecution of a criminal offense or the enforcement of a custodial sentence - it must be: i) an offense under Dutch law and ii) have a maximum sentence of at least twelve months, contrary to Art 2(4) in conjunction with Art 4(1) of the EAW FD. The CJEU ruled in *Case C-463/15 PPU* against refusal of the execution of an EAW solely because the offense is not punishable by a custodial sentence of at least twelve months in the executing Member State[579].

These transposition errors were addressed by the District Court of Amsterdam, which aligned its interpretation with the EAW FD [580]. Currently, for surrender for the purpose of prosecution, the offense must be punishable by a custodial sentence of at least twelve months in the issuing Member State, while for surrender for the purpose of execution, only a minimum sentence of four months is required.

5.2.2.2.8 Amendments proposed by legislation draft

The draft amendments to Art 7 of the SPA aim to enhance clarity and flexibility in the surrender process between Member States of the European Union.

[577] As an example, see District Court of Amsterdam, Judgement of 15 April 2021, ECLI:NL:RBAMS:2021:1803.
[578] In this specific case, despite the conclusion that non-payment of maintenance without intent to endanger or abandon the child did not constitute an offence under Dutch law, the court still considered the surrender admissible. This was based on the need to enforce other custodial sentences imposed in Poland and to facilitate the consolidated resolution of all pending custodial cases, which was considered beneficial to the person concerned.
[579] Case C-463/15 PPU *Public Prosecutor at the Court of First Instance Brussels v A* EU:C:2015:634.
[580] See District Court of Amsterdam, Judgement of 30 October 2015, ECLI:NL:RBAMS:2015:7470.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Firstly, the proposed modification of paragraph 1 expands the grounds for surrender by allowing individuals to be surrendered for acts punishable under both the issuing Member State's law and Dutch law, beyond specific listed offenses[581]. This ensures that individuals cannot evade surrender simply because their alleged offense is not explicitly mentioned in the surrender request.

Secondly, the draft amendment specify conditions under which surrender may be refused. For instance, surrender can now be denied if the act in question is not considered a crime under Dutch law, regardless of how it is classified or defined in the issuing Member State[582]. This prevents individuals from being surrendered for acts that do not meet Dutch legal standards.

Moreover, the draft clarifies that surrender requests cannot be rejected solely based on differences in financial or regulatory laws between Member States, pursuant to the new paragraph 3[583]. This means that variations in taxes, customs, or other regulations do not hinder the surrender process if the underlying criminal offense meets the surrender criteria.

Lastly, the draft amendment regarding paragraph 7, introduces flexibility when handling surrender requests involving multiple offenses[584]. Even if some specific acts within a request do not individually meet the severity conditions initially required for surrender,

[581] Art 7 is amended as follows: "1. In the first paragraph, part b, the words 'or 2°' are deleted and the words 'or for another act punishable under both the law of the issuing Member State and the law of The Netherlands' are inserted after the words "intended"."

[582] Art 7 is amended as follows: "(…) 2. Two paragraphs are inserted, renumbering the second to fifth paragraphs as the fourth to seventh paragraphs, worded as follows: 2. Except as provided in the third paragraph, surrender may be refused if: a. Another act as referred to in the first paragraph, part a, under 2°, but which is not punishable under Dutch law, regardless of its elements or qualification; or b. The execution of a custodial sentence of four months or a longer period to be served by the requested person in the territory of the issuing Member State for another act referred to in the first paragraph, point (b), but which is not punishable under Dutch law, regardless of its constituent elements or description. (…)"

[583] Art 7 is amended as follows: "(…) 3. In respect of charges and taxes, customs and exchange, extradition may not be refused on the grounds that The Netherlands does not levy the same type of charges or taxes, or does not have the same type of regulations on charges, taxes, customs and exchange, as the issuing Member State."

[584] Art 7 is amended as follows: "(…) 3. The sixth paragraph (new) shall read: 6.Where the European arrest warrant relates to several separate acts which are punishable either under the law of both the issuing and executing Member States or under the law of the issuing Member State alone, but one or more of which do not fulfil the condition as to the severity of the penalty referred to in point (a)(2) of the first paragraph or in point (b), surrender may also be authorised for those acts, at the same time as surrender for the act or acts which do fulfil that condition."

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

individuals can still be surrendered if other related acts fulfil these conditions. This adjustment aims to expedite surrender proceedings while ensuring that serious criminal activities are appropriately addressed across borders. This result is compliant with the EAW FD, as it aligns with the framework's objectives of facilitating efficient and effective judicial cooperation while maintaining the necessary legal standards for serious offenses.

5.2.2.2.8 Ne bis in idem

5.2.2.2.8.1 Transposition Challenges

In the first version of the SPA, the Dutch legislature clearly aligned with the *Erledigungsprinzip* applied in Dutch law by transposing number 2 of Art 3(1) of the EAW FD, which concerns the *ne bis in idem* principle, into Art 9(1) of the SPA as a mandatory ground for refusal. However, the April 2021 amendment inadvertently changed this to an optional ground for refusal, which is in contravention of both Art 54 of the Convention Implementing the Schengen Agreement (CISA) and Art 50 of the Charter of Fundamental Rights of the European Union. In this regard, the CJEU clarified in *Case C-665/20 PPU* that the executing judicial authority has no discretion under Art 3 of the EAW FD and must adhere to the *ne bis in idem* principle as enshrined in Art 50 of the Charter[585].

5.2.2.2.8.2 Prosecutor's penal orders

Another issue identified in the transposition of Art 3(1)(2) of the EAW FD concerns Art 9(2) of the SPA. This Art explicitly outlines the conditions under which surrender can be refused. It requires either: i) an acquittal or discharge from legal proceedings by a Dutch court, or a final EAW FD by a court of another EU Member State "which materially corresponds to a Dutch judgment to that effect"; or ii) a *res judicata* conviction by a Dutch court or by a court in another EU Member State.

The way the provision has been transposed poses a problem, since it fails to address situations where the prosecutor issues a penal order (*strafbeschikking*) against a defendant after fulfilling certain obligations, such as the payment of economic reparations, or when the prosecutor decides to discontinue proceedings based on the merits of the case[586]. These decisions, not being court judgments, are not covered by the current transposition.

[585] Case C-665/20 PPU *Local Court Tiergarten v X* EU:C:2021:339.
[586] V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak, (n 1) 107.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

However, the CJEU, in interpreting Art 54 of the CISA, has concluded that such prosecutorial decisions should be equated to final court judgments, even though they are made without court involvement and do not have the form of judicial decisions[587].

According to Glerum & Kijlstra, Art 9(2) of the SPA should be invoked in such cases, instead of relying on Art 9(1)(b) or (c), which currently provide for optional grounds for refusal. We agree with this position, since it aligns with the principle that mandatory grounds should take precedence over optional ones when determining the refusal of requests for surrender. This position was partly endorsed by the Amsterdam District Court in a case concerning the issuing by the Dutch public prosecutor's office of a penal order for the same facts on which the surrender request was based. The District Court considered that the prosecutor's penal order sentencing the requested person to community service constituted a final judgment within the meaning of Art 3(2) of the EAW FD. Accordingly, the refusal to surrender should be mandatory and not discretionary.

5.2.2.2.8.3 Exception clause

Art 9 of the SPA has included an exception since its inception, allowing the refusal of surrender if the requested person is being prosecuted in The Netherlands for the same offenses. For this exception to apply, the Dutch Minister of Justice, based on advice from the Public Prosecutor, must order the discontinuance of the judicial proceedings to allow the prosecution to take place in the issuing Member State. During the case law analysis conducted for this work, we encountered a ruling that exemplified the application of this exception. The court deliberated on whether a prosecution, as defined in Art 9, paragraph 1(a) of the SPA, had commenced[588]. If the grounds for refusal under Section 9(1)(a) existed, the Minister's decision under Section 9(3) effectively resolves this issue.

5.2.2.2.8.4 Proposed modification to Art 9(1) by amendment draft

The amendment to the first paragraph, subsection b, specifies that surrender may be refused if in The Netherlands a decision has been made not to prosecute for the criminal offense for which the EAW has been issued, or to discontinue such prosecution[589]. This

[587] Case C-486/14 *Piotr Kossowski v Generalstaatsanwaltschaft Hamburg* EU:C:2016:483.
[588] See District Court of Amsterdam, Judgement of 14 November 2023, ECLI:NL:RBAMS:2023:7223.
[589] Art 9 is amended as follows: "1. The first paragraph, part b, shall read: b. in The Netherlands, a decision has been taken to abandon prosecution for the offence for which the European arrest warrant was issued or not to pursue prosecution for that offence."

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

amendment clarifies that a decision not to prosecute in the requested state can serve as a ground for refusal of surrender, ensuring that individuals are not surrendered for offenses where prosecution has been abandoned or where there is no intent to prosecute.

5.2.2.2.8.5 Recommendations for improvement

To address the challenges posed by the transposition of Art 3(1)(2) of the EAW FD into the SPA, several steps can be taken. Firstly, the Dutch legislature may align Art 9 of the SPA with the mandatory nature of number 2 of Art 3(1) of the EAW FD to ensure consistency with EU law and fundamental rights.

Secondly, Art 9(2) of the SPA requires clarifications to explicitly include situations where prosecutors issue penal orders or discontinue proceedings, ensuring legal clarity. Based on CJEU interpretations, amendments might need to be made to the SPA to provide clear procedures for situations involving prosecutorial decisions, treating penal orders as equivalent to final judgments in the surrender refusal process. This would enhance legal consistency and predictability. These proposals have been incorporated into the draft legislation, which suggests supplementing the second paragraph of Art 9 with a new subsection (c) [590] . This addition ensures that individuals cannot be surrendered if prosecution rights have lapsed in The Netherlands due to compliance with conditions imposed by the public prosecutor before the start of proceedings aimed at preventing criminal prosecution.

Finally, the exception clause in Art 9 of the SPA should be clarified to establish specific criteria for refusal, reducing ambiguity. This should include clear guidelines on when it should be considered that prosecution for the same offenses in The Netherlands has commenced. By establishing clear criteria for invoking this exception, the consistency and effectiveness of surrender procedures can be ensured.

[590] Art 9 is amended as follows: "(…) 2. The following subparagraph is added to the second paragraph, replacing the full stop at the end of subparagraph (b) with a semicolon: c. he has been prosecuted in The Netherlands, but renewed prosecution is excluded on the basis of Art 255 or Art 255a of the Code of Criminal Procedure, or the right to prosecute has lapsed in The Netherlands because he has complied with conditions imposed by the public prosecutor prior to the commencement of the hearing to prevent criminal prosecution, or a corresponding decision has been taken in his respect in another Member State involving a final judgment for the same facts."

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

5.2.2.2.9 Trials in absentia

5.2.2.2.9.1 2011 Amendment

The Dutch system complies with the EAW FD by transposing Art 4a into Art 12 of the SPA in 2004, making the refusal of surrender mandatory if the requested person did not attend their trial, unless proper notification can be proven.

On February 26, 2009, Council Framework Decision 2009/299/JHA amended the EAW FD, introducing grounds for refusing surrender of persons tried and convicted in absentia. One such ground involves cases where the person was not aware of the proceedings. However, it is important to note that this amendment did not establish a mandatory ground for refusal, instead leaving it to the requesting authorities to demonstrate the person's awareness of the proceedings for the purpose of surrender. This amendment did not seek to harmonize national legislation across Member States.

This amendment was incorporated into the SPA on August 1, 2011, through Art 12(a), yet this ground for refusal remained mandatory, which led to a high incidence of refusals to execute EAWs[591].

Specifically, when applying Art 12(d), which outlines the requirements for surrender when the person has not been served with the decision in person, the District Court of Amsterdam employs a two-fold test[592]: i) the person must be served in person promptly after surrender and informed of their right to an objection or appeal procedure. This procedure allows for the re-examination of the case with the possibility of presenting new evidence and reviewing the original decision; and ii) the individual must be informed of the timeframe within which they must lodge an objection or appeal, as specified in the European arrest warrant.

To this point in time, it could be said that the SPA did not fully comply with the EAW FD, since Article 4a was transposed as mandatory, which reversed the intended logic of the provision.

[591] K H Brodersen, V Glerum and A Klip, 'The European arrest warrant and in absentia judgments: The cause of much trouble', New Journal of European Criminal Law [2022] 13

[592] See as example District Court of Amsterdam, Judgement of 30 October 2015, ECLI:NL:RBAMS:2015:7460.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

5.2.2.2.9.2 2021 Amendment

On 26 May 2016, in the *Dworzecki* case the CJEU clarified that Art 4a of the EAW FD allows for optional refusal of surrender[593]. It underlined that the situations described in Art 4a constituted exceptions where non-recognition was not mandatory, allowing the executing judicial authorities to weigh other factors to avoid any violation of the individual's right to a fair trial. This was reaffirmed in the *Zdziaszek* case, where the CJEU stressed the discretionary nature of Art 4a[594]. This practice strikes a crucial balance between promoting judicial cooperation between Member States and safeguarding individual rights. It allows for a tailored approach that ensures adequate protection of rights, especially the right to a fair trial, while maintaining flexibility to address the diverse circumstances of each case.

In line with these rulings, the SPA was amended in April 2021, making Art 12 an optional ground for refusal. This remedies the defective compliance and will reduce the number of refusals[595]. However, while this amendment does not explicitly allow the court to consider other circumstances, such as the lack of diligence of the requested person, the District Court of Amsterdam has taken this into account when deciding under this provision. In an April 2021 ruling[596], the court stated that, to comply with CJEU standards, it must first determine if the requested person appeared at the process leading to the decision. If not, it assesses if any of the circumstances mentioned in the law occurred. If none apply, it may take other circumstances into account to ensure no violation of the person's defence rights. For instance, in cases where the person was properly notified, the court may request assurances from the issuing authority that the person was in fact properly notified.

5.2.2.2.9.3 Compliance assessment

The Dutch system's compliance with the EAW FD has improved through significant amendments in 2011 and 2021. Initially, the transposition of Article 4a into the SPA as a mandatory ground for refusal led to frequent rejections of EAWs, contrary to the optional nature intended by the EAW FD. Following the CJEU rulings in the *Dworzecki* and *Zdziaszek*

[593] See Judgement of 26 May 2016, *Dworzecki*, Case C-108/16, ECLI:EU:C:2016:346.
[594] See Judgement of 10 August 2017, *Zdziaszek*, Case C-271/, ECLI:EU:C:2017:629.
[595] V H Glerum, 'De Overleveringswet op de helling: de herimplementatie van Kaderbesluit 2002/584/JBZ', Nederlands Tijdschrift voor Strafrecht [2021] 5, 5.2.
[596] As an example, see District Court of Amsterdam, Judgement of 15 April 2021, ECLI:NL:RBAMS:2021:1818.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

cases, which emphasized the discretionary aspect of Article 4a, the SPA was amended in 2021 to make Article 12 an optional ground for refusal. This change, allowing the District Court of Amsterdam to consider additional circumstances to protect defence rights, has brought the Dutch system into better alignment with the EAW FD, balancing judicial cooperation and individual rights more effectively.

5.2.2.2.10 Territoriality

5.2.2.2.10.1 Transposition problems

Initially, both refusal grounds were transposed as mandatory in Art 13, paragraph 1(a) and (b) of the SPA, respectively. An additional paragraph 2 was introduced, stating: "At the request of the public prosecutor, a refusal of surrender shall be waived solely pursuant to subsections 1(a) and 1(b), unless, in the opinion of the court, the public prosecutor could not reasonably have arrived at his request."

Due to the vagueness of this second paragraph, the District Court of Amsterdam had to establish through case law the requirements for its application through case law. In their study, Kurtovic & Langbroek[597] referred to a judgment of July 2, 2004, in which the court refused the surrender of the requested person to French authorities, finding that the prosecutor could not reasonably waive the refusal to surrender since she did not consider the requested person's interests in being tried as a Dutch national in his own country and not being subjected to indefinite pre-trial detention abroad[598]. The court further concluded that, in assessing whether to waive the refusal under Art 13 of the SPA, the public prosecutor must balance the interests of the issuing authority and the requested person.

However, in its ruling of November 28, 2006, the Supreme Court of The Netherlands held that humanitarian reasons cannot be considered as grounds to refuse surrender under Art 13 of the SPA[599]. It clarified that the legislative intent behind Art 13 is to prevent Dutch judicial authorities from cooperating in surrendering individuals for acts committed in The Netherlands that are either not punishable under Dutch law or do not warrant prosecution in the country. The Supreme Court further noted that the provision allowing waiver of refusal grounds at the request of the public prosecutor was created to ensure the proper administration of justice, particularly in cases where Member States have cooperated in

[597] E G Kurtovic, P M Langbroek, 'The EAW in The Netherlands' in B de Santos Sousa (eds), (n 1) 262.
[598] See District Court of Amsterdam, Judgement of 02 July 2004, ECLI:NL:RBAMS:2004:AQ6068.
[599] See Supreme Court of The Netherlands, Judgement of 28 November, 2006, ECLI:NL:HR:2006:AY6631.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

investigations, and concentrating prosecution in one of the Member States is deemed appropriate.

In conclusion, the initial transposition of the grounds for refusal as mandatory in Article 13 of the SAP was not in conformity with the EAW FD, as the latter provides for these grounds to be optional. The vague wording of the additional paragraph 2 further complicated compliance, making judicial clarification necessary. However, the 2006 Supreme Court ruling, which excluded humanitarian reasons as valid grounds for refusal and clarified the legislative intention, brought the SAP closer to meeting the objectives of the EAW FD by ensuring a more uniform and cooperative approach to the surrender process in the EU.

5.2.2.2.10.2 2021 Amendment

Following an amendment on April 1, 2021, the second paragraph of Art 13 was removed, leaving the first paragraph as an optional ground for refusal of surrender. When analysing national case law, it was observed that since this amendment, the Amsterdam District Court has focused on determining in which country it would be most appropriate to conduct the investigation, considering factors such as where the proceedings have already been initiated, where the most evidence is located, and in which jurisdiction the co-accused are being prosecuted[600]. For the court, the mere fact that offenses are considered to have been committed wholly or partly in The Netherlands is insufficient reason to apply the ground for refusal[601].

In conclusion, the amendment of 1 April 2021, which removed the second paragraph of Article 13 and left the first paragraph as an optional ground for refusal of surrender, brought the SPA in line with the EAW FD. The Amsterdam District Court's shift of focus towards practical considerations, such as the location of proceedings, evidence and jurisdiction of co-defendants, is in line with the intention of the EAW FD to facilitate effective judicial cooperation. This approach ensures that the grounds for refusal are applied in a manner consistent with the EAW FD, avoiding automatic refusals based solely on the connection of the offence to the Netherlands.

[600] See District Court of Amsterdam, Judgement of 06 April, 2021, ECLI:NL:RBAMS:2021:1628.
[601] See District Court of Amsterdam, Judgement of 09 August, 2022, ECLI:NL:RBAMS:2022:5185.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

5.2.2.2.11 Fundamental rights and proportionality issues

The protection of fundamental rights is a cornerstone of the EAW system, as recognized in Recital 13 of the EAW FD, along with Article 1(3) Article of the EAW FD, which prohibit the surrender of persons where there is a risk that their rights under the European Convention on Human Rights and Fundamental Freedoms (ECHR) will be violated. The Dutch implementation of the EAW FD reflects this principle, particularly through Article 11 of the SPA, which allows for refusal of surrender if there is a risk of inhuman or degrading treatment.

5.2.2.2.11.1 Proportionality and detention conditions

The assessment of potential human rights violations is closely linked to considerations of proportionality, which the executing Member State must carefully assess [602] . However, the Dutch SPA lacks a clear provision on the examination of proportionality when executing an EAW[603]. Although the EAW FD does not explicitly refer to proportionality, scholars such as Glerum and Kijlstra argue that this principle is implicitly addressed [604] . They argue that Article 2(1) of the EAW FD inherently incorporates proportionality. This is reinforced by the fact that an EAW can only be issued for offences punishable by a custodial sentence of at least twelve months in the case of prosecution, or for sentences of at least four months in the case of execution EAWs. This threshold ensures that the issuing of an EAW is proportionate to the seriousness of the offence, although exceptions may arise where surrender does not meet the proportionality standards in exceptional circumstances.

An illustrative case highlighted by Glerum and Kijlstra concerns the Amsterdam District Court, which refused to execute an EAW on the grounds of proportionality[605]. In this case referred to *supra,* § 3, the requested person, who was terminally ill with a prognosis of only twelve months to live, was facing surrender for the prosecution of drug-related offences. The Court's decision reflected concerns that the act of surrender itself could

[602] V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak, (n 2) 150.
[603] Glerum & Kijlstra are of the opinion that the EAW FD should contain a provision on verifying the proportionality of issuing an EAW, detailing the relevant criterion and alternatives to issuing an EAW, as well as stating to what extent the judicial authority should check the proportionality of it. For more information on this topic, see V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak, (n 2) 230.
[604] V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak (n 2) 134.
[605] See District Court of Amsterdam, judgement of 1 March 2013, ECLI:NL:RBAMS:2013:BZ3203.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

potentially violate Article 4 of the Charter of Fundamental Rights of the European Union (CFR), even if the issuing Member State ensured adequate medical care and prison conditions[606]. This decision underlines the challenges of balancing proportionality and fundamental rights, emphasizing the need for rigorous judicial scrutiny to protect human rights in EAW proceedings.

5.2.2.2.11.2 Examination of human rights violations

Initially, Article 11 of the SPA provided for refusal of surrender only in cases where there were strong suspicions of a flagrant violation of fundamental rights. This strict threshold limited the ability of courts to withhold rendition based on arising human rights concerns. However, in response to the landmark judgment of the CJEU in the *Aranyosi and Căldăraru* case[607], an amendment was introduced in 2021 extending the scope of judicial review. Under the revised Article 11(2) SPA, courts can now delay the execution of an EAW if there is a possibility that changing circumstances will prevent violations of fundamental rights. If these circumstances do not improve within a reasonable time, Article 11(4) SPA empowers the courts to refuse surrender.

This amendment marks a critical change in the legal framework, noting that mutual trust between Member States is no longer absolute and undisputed. It recognizes the need for judicial oversight when fundamental rights are at risk, giving issuing Member States the opportunity to rectify conditions to ensure compliance with human rights obligations. This development also serves the broader objective of preventing impunity by ensuring that the surrender of the requested person is not automatically refused based solely on concerns that his or her fundamental rights may be affected by the conditions of detention. Instead, it promotes a more nuanced assessment that balances the protection of rights with the need for judicial cooperation.

A case from August 2019 exemplifies this judicial discretion[608]. The Amsterdam District Court was faced with a request to surrender an accused person to Hungary. The

[606] V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak, (n 2) 135.
[607] The CJEU ruled that if, after a two-stage assessment, the executing judicial authority finds that there is a real risk of an Art 4 violation for the requested person once surrendered, the execution of the arrest warrant must initially be deferred and, where such a risk cannot be discounted, the executing judicial authority must decide whether or not to terminate the surrender procedure. Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru,* ECLI:EU:C:2016:198.
[608] See District Court of Amsterdam, Judgement of 06 August 2019, ECLI:NL:RBAMS:2019:5853.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

defense counsel challenged the surrender on the grounds of inhumane detention conditions, citing previous violations and a damning report by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Considering these concerns, the court adjourned the hearing indefinitely to conduct further investigations into the conditions of detention in Hungary. This decision underlines the growing judicial recognition of the need to critically assess human rights conditions before proceeding with surrender.

5.2.2.2.11.3 Court's approach to detention conditions

In cases of possible violations of Article 11 of the SPA due to concerns about prison conditions, the Amsterdam District Court usually relies on general communications from the issuing Member State. These communications often consist of general assurances that the country in question complies with the standards set by the CPT, without carrying out a detailed case-by-case analysis.

For example, in a December 2021 judgment, the court accepted a non-specific assurance from the Belgian authorities on conditions of detention as sufficient for all cases, despite the lack of individualized guarantees [609]. This pattern of accepting general assurances was also evident in a decision of 23 March 2022, in which the court concluded that there was no risk of inhumane treatment in a Belgian prison, based on an earlier non-specific assurance provided by the Belgian authorities on 7 October 2021[610]. The same approach was followed in a judgment of 6 September 2022, concerning a Belgian request for surrender of a Dutch national involved in criminal activities[611].

This reliance on general safeguards illustrates a tendency of the Amsterdam District Court to prioritize mutual trust between Member States, often allowing this principle to prevail over close scrutiny of specific prison conditions. While mutual trust is a cornerstone of the EAW system, such trust may conflict with the legal obligations laid down by the CJEU in its *Aranyosi and Căldăraru*[612] judgment. This judgment emphasizes the need for Member States to carry out a detailed assessment, on a case-by-case basis, of prison conditions

[609] See District Court of Amsterdam, Judgement of 9 December 2021, ECLI:NL:RBAMS:2021:7414.
[610] See District Court of Amsterdam, Judgement of 23 March 2022, ECLI:NL:RBAMS:2022:2273.
[611] See District Court of Amsterdam, Judgement of 6 September 2022, ECLI:NL:RBAMS:2022:5363.
[612] Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru,* ECLI:EU:C:2016:198.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

where doubts arise as to compliance with fundamental rights, in particular regarding the prohibition of inhuman or degrading treatment.

5.2.2.2.11.4 Recommendations for improvement

To better safeguard human rights in EAW cases, the Amsterdam District Court should move towards more individualized assessments for each case, rather than relying on general assurances from issuing Member States. Reliance on broad, non-specific guarantees of compliance with fundamental rights has proven insufficient to address the complex and varied nature of detention conditions across the EU[613].

However, such a change in judicial practice brings with it significant challenges. It would require the court to conduct thorough investigations into the detention standards of the issuing Member State, often with limited access to full and reliable information. Given the inherently sensitive nature of human rights assessments, courts must navigate the tension between maintaining mutual trust within the EU and ensuring the protection of individuals' fundamental rights. The practical difficulties in obtaining detailed data on detention conditions, especially in countries with documented human rights problems, pose a significant burden. However, this should not deter courts from fulfilling their human rights obligations under both EU and international law. The principle of mutual recognition, while fundamental to the EAW system, cannot justify surrendering individuals to face conditions that violate their dignity and rights under the ECHR and the FCR.

The 2021 amendment to Article 11 of the SPA, as noted in § 4.2, introduces a more flexible, human rights-oriented legal framework. This allows courts to delay surrender if there is a substantial risk of a human rights violation, pending changes in conditions or safeguards in the issuing Member State. While this is an important step towards a more protective regime, its effectiveness depends on the courts actively engaging with the facts of each case, examining the reliability of assurances and the current conditions of detention to assess whether risks have been mitigated.

In such cases, the Amsterdam District Court should proactively seek additional information from independent and credible sources, such as reports from the CPT, human rights NGOs, or international organizations. These assessments are crucial for countering the limitations of assurances from the issuing Member State, especially when systemic

[613] See for example joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru,* ECLI:EU:C:2016:198; and Case C-220/18 PPU, *ML*, ECLI:EU:C:2018:589.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

issues in the prison system are documented. By relying on reliable and up-to-date information, the court can ensure a well-informed balance between mutual recognition obligations and the protection of fundamental rights.

The flexibility offered by the amendment, while improving protection against human rights violations, also introduces important questions of judicial accountability. While delaying surrender allows courts to avoid immediate violations, it shifts responsibility for improving conditions to the issuing Member State. This raises concerns that requested persons may remain in prolonged legal uncertainty, awaiting improvements that may never materialize. Courts must therefore carefully balance postponement with a clear deadline for reassessing the situation, ensuring that delays do not lead to further injustice.

From the perspective of compliance with the EAW FD, the 2021 amendment is in line with EU legal standards and the case law of the CJEU, reinforcing that mutual recognition cannot absolve Member States from their human rights obligations. By allowing for delays or refusals of surrender on fundamental rights grounds, the amendment underlines the need to balance effective judicial cooperation with the protection of individual rights. This balance is crucial to maintaining public confidence in the EAW system and ensuring compliance with human rights obligations under EU and international law.

Ultimately, the adoption of a more individualized approach, supported by the flexible framework introduced by the 2021 amendment to the SPA, may lead to fairer outcomes in EAW cases. Despite the additional responsibilities it imposes on the court, this approach is essential to uphold the principle that fundamental rights should not be compromised, even in the framework of mutual recognition and judicial cooperation between Member States.

5.2.3 Execution and cooperation between judicial authorities

The execution of an EAW in the Netherlands follows a structured approach to ensure compliance with national and EU legal standards. The Amsterdam District Court plays a key role as the central authority responsible for supervising EAW execution proceedings. Once a person is arrested on the basis of an EAW, all subsequent proceedings fall under the jurisdiction of this court. Although it is not common, the Dutch prosecutor can invoke Article 23(1) of the SPA[614] to request the court to refuse surrender, mostly in cases where

[614] Art 23(1): "If the public prosecutor immediately takes the view that surrender cannot be authorized on the basis of the European arrest warrant at issue, he shall immediately inform the issuing judicial authority

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

fundamental rights may be violated. These concerns often relate to issues such as the conditions of detention or the guarantee of a fair trial in the issuing Member State. For example, in a notable case involving a terminally ill person charged with drug offenses, the court agreed with the prosecutor's argument, finding that surrender of the person would be an undue burden, and therefore refused surrender in these special circumstances[615].

The EAW is first assessed by the public prosecutor in Amsterdam, who evaluates whether it meets the basic legal requirements under Article 20 SPA[616]. If the prosecutor considers the EAW *prima facie* to be deficient, he or she must immediately notify the issuing authority, as provided for in Article 23(1) SPA. However, the ultimate authority to refuse surrender is the executing judicial authority. Pursuant to Article 6(1) of the EAW FD, further elaborated by Article 15(1) of the EAW FD, the judicial authority has the power of final decision in relation to the execution of the EAW[617]. The recent legislative draft currently at the Senate, aims to strengthen the role of the Amsterdam District Court in these decisions, ensuring that the process is rigorous and complies with human rights considerations. Under proposed Article 23(1) SPA[618], the prosecutor must notify the court within three days if he or she considers that surrender should not be authorized. The court then has ten days to make a final decision on the refusal to surrender. If the court refuses surrender, the prosecutor must immediately inform the issuing judicial authority. This amendment strengthens judicial oversight, reinforces the integrity of the EAW process, and safeguards the fundamental rights of persons subject to surrender.

thereof."

[615] See District Court of Amsterdam, judgement of 1 March 2013, ECLI:NL:RBAMS:2013:BZ3203.

[616] Art 20(1): "A European arrest warrant, if not sent to the public prosecutor, shall be forwarded to him without delay". (2): "A European Arrest Warrant may only be processed if it meets the requirements set out in Art 2." (3): "If, in the opinion of the Public Prosecutor, a European Arrest Warrant does not meet the requirements set out in Art 2, he shall offer the issuing judicial authority the opportunity to complete or correct it." (4): "If, in the opinion of the Public Prosecutor, additional information in addition to the European Arrest Warrant is necessary, in particular in connection with Arts 7 to 9 and 11 to 13, he shall give the issuing judicial authority the opportunity to complete or correct it, taking into account the time limits referred to in Art 22."

[617] V H Glerum, N Rozemond, 'Overlevering' in R van Elst, E van Sliedregt (eds.), (n 2) 5.1.6.

[618] The proposed Art 23(1) reads: "If the Public Prosecutor already at an early stage considers that the surrender cannot be authorized on the basis of the European Arrest Warrant before it, he shall bring this opinion to the attention of the court no later than on the third day after receipt of the European Arrest Warrant, submitting the European Arrest Warrant and its translation. In that case, the court may disapply the provisions of Art 23(2) of the Code of Criminal Procedure. The court shall decide within a period of 10 days on the immediate refusal of the surrender. If the court decides that the European arrest warrant shall be refused, the public prosecutor shall immediately notify the issuing judicial authority of this decision."

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Regarding the postponement of surrender, Article 36(1) of the SPA assigns responsibility to the Amsterdam public prosecutor if the person is involved in ongoing criminal proceedings in the Netherlands or if the judgment of a Dutch court is still pending execution in whole or in part. In addition, Article 36(2) SPA gives the Minister of Justice and Security the authority to conditionally surrender individuals in similar circumstances, in cooperation with the Public Prosecutor's Office. This provision allows the Minister to impose conditions, such as guaranteeing the return of the individual to the Netherlands upon completion of the foreign legal process[619]. However, under the proposed legislative changes, this authority would be transferred from the Minister to the Amsterdam District Court[620], further centralizing judicial control over EAW proceedings. This change is expected to improve the consistency and monitoring of the enforcement process, which could lead to stricter judicial control and greater compliance with legal standards.

If the individual opposes surrender, a panel of three judges will decide the case in a public hearing. Conversely, if the individual consents, a single judge (*unus judex*) will decide in a faster process, known as a summary proceeding (*verkorte procedure*), after an in camara hearing pursuant to Article 39 of the SPA[621]. In either scenario, the court's decision is immediately enforceable under Article 29 of the SPA. Appeals are generally not permitted, except in extraordinary circumstances, what is known as the 'interest of justice', which is a legal remedy used to request the Supreme Court (*Hoge Raad*) ruling on an issue that requires resolution in the interest of legal unity or development[622].

In cases where the 'interest of justice' applies, the Attorney General may file an appeal in cassation with the Dutch Supreme Court, pursuant to Article 456(1) of the Dutch Criminal Procedure Code (CCP) (*Wetboek van Strafvordering)*. The primary function of cassation is to review whether the lower courts applied the law correctly, without re-examining the factual aspects of the case. While cassation ensures consistency in legal interpretations and contributes to the development of case law, it does not affect the original parties' outcomes in the proceedings. According to Article 456(3) CCP, the decision only applies to future cases, serving as a legal precedent.

[619] For further information as to the rationale to allow non-judicial authorities to make these decisions, see V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak, (n 2) 134.
[620] The proposed amendment to Art. 36 reads as follows: "In the second and third paragraphs, 'Our Minister' is replaced by 'the court' each time and 'his trial' is replaced by 'his prosecution'."
[621] For further information, see V Glerum, H Kijlstra, A Klip, C Peristeridou, (n 2) 131-133.
[622] See *Cassatie in het belang der wet*, 'Jaarverslag Hoge Raad' (n.d.) <https://www.hogeraad.nl/jaarverslag/parket-hoge-raad/cassatie-belang-wet/> accessed 17 July 2024.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

The cassation process, therefore, plays a crucial role in shaping future legal judgments and fostering legal development, potentially leading to the creation of new law. While it is a valuable tool for maintaining uniformity in EAW procedures and promoting legal evolution, its limitation lies in the fact that it does not provide immediate relief or redress for the parties involved in the initial case. From a systemic perspective, this is beneficial for the legal framework, but it may not satisfy individuals seeking personal remedies.

Cooperation between the Dutch judicial authorities and their foreign counterparts plays a key role in ensuring the effective execution of EAWs. This cooperation is generally considered effective, as confirmed by interviews with judges and prosecutors[623]. When additional information is needed, such as the description of the offence and the role that the requested person played, or the applicable maximum sentence for each separate offence, the Dutch authorities usually request further documentation from the issuing Member State[624]. This is particularly important in cases where detention conditions may raise human rights concerns. In such instances, the case law of the Amsterdam District Court shows cooperation with Member States such as Poland and Belgium have resulted in the postponement of the execution of the EAW until sufficient information is provided[625]. Despite these occasional delays, this practice continues to meet the deadlines set out in Article 17 of the EAW FD, ensuring that the execution process remains timely and legally sound.

5.2.4 Remedies

According to Art 29(2) of the SPA, the District Court of Amsterdam's judgments on the (non-)execution of an EAW are immediately enforceable, with no legal remedies available except for an appeal in cassation in the interest of justice as specified in Art 456 of the CCP, as explained in section 2.3. It should be reiterated that if the Supreme Court overturns the District Court's judgment, this does not alter the disposition of the case at hand. Before 2022, the Prosecutor-General had lodged an extraordinary appeal on points of law in only five EAW cases[626]. This state of affairs restricts broader appellate review,

[623] See E G Kurtovic, P M Langbroek, 'The EAW in The Netherlands' in B de Santos Sousa (eds), 285.
[624] For the complete list of supplementary information requested by the Dutch authorities, go to V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak, (n 2) 176.
[625] See *infra*, section 7.2.2.2.12.2..
[626] V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak, (n 1) 133. The publication does not include the references to the cases.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

which, while common in legal frameworks, may limit avenues for challenging decisions and potentially impact procedural fairness.

In cases where the requested person has been detained while awaiting the decision of the Dutch judicial authority on the request for surrender pursuant to an EAW, the public prosecutor can appeal a decision to release the requested person provisionally pursuant to Art 64(2) of the SPA in conjunction with Art 87(1) CCP . According to the same provisions, the requested person can appeal a decision to deny conditional release from detention, but only once. If the decision is issued by the investigating judge, the Amsterdam District Court has jurisdiction to hear the appeal; if it is given by the Amsterdam District Court, the Amsterdam Court of Appeal has jurisdiction. These proceedings are governed by Art 64(2) of the SPA in conjunction with Art 87(1) CCP. The restriction to a single appeal for denied conditional releases may be viewed as limiting, especially given its implications for the requested person's detention status.

Additionally, both the public prosecutor and the requested person can appeal a decision of the District Court of Amsterdam regarding the awarding of damages for wrongful detention, pursuant to Art 67(1) of the SPA in conjunction with Art 535(1) CCP. These appeals are heard by the Court of Appeal of Amsterdam, as stipulated in Art 67(2) of the SPA. This remedy ensures that both parties have an opportunity to challenge rulings on an equitable basis.

The current framework of the SPA provides specific appeal mechanisms related to EAWs, which align with the EAW FD's requirements to an extent. While the provisions for immediate enforceability and appeals regarding detention and damages ensure compliance with the need for judicial protection and fairness, the limitations on broader appellate review and the restriction to a single appeal for denied conditional releases indicate partial compliance. Enhancing these mechanisms could improve alignment with the EAW FD, ensuring comprehensive procedural fairness and judicial protection.

5.3 The implementation of Directive 2014/41

The Directive has been transposed through the Act of 31 May 2017 amending the Dutch CCP. As of then, Title 4 of Book 5 of the CCP applies to the recognition and execution of EIOs[627]. More precisely, implementation has taken place through the amendment of Arts

[627] Report from the Ministry of Security and Justice 31 May 2017, 231.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

5.4.1 to 5.4.31 of the CCP. In some of the amended provisions, reference is made to pre-existing Dutch legislation that was already applicable in The Netherlands prior to the implementation of the Directive and relates to domestic criminal matters, but by virtue of the adopted provisions 5.4.1 to 5.4.31 of the CCP, are also applicable in EIO cases. To date no amendments have been made to the implementing legislation.

In the past, refusal to recognize and execute a foreign criminal order was possible based on the grounds of Art 7 of Framework Decision 2003/577/JHA [628], which were implemented through Art 552II (2)(3) of the CCP. Now, Art 5.4.4 of the CCP lists the grounds for refusal for non-recognition or non-execution of an EIO. Apart from the exact wording, some of the EIO grounds for refusal, which are currently included in the CCP, bear similarities to the Framework Decision's 2003/577/JHA grounds for refusal at the time. For instance, the second ground for refusal (section b) of FD 2003/577 was related to the situation where a privilege or immunity applicable under Dutch legislation precludes seizure; the third ground for refusal (section c) to the situation where the seizure would ultimately lead to cooperation in a prosecution or trial that under Dutch legislation is deemed to violate the principle of ne bis in idem; the fourth ground for refusal (section d) concerned the situation where double criminality is absent[629]. Art 13 of Framework Decision 2008/978/JHA[630], the immediate predecessor of the EIO D, included the grounds for refusal of an evidence order. Art 13 of Framework Decision 2008/978/JHA was implemented in Dutch legislation through Art 552yy of the CCP[631]. Thus, the grounds for refusal applicable in The Netherlands under Art 5.4.4 of the CCP are not entirely novel and Dutch legal practitioners already had some practical experience with certain grounds for refusal.

5.3.1 Scope

In The Netherlands, an EIO may be issued to obtain evidence in criminal matters or to obtain evidence already in the possession of the competent authorities of the executing State (Art 5.4.1(1) CCP). An EIO may also be issued in proceedings initiated by an

[628] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.
[629] Kamerstukken II 2004-2005, 29845, 3; Kamerstukken II 2004-2005, 29845, F.
[630] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.
[631] Staatsblad van het Koninkrijk der Nederlanden 2013, 32717, 10.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

administrative or judicial authority in respect of acts which are punishable under the national legislation of The Netherlands provided that the decision may be appealed against before a court having jurisdiction in criminal matters (Art 5.4.1(2) CCP). However, an EIO cannot be used to establish a joint investigation team (Art 5.4.1(3) CCP), which refers to the possibility for the public prosecutor, in some cases provided for in Art 5.2.1 of the CCP, to set up an investigation team together with competent authorities of other countries.

The authorities that, in principle, have the competence to issue an EIO in The Netherlands are the public prosecutor, examining magistrate, or court (Art 5.4.21(1) CCP)[632]. These are also designated as possible competent issuing authorities in Art 2(c)(i) of the Directive. In addition, the CJEU has ruled that an EIO may be issued by a public prosecutor even if they are not completely independent of the executive authority[633]. Based on the Dutch implementing legislation there do not appear to be any cases where the magistrate judge should be mandatorily involved in the issuance of an EIO, contrary to the execution of an EIO [634] However, Art 5.4.25(2) of the CCP states that the practical arrangements for the application of videoconferencing shall be agreed upon by the magistrate judge or the court issuing the EIO. In this, it appears, there is therefore no role for the public prosecutor. Furthermore, where the decision to issue the EIO is concerned, the court before which the criminal case is pending is competent to assess whether that decision was taken in accordance with Art 5.4.21(2) of the CCP. This includes an assessment of the substantive grounds for issuing the EIO. To the extent that the issue of the EIO has already been decided on by the examining magistrate, the judge in the criminal case may assess whether the examining magistrate could reasonably have reached his decision on the issuance of the EIO[635].

Art 5.4.21(2) of the CCP clarifies the prerequisites that should be met before an order can be issued: (1) the issuance of the order must be necessary for the investigation and proportionate to the purpose of the investigation, taking into account the rights of the

[632] Art 5.4.21(1) of the CCP: "The prosecutor, examining magistrate or a court, as the issuing authority, may issue a European Investigation Order applying investigative powers in another Member State, with the exception of Denmark and Ireland."
[633] Judgement of 8 December 2020, *A and others v Staatsanwaltschaft Wien*, Case C-584/19, ECLI:EU:C:2020:1002; J H Crijns, S M A Lestrade, A W Ouwerkerk, K M Pitcher, 'Het OM uit de positie? De institutionele positionering van het Openbaar Ministerie ter discussie' [2022] 2 Boom Strafblad 45, 50-54.
[634] For more clarification on the mandatory involvement of the examining magistrate, in some matters, in the execution of an EIO see 3.3.
[635] See Supreme Court, Judgement of 13 June 2023, ECLI:HR:2023:913.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

suspect or accused person; (2) the EIO could have been ordered under the same conditions in a similar domestic case[636]. The prerequisites for issuing an EIO are in conformity with Art 6(1)(a-b) of the Directive, as well as the means of transmitting the EIO to the executing Member State stipulated in Art 7(1) of the Directive and transposed to Art 5.4.23(1)[637] of the CCP. The Dutch legislature has chosen to adopt the wording of the provisions of the Directive almost completely verbatim, with occasional nuances more appropriate to the Dutch language[638].

5.3.2 Grounds for non-recognition and non-execution

The Dutch legislator has transposed all the grounds for refusal mentioned in the EIO D through Art 5.4.4 of the CCP. The decision was made to designate all the grounds for refusal as imperative. In this regard, Dutch legislation is at odds with the Directive[639]. However, this has until now not resulted in debates or discussions in practice. Perhaps this can be explained by the fact that the EIO D and the Dutch implementing legislation prescribe consultation with the issuing authority in all cases before invoking a ground for refusal. A ground for refusal is thus only at issue if consultations have not led to a solution[640].

In assessing whether a ground for refusal referred to in Art 5.4.4 of the CCP arises, the court shall consider the contents of the complaint and what has been put forward in that regard by the public prosecutor and by or on behalf of the person concerned at the hearing of the complaint. However, there is no obligation for the court to show *ex officio* that it has examined whether the public prosecutor, after receiving the EIO, complied with

[636] See Art 5.4.22 in conjunction with Art 5.4.3(1) of the CCP, which establish additional requirements regarding the content of the issued EIO.
[637] Art 5.4.23(1) of the CCP: "The issuing authority shall transmit the European Investigation Order completed in accordance with Arts 5.4.21 and 5.4.22 directly to the authority of the executing State competent to recognize and execute it in such a way that it may be recorded in writing and the executing State may establish its authenticity."
[638] Separate provisions have been given for the issuance of interrogation by videoconference (Art 5.4.25 CCP), the temporary posting of a person detained abroad to the Netherlands (Art 5.4.26 CCP), the temporary transfer of a person detained in the Netherlands to a foreign country for the purpose of executing an EIO issued in the Netherlands (Art 5.4.27 CCP) and the recording of telecommunications (Arts 5.4.28 and 5.4.29 CCP).
[639] As also noted in Brussels, 20.7.2021, Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, COM (2021) 409.
[640] Kamerstukken II 2016-2017, 34611, 3.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

all the requirements of Arts 5.4.2 to 5.4.5 of the CCP before recognizing and executing the EIO[641].

With the grounds having been adopted almost *verbatim* in the same order for nearly all grounds, it suffices to examine here only the few exceptions and grounds that require clarification. Art 5.4.4(1)(a) of the CCP, transposing Art 11(1)(a) of the Directive, is a pivotal piece of legislation as it encompasses several elements for refusal, including incompatibility of execution with a privilege or immunity applicable under Dutch legislation, as well as incompatibility with rules establishing and limiting criminal liability concerning freedom of the press and freedom of expression in other media[642]. Unlike Framework Decision 2003/577/JHA and Framework Decision 2008/978/JHA the last part - "as well as incompatibility with rules establishing and limiting criminal liability concerning freedom of the press and freedom of expression in other media" - is explicitly included as part of a ground for refusal. In the Framework decisions, this was only listed in the preamble. The Dutch legislator has chosen to adhere to the manner in which this ground for refusal is incorporated into the Directive, as a result public prosecutors can now explicitly invoke 'incompatibility with rules establishing and limiting criminal liability concerning freedom of the press and freedom of expression in other media' as a ground for refusal.

In Dutch legislation privilege and immunity relate to cases in which Arts 218 and 218a of the CCP apply. These Arts are applicable, for example, when a lawyer or medical professional successfully appeals to their right to decline to testify. The categories of professionals who can invoke the right to privilege are limited in number. Generally recognized as persons entitled to privilege are doctors, clergymen, notaries, and lawyers. The Dutch Supreme Court ruled that probation officers and legal assistants working for legal aid offices can also qualify[643]. If a Dutch authority has the power to waive an immunity or privilege, that authority shall be requested to waive it by the public prosecutor as soon as possible (Art 5.4.4(5) CCP). Despite the clear designation of persons deemed to be privileged in Arts 218 and 218a of the CCP, there was a case before the Supreme Court, which concerned a lack of clarity as to whether the person concerned could claim the privilege. This pertained not so much to the position of the person concerned, but to a discrepancy in

[641] See Supreme Court, Judgement of 28 June 2022, ECLI:NL:HR:2022:965.
[642] To gain perspective on how Dutch courts apply this ground for refusal see: Supreme Court, Judgement of 15 December 2020, ECLI:NL:HR:2020:1970.
[643] P P J van der Meij, 'Verschoningsrecht op grond van geheimhoudingsplicht' (in: T&C Strafvordering 2024, art. 218 Sv) accessed 20 May 2024.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

wording between the Directive - *person concerned* - and the CCP - *interested party.* The Supreme Court has ruled the right to complain about persons entitled to privilege is not limited by the fact that the Directive refers to - *person concerned* - rather than - *interested party*[644].

Art 11(1)(e) of the Directive has been transposed to Art 5.4.4(1)(e) of the CCP and allows for non-recognition and execution of an EIO where the latter relates to an offence committed outside the territory of the issuing State and committed at least partially on Dutch territory, which is not punishable under Dutch law. This is the only ground for refusal for which it was considered making it optional. Notwithstanding this consideration, the legislator made this ground for refusal mandatory in line with the other grounds for refusal[645].

In conclusion, legislation and case law has not given rise to significant debates or discussions about the application or compliance regarding the EIO D. The Netherlands quite explicitly adheres to the wording of the grounds for refusal in the Directive. However, all grounds for refusal are imperative instead of optional as is the case for the grounds for Refusal in Art 11(1) of the Directive. In this respect, the Netherlands seems to be in noncompliance with the Directive, but consultation with the issuing authority is obligatory in all cases before invoking a ground for refusal. A ground for refusal is thus only raised if consultation has not led to a solution, which makes it unlikely for refusal to occur in practice. For this reason, there seems to be little issue in practice.

5.3.3 Fundamental rights and proportionality issues

Recital 18 of the Directive, alongside Art 1(4) of the Directive, stipulate that the Directive does not have the effect of modifying the obligation to respect the fundamental rights and fundamental legal principles of the Treaty on European Union (hereafter: TEU) and the Charter of Fundamental Rights of the European Union (hereafter: CFREU). In addition, Art 11(1)(f) of the Directive states that where investigative measures in the execution of the EIO conflict with fundamental rights, execution may be refused. This ground for refusal is explicitly transposed in Dutch legislation, under Art 5.4.4(1)(f) of the CCP.

[644] See Supreme Court, Judgement of 15 December 2020, ECLI:NL:HR:2020:1970.
[645] Kamerstukken II 2016-2017, 34611, 3.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Questions have been referred both to Eurojust[646],by Member States (in respect of the Directive) and to national courts by individuals on whose behalf an EIO was (about to be) executed (in respect of the CCP), regarding the (possible) incompatibility of an EIO with fundamental rights enshrined in the TEU and/or the European Convention of Human Rights (hereafter: ECHR). The only issue which emerged before the national Dutch courts up to now is whether there has been a violation of Art 8 ECHR in conjunction with Art 7 CFREU. Counsel requested the return of data carriers that contained, among other things, photographs of the deceased partner and (grand)children of the complainant. The counsel considered the seizure and inspection to be in violation of Art 8 ECHR. The seizure was deemed not in accordance with Dutch law, as it was carried out without prior judicial review in which the interests of the complainant were considered. The District Court of Amsterdam assessed this complaint under Art 5.4.4(1)(f) of the CCP, since the violation of private life is a fundamental right included under Art 7 CFREU. The restriction on the right to respect for private life was deemed permissible, as the infringement was based on the CCP and seeked to implement an EIO deemed necessary in the issuing State, established for the protection of the rule of law and the prevention of crime[647].

Eurojust highlighted that the national legislation of the Member States differs, sparking debates about what constitutes fundamental rights. Questions mostly arise, due to difference in the interpretation of fundamental rights, specifically Art 6 TEU and/or the CFREU. As a result, concerns arise about whether the procedural law of the executing Member State is in conformity with Article 6 TEU and/or the CFREU[648]. However, in most cases it is just a matter of interpretation differences instead of noncompliance.

The concept of fundamental rights seems, at first glance, to have different scopes within Dutch legislation as well. The legislator chose to word the ground for refusal of Art 5.4.4(1)(f) of the CCP differently than in Art 11 of the SPA, which was already in force before the new Arts of the CCP were drafted. This was done to align the newly written text of the

[646] Eurojust, 'Report on Eurojust's casework in the field of the European Investigation Order' (Revisited version 24 November 2020) < https://www.eurojust.europa.eu/sites/default/files/assets/2020_11_eio_casework_report_corr.pdf> accessed 20 May 2024.
[647] See District Court of Amsterdam, Judgement of 04 November 2021, ECLI:NL:RBAMS:2021:6315.
[648] Eurojust, 'Report on Eurojust's casework in the field of the European Investigation Order' (Revisited version 24 November 2020) < https://www.eurojust.europa.eu/sites/default/files/assets/2020_11_eio_casework_report_corr.pdf> accessed 20 May 2024.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

ground of refusal in the CCP with the ground of refusal in the Directive. However, there is no doubt that the content of the ground for refusal under Art 11 of the SPA, which has its origins in the European Court of Human Rights (hereafter: ECtHR) and the Dutch Supreme Court, is covered by the wording used here, if only because the content of Art 6 TEU is considered to include the ECHR[649].

In conclusion, based on the legislation and relatively small quantity of case law, especially regarding this ground for refusal, the Netherlands currently seems to conform to the Directive. Art 5.4.4(1)(f) of the CCP explicitly stipulates what is also provided for in Art 11(1)(f) of the Directive, and the District Court of Amsterdam assessed, when this ground for refusal was invoked in a complaint procedure, whether the fundamental right invoked by the complainant has been violated based on the requirements laid down in that specific European fundamental rights provision.

5.3.4 Execution procedure and cooperation between judicial authorities

In The Netherlands, the public prosecutor is the authority authorised to execute an EIO (Art 5.4.2(1) CCP). If a Dutch authority other than the public prosecutor receives an EIO, it shall immediately forward the order to the public prosecutor and inform the issuing authority thereof (Art 5.4.2(3) CCP).

Although in most cases, the public prosecutor is authorized to carry out investigative acts independently within EIO proceedings, there are cases in which involvement of the examining magistrate is made either optional or mandatory. Pursuant to Art 5.4.8 of the CCP, an optional ground for involvement of the examine magistrate, the public prosecutor, if necessary or desirable for the execution of the EIO, shall submit the EIO to the examining magistrate. The public prosecutor specifies in a written requisition the operations required of the examining magistrate and may withdraw the requisition at any time.

There are also specific investigative acts where only the examining magistrate is authorized to execute an EIO. This is the case regarding an EIO that seeks to have a witness or expert who is in the territory of the executing state, to be heard by videoconference or other audio-visual transmission. The public prosecutor shall, to this effect, submit the order to the examining magistrate (Art 5.4.13(1) CCP)[650]. Another case of mandatory involvement

[649] Kamerstukken II 2016-2017, 34611, 3.
[650] Art 5.4.13(1) of the CCP: "The examining magistrate shall be empowered to execute a European Investigation Order to have a witness or expert located in the territory of the executing State heard by videoconference or other audiovisual transmission in accordance with paragraphs 4 to 6. The public

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

of the examining magistrate is that of interception of telecommunications carried out in the Netherlands, by another Member State, without the technical assistance of The Netherlands. If the public prosecutor, using the form provided by Annex C to the Directive receives a telecommunication recording notification, they shall immediately put the notification in the hands of the examining magistrate (Art 5.4.18(1) CCP)[651]. The magistrate judge shall decide within 48 hours of receiving notification whether to agree to the recording (Art 5.4.18(2) CCP)[652].

Art 5.4.3(1) of the CCP[653] contains minimum requirements regarding the content of an EIO, which are transposed from Art 5(1) (a-e) of the Directive. This provision further includes rules on the language in which the EIO should be drawn up, what the public prosecutor should do when a request has been transmitted by an unauthorized foreign authority, information is missing in the form provided by Annex A to the Directive, and/or an EIO is deemed disproportionate to the investigation in the issuing Member State.

The Directive states that the gathering of evidence should take place in the same manner as in a domestic case and that, in principle, there is an obligation to execute the EIO[654]. In The Netherlands the public prosecutor, as the executing authority, shall decide on the recognition and execution of the order as soon as possible and at the latest within 30 days of receiving it in conformity with Art 12(3) of the Directive[655]. An EIO capable of recognition and execution should be addressed with the same speed and priority as a similar domestic case. If necessary, the Netherlands shall consult with the issuing authority about

prosecutor, applying Art 181, shall place the order to this effect in the hands of the examining magistrate. The order may also relate to the interrogation of a suspect by videoconference or other audiovisual means of transmission."

[651] Art 5.4.18(1) of the CCP: "(…) The notification shall be in the Dutch or English language."

[652] Art 5.4.18(2) of the CCP: "The examining magistrate shall decide within 48 hours after receiving notification, with due observance of the provisions of or pursuant to Arts 126m and 126t, whether consent may be given to the recording. Consent may be refused if in a similar Dutch criminal case the recording of telecommunications would not be permitted."

[653] Art 5.4.3(1) of the CCP: "Susceptible to recognition is a European Investigation Order containing at least the following information: (a) details of the issuing authority and, where applicable, the validating authority; (b) the subject matter and grounds for the warrant; (c) the available necessary information on the person(s) concerned; (d) a description of the offence that is the subject of the investigation or criminal case, as well as the legal qualification of the offence under the law of the issuing State; (e) a description of the jurisdiction requested and the evidence to be obtained."

[654] Art 1 of EIO D; Case C-584/19 *A and others v Staatsanwaltschaft Wien* EU:C:2020:1002.

[655] If this is deemed impossible, the public prosecutor shall inform the competent authority of the issuing State without delay, stating the reasons for the delay and the time deemed necessary to take the decision. The period may then be extended by up to a maximum of up to 30 days. See Art 5.4.2(3-5), of the CCP.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

the execution of the order and the expected duration of execution (Art 5.4.5(1) CCP). In the execution of an EIO, investigative powers can be applied under the same conditions under which they can be applied in a Dutch investigation into the same facts under the CCP. However, this does not include requirements of proportionality or an assessment of the investigation interest (Art 5.4.7(1) CCP). In addition, the formal requirements and procedures indicated by the issuing authority shall be complied with in the execution of the request unless this violates fundamental principles of Dutch legislation (Art 5.4.5(2) CCP). Fundamental principles of Dutch criminal procedural law include, among others, the principle of subsidiarity and the principle of proportionality, as well as the prohibition of *détournement de pouvoir*. The latter means that a power shall not be exercised for a purpose other than that for which it was given[656]. Furthermore, Art 5.4.5(3) of the CCP[657] reflects that unless there are grounds for delay under Art 5.4.6 of the CCP[658], or if what is required in the EIO is already available, the EIO must be executed within 90 days of the decision to do so.

Geelhoed and Ouwerkerk argued that for the procedure to be swift and efficient, the short procedural deadlines and the prosecutor's information and consultation obligations require action at regular intervals and within prescribed, relatively short, timeframes, or at the very least, consideration of whether action is necessary[659]. Concerns can be voiced regarding the uncertainty that remains with respect to whether a response to a request for legal assistance will be received in a timely manner and whether that response will be usable[660]. The Netherlands is a logistical hub, which causes it to receive more requests than it issues and this can negatively affect the Dutch investigative capacity[661]. Moreover, swift

[656] P H P H M C van Kempen, 'Subsidiariteit, proportionaliteit en doelbinding als algemene beginselen: codificatie graag, maar meer volledig' [2018] 8 DD 85, 85.
[657] Art 5.4.5(3) of the CCP: "If the issuing authority has indicated in the order that due to procedural deadlines, or the seriousness of the offence or other particularly urgent circumstances, a shorter lead time for execution of the order is necessary than that given in this Art, or that the order should be executed on a specific date, this shall be considered to the extent possible."
[658] Art 5.4.6(1) of the CCP: "The public prosecutor may suspend recognition and execution of the European Investigation Order if:(a) the interests of an ongoing criminal investigation in The Netherlands oppose the execution of the order; (b) the documents, objects or data to which the order relates are already being used in another judicial proceeding."
[659] W Geelhoed, J W Ouwerkerk, 'Wederzijdse rechtshulp in strafzaken 2.0' [2017] NtEr 16, 21-23.
[660] B de Jonge, 'Grensoverschrijdende misdaad. Wanneer moeten opsporing en vervolging de grens over' [2022] 3 Boom Strafblad 78.
[661] T M de Groot, P van Glabbeek, 'Het Europees onderzoeksbevel: vergaande Europese samenwerking op basis van het beginsel van wederzijdse erkenning' [2022] 3 NTS 140.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

and efficient judicial cooperation may create tension with the legal safeguards that The Netherlands can grant to the person affected by the EIO[662]. This criticism is further discussed in paragraph 3.6, which elaborates on Dutch remedies against an EIO.

5.3.5 Remedies

The CJEU ruled in the *Gavanozov II* case that the right to an effective remedy requires that in the Member State issuing an EIO, an appeal against that issuing decision must be available[663]. This ruling can be interpreted with different levels of strictness. Dutch commentators favour a less strict reading, as the CJEU does not comment on when that remedy should be available[664].

Art 14(1) of the Directive states that Member States should provide a remedy against the investigative measures defined in an EIO equivalent to the remedies in a domestic case. In The Netherlands, persons whose properties have been seized within the course of the execution of an EIO have the right to file a written complaint about the seizure, about the use of the objects seized, or for the purpose of having their properties returned (Art 5.4.10(1) in conjunction with 552a CCP.

The Dutch Supreme Court clarified the role and responsibilities of executing authorities in proceedings in which a complaint against the seizure is filed, which should be active in safeguarding the rights of the person concerned. However, the role of the court in complaint proceedings should be limited to assessing whether there are grounds to refuse or delay the recognition or execution of the EIO[665]. The substantive grounds (Art 5.4.10(3) CCP)[666], proportionality and transfer of evidence (Art 5.4.7(1) CCP), may not be assessed by the Netherlands as executing Member State. This contributes to the concern that Dutch judges, as executing authorities, are sometimes unsure of what they may or may not assess. In response, the Supreme Court has developed a framework for review if the interested party files a notice of complaint under Art 5.4.10(1) in conjunction with Art 552a of the CCP

[662] Ibid.
[663] Case C-852/19 *Ian Gavanozov* EU:C:2021:902.
[664] Annotation to Case C-852/19 *Ian Gavanozov* EU:C:2021:902.
[665] P Geelhoed, J Ouwerkerk, 'The role and position of public prosecutors in the application of the European Investigation Order: A view from The Netherlands', in M Luchtman, F de Jong, F Kristen, K Ligeti, J Lindeman, S Tosza, (n 2).
[666] Art 5.4.10(3) of the CCP: "Arts 552a(1) to (6), 552d(1) and (2), and 552e(1) shall apply mutatis mutandis, except that the court shall not examine the grounds for issuing the order, the execution of which led to the filing of the complaint."

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

for the purpose of executing the EIO[667]. The court assesses whether: (1) there are grounds for suspension or refusal (Arts 5.4.3, 5.4.4, 5.4.6 CCP); may assess whether the authority by which the EIO was executed was lawfully applied. In doing so, the court must limit itself to an examination of the formalities with which the seizure must comply. Any defences touching on the lawfulness of the prolongation of the seizure must, in view of the principle of mutual recognition, be disregarded; (3) the seized objects concern the evidence to which the EIO relates and which the issuing authority seeks to obtain by that order. The presence of an interest in the issuing Member State in issuing an EIO is central and is automatically assumed after establishing that the seized objects are evidence to which the EIO relates[668].

Questions were also raised about the scope of legal protection to which interested parties are entitled, both in the context of the issuance and execution of EIOs and the role of the authorities involved[669]. These questions revolve around the exception that there are merely fourteen days to file a complaint against the seizure (Art 5.4.10(1) CCP). Indeed, contrary to the regular complaint procedure in a domestic case (Art 552a(3)(4) CCP), a short complaint period of fourteen days applies to the EIO (Art 5.4.10(1) CCP), which seems to be in contradiction with of Art 14(4) of the Directive. This provision stipulates that Member States shall ensure that the time-limits for seeking a legal remedy shall be the same as those that are provided for in similar domestic cases. It is therefore questionable whether The Netherlands has implemented this provision in conformity with the Directive. If no complaint is made within the short complaint period of fourteen days, the seized objects can be transferred to the judicial authorities of the issuing Member State. But Van Eekelen and Schild argued that the main issue, regarding the EIO complaint procedure, is not the exceptionally short timeframe for submitting the complaint. Instead, the main problem is that the notification of the seized person of his right to complain in practice occasionally

[667] See Supreme Court, Judgement of 21 December 2021, ECLI:NL:HR:2021:1940.
[668] T M de Groot, P van Glabbeek, 'Het Europees onderzoeksbevel: vergaande Europese samenwerking op basis van het beginsel van wederzijdse erkenning' [2022] 3 NTS 140; See for example, District Court of Rotterdam, Judgement of 22 February 2024, ECLI:NL:RBROT:2024:2261.
[669] M van Noorloos, J Ouwerkerk, P Verrest, 'Kroniek van het Europees strafrecht' [2023] 33 NJB 2917.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

fails, because in the case of a regular criminal seizure there is no obligation to give notice of the complaint period[670]. This is forseen to protect the confidentiality of the investigation[671].

Art 19(2) of the Directive stipulates that confidentiality of the EIO is a basic principle[672]. The legislative history does not disclose if the legislator considered how to ensure effective legal safeguards in view of the EIO's confidentiality obligation. It has been left to the executing Member State to navigate through how to ensure effective legal safeguards [673]. The challenge in EIO proceedings is that given the obligation of confidentiality, an EIO cannot be contested in the complaint procedure, and in addition, the public prosecutor will, in some cases, not be obliged to notify interested parties of their right to lodge a complaint. However, the confidentiality of EIO proceedings does not mean that the public prosecutor need not carry out any activity regarding protecting the rights of the interested party[674]. To provide effective legal protection, the public prosecutor could ask the authorities of the issuing Member State whether there are any objections to the disclosure of the EIO in the complaint's procedure. In addition, if the issuing Member State does not give its consent, the possibility remains for the chamber to apply Art 23(5) of the CCP[675], which allows only the chamber and not the complainant to examine the EIO. This allows for the assessment of the public interest in issuing the EIO by the chamber. However,

[670] J van Eekelen, A Schild, 'Rechtsbescherming na beslag gelegd ter uitvoering van een Europees Onderzoeksbevel' [2018] NJB 2153; P Geelhoed, J Ouwerkerk, 'The role and position of public prosecutors in the application of the European Investigation Order: A view from The Netherlands in M Luchtman, F de Jong, F Kristen, K Ligeti, J Lindeman, S Tosza, (n 2) 438-439.

[671] P Geelhoed, J Ouwerkerk, 'The role and position of public prosecutors in the application of the European Investigation Order: A view from The Netherlands', in M Luchtman, F de Jong, F Kristen, K Ligeti, J Lindeman, S Tosza, (n 2) 438.

[672] Art 19(2) of Directive 2014/41/EU: "The executing authority shall, in accordance with its national law, guarantee the confidentiality of the facts and substance of the EIO, except in so far as such information must be disclosed for the purpose of implementing investigative measures. If the executing authority is unable to comply with the obligation of confidentiality, it shall inform the issuing authority without delay."

[673] J van Eekelen, A Schild, 'Rechtsbescherming na beslag gelegd ter uitvoering van een Europees Onderzoeksbevel' [2018] NJB 2153, 2153-2154.

[674] J van Eekelen, A Schild, 'Rechtsbescherming na beslag gelegd ter uitvoering van een Europees Onderzoeksbevel' [2018] NJB 2153, 2153-2154; P Geelhoed, J Ouwerkerk, 'The role and position of public prosecutors in the application of the European Investigation Order: A view from The Netherlands', in M Luchtman, F de Jong, F Kristen, K Ligeti, J Lindeman, S Tosza, (n 2) 439.

[675] Art 23(5) of the CCP: "The prosecution shall submit to the chambers the documents relating to the case. The accused and other participants in the proceedings, as well as their counsel or attorney, shall be authorized to peruse the contents of these documents."

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

this will not change the fact that the complainant is impeded in their ability to substantiate his complaint, for which there is no solution within Dutch legislation in EIO proceedings[676].

Art 14(7) of the Directive stipulates that Member States, without prejudice to national procedural rules, when assessing evidence obtained by means of an EIO, shall ensure that the rights of the defence and the fairness of proceedings during criminal proceedings in the issuing State are safeguarded. In 2022, the Dutch Supreme Court provided a preliminary ruling at the request of the District Courts of Overijssel and Noord-Nederland in the Encrochat/Sky cases. It was ruled that if the assessment of evidence obtained by means of an EIO is concerned, the judge in the criminal case must ensure that the use of that evidence complies with the right to a fair trial and the rights of the defence. This means, when using that evidence, the court must ensure the 'overall fairness' of the criminal case in question[677]. In 2024, the Supreme Court delivered another judgement after answering the preliminary questions. It was ruled that where the reliability of investigation results used for evidence is concerned, when answering the question of whether the charges can be proved, the court uses only evidence that it considers reliable. Exclusion of evidence is possible if irregularities have occurred that have substantially affected the reliability and accuracy of investigation results. It makes no difference whether those investigation results were obtained under the responsibility of other Member States or in a Dutch criminal investigation. However, the court may take as a starting point that investigations conducted under the responsibility of other Member States were conducted in such a way that the results obtained by those investigations are reliable. However, if there are concrete indications to the contrary, the judge is obliged to examine the reliability of those results[678]. The CJEU held in the *Encrochat case*[679] that information and evidence should be disregarded if the person involved is not in a position to comment effectively on that information or evidence and the said information and evidence are likely to have a preponderant influence on the findings of fact.

In conclusion, there is no clear-cut answer to the question whether the possibilities under Dutch legislation to appeal can be considered adequate. For the time being, therefore, there is no indication for adjusting legislation or practice. However, The

[676] J van Eekelen, A Schild, 'Rechtsbescherming na beslag gelegd ter uitvoering van een Europees Onderzoeksbevel' [2018] NJB 2153, 2153-2154.
[677] Supreme Court, Judgement of 13 June 2023, ECLI:NL:HR:2023:913.
[678] Supreme Court, Judgement of 13 February 2024, ECLI:NL:HR:2024:192.
[679] Case C-670/22 *Encrochat* EU:C:2024:372.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Netherlands seems to conform to the rules laid down in the Directive regarding remedies. The review framework developed by the Supreme Court regarding what Dutch courts may or must assess in the context of a complaint's procedure against an EIO is in conformity with the Directive. Also, the Supreme Court's rulings in the Encrochat cases, although prior to the CJEU ruling, seem to correspond to what was stipulated herein regarding exclusion of evidence without a remedy. The main shortcoming of the Dutch implementation legislation concerns the short complaint period, which differs from the national procedure, while the Directive expressly states that Member States should ensure time limits for appeal that are the same as those in comparable domestic cases.

5.4 The coordination with Regulation 2018/1805

Dutch legislation provided rules on the recognition and execution of freezing and confiscation orders before the Regulation 1805/2018 (hereafter: Regulation) was adopted. The Regulation simplified and accelerated the procedures for taking away criminal assets concealed in another European Member State. The so-called prohibition on overwriting European regulations meant that the existing national rules could not apply to freezing and confiscation orders covered by the Regulation and had to be removed. The deletion of these existing Dutch provisions was deemed undesirable as Denmark and Ireland were (and are) not bound by the Regulation. Therefore, the already existing rules in Title 5 of Book 5 of CCP and the Mutual Recognition and Enforcement of Monetary Penalties and Confiscation Act (hereafter: MREMPCA)[680] were retained in respect of those Member States. With respect to a freezing order from another Member State not bound by the Regulation, including Denmark and Ireland, Arts 5.5.1 to 5.5.13 of the CCP apply. For a confiscation order from another Member State not bound by the Regulation, including Denmark and Ireland, Arts 22 to 33 of the MREMCPA apply. With respect to the other Member States, which are bound by the Regulation, the directly applicable provisions of the Regulation became applicable and entered into force as of December 19, 2020[681]. In addition, with regard to Member States bound by the Regulation a new Third Section has been added to Title 5 of the Fifth Book of the CCP (Arts 5.5.15 to 5.5.19) and also a new Third section was added to Chapter III of the MREMPCA. As a result, Chapter III of the MREMCPA came to consist of three

[680] Wet wederzijdse erkenning en tenuitvoerlegging geldelijke sancties en beslissingen tot confiscatie, overheid.nl, https://wetten.overheid.nl/BWBR0022604/2023-04-19.
[681] Kamerstukken II 2019-2020, 35402, 3.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

sections. The first two sections apply to confiscation orders against Member States not bound by the Regulation, the third section deals with confiscation orders from Member States that are bound by the Regulation[682]. This approach, in which new articles were added to the existing Dutch legislation in addition to the Regulation having direct effect, was adopted with the intention of effective practical application of the Regulation in the Netherlands[683]. As of then no amendments have been made.

The Regulation has four innovative aspects compared to previous legislation. Firstly, the Regulation has a broad scope of application, which allows to take into consideration the differences between Member States on confiscation procedures. The Regulation applies to all confiscation orders issued in the context of criminal proceedings and is thus not limited to the confiscation measures harmonised by the European Union legislator. It may involve classic confiscation, but also confiscation that goes beyond the confiscation of property directly related to the offence for which the person was convicted. In this context, the standard of proof is often lower, or the burden of proof is reversed or shifted. Also, the Regulation applies to all national legislation that creates a confiscation power, including confiscation without a final conviction: so-called non-conviction-based confiscation (hereinafter: NCBC)[684].

A draft bill on confiscation of criminal assets (hereafter: CCG) was published by the Dutch Minister of Justice and Security on 16 November 2021, proposing the possibility of taking away criminal assets without prior criminal conviction. A parliamentary letter dated 15 March 2024 revealed that this bill will not be submitted to the House of Representatives in its current form[685]. It was planned to amend the bill in response to the European Union Confiscation Directive when agreed on by the European Council and the European Parliament, which was deemed likely to include an obligation for Member States to allow two forms of non-conviction-based confiscation[686]. On 2 May 2024, Directive 2024/1260 on asset recovery and confiscation was published. The adoption of Directive 2024/1260 has resulted in the withdrawal of the CCG bill in the Netherlands. A new draft bill to implement

[682] Ibid 167.

[683] Kamerstukken II 2019-2020, 35402, 3.
[684] S Bollens, D van Daele, 'De wederzijdse erkenning van confiscatiebevelen: de innovatieve aspecten van Verordening (EU) 2018/1805' [2022] 3 Boom Strafblad 98.
[685] Letter by the Minister of Justice and Safety 15 March 2024, 29911, 435.
[686] Ibid; M van Noorloos, J Ouwerkerk, P Verrest, 'Kroniek van het Europees strafrecht' [2023] 33 NJB 2917, 2923.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Directive 2024/1260 is currently being prepared, of which the NCBC procedure will be part. The aim is to present a draft bill for consultation around the end of 2024[687].

When examining the Dutch legislation and case law it is apparent that the provisions in the Regulation have direct effect in The Netherlands. In addition, some articles of the CCP and MREMCPA should be consulted, for example to ascertain who is the issuing authority in the Netherlands, in cases governed by the Regulation. This implies that in some cases three instruments (Regulation, CCP, MREMCPA) need to be considered in conjunction.

5.4.1 Legal basis in the national system and scope

The Third Section to Title 5 of the Fifth Book (Arts 5.5.14 to 5.5.19), named "freezing orders under Regulation 2018/1805", was added. In addition Arts 34 and onwards of the MREMCPA were added to the Third section of Chapter III, named "confiscation order under Regulation 2018/1805"[688].

Art 3(1) of the Regulation specifies for which offences freezing orders and confiscation orders should be executed without verification of the double criminality requirement. Art 3(2) complements that, for all other offences, Member States may assess whether the conduct also constitutes an offence under domestic legislation. Both paragraphs have direct effect in The Netherlands. Regarding the second paragraph, it is noted that the Dutch Criminal Code and particular legislation provide for the penalization of offences other than those mentioned in Art 3(1) of the Regulation.[689].

Art 5.5.14(b) of the CCP[690] refers to the authorities mentioned in Art 2(8)(a) of the Regulation as issuing authorities. The Regulation states that "issuing authority" means any judge, court, or public prosecutor in charge of the case, or another competent authority which is designated as such by the issuing State, and which is competent in criminal matters to order the freezing of property or to execute a freezing order in accordance with national legislation. Art 5.5.19 of the CCP designates the public prosecutor as the issuing authority. Besides, this provision there are no other provisions in the CCP that deal with the issuance of an order. Also, regarding the issuance of confiscation orders, no provisions can be found

[687] Report of a written consultation JHA Council 12 June 2024, 32317, 880.

[688] Kamerstukken II 2019-2020 35402, 3.
[689] Kamerstukken II 2019-2020, 35402, 3.
[690] Art 5.5.14(b) of the CCP: "Issuing authority means the authority referred to in Art 2, section 8, subsection a, of External link: Regulation 2018/1805."

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

in the MREMCPA. Reference is made to the direct effect of the provisions in the Regulation only[691].

5.4.2 Grounds for non-recognition and non-execution

Art 5.5.16 of the CCP refers to Art 8(1) of the Regulation, and Art 36 of the MREMCPA refers to Art 19(1) of the Regulation, with the only difference that the public prosecutor is designated as the competent authority for refusing recognition or enforcement on the grounds mentioned in Art 8(1) of the Regulation, and with respect to refusal of recognition or enforcement on the grounds mentioned in Art 19(1) of the Regulation also the Minister of Justice and Security[692].

Especially during the legislative process, there was debate about the nature of the grounds for refusal. The Dutch legislator initially intended to implement the Regulation so that all grounds are mandatory grounds, but eventually opted for optional grounds for refusal, following the opinion of the Council of State's Advisory Division (hereinafter: council). The council pointed out that the Regulation states the executing authority may decide not to recognize or execute a confiscation order if one of the grounds for refusal applies, whereas the proposed national legislation stated that the public prosecutor or the Minister should refuse the recognition or execution of a confiscation order[693]. The latter was deemed inconsistent with the *Poplawski I* judgment[694]. The approach also differs from the system of partly mandatory and partly optional grounds for refusal adopted in the domestic system implementing Framework Decision 2006/783/JHA[695].

In the existing case law, a framework is developed for assessing complaints based on Art 5.4.10 in conjunction with Art 552a of the CCP, which also applies to assessing a complaint against the execution of a freezing order based on the Regulation[696]. The court should, in that instance, also consider *ex officio* whether any of the grounds for refusal under Art 5.5.16 of the CCP in conjunction with Art 8(1) of the Regulation are present.

[691] Kamerstukken II 2019-2020, 35402, 3.
[692] Kamerstukken II 2019-2020, 35402, 3.
[693] Kamerstukken II 2019-2020, 35402, 4.
[694] Judgement of 29 June 2017, *Poplawski*, Case C-579/15, ECLI:EU:C:2017:503.
[695] Kamerstukken II 2019-2020, 35402, 3.
[696] The ruling stated that: "With respect to a European Investigation Order, among other things, it should be assessed, ex officio or otherwise, whether, in view of Arts 5.4.3 and 5.4.4 of the Code of Criminal Procedure, a ground arises for refusing the recognition or execution of the European Investigation Order." Court of Amsterdam, Judgement of 17-08-2023, ECLI:NL: RBAMS:2023:5995.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

To date, there is relatively little case law on Art 5.5.16 of the CCP in conjunction with Art 8 of the Regulation, and Art 36 of the MREMCPA in conjunction with Art 19(1) of the Regulation. The adoption of a ground for refusal by the courts hardly ever occurs and, in addition, the reasoning is usually meagre. Two of the most extensively addressed grounds for refusal in domestic case law concern Art 19(1)(d) (on double criminality) and Art 19(1)(h) (on fundamental rights) of the Regulation. Important in this regard is that the District Court of Noord-Nederland proceeded to assess a complaint that was not based on Art 36 in relation with Art 19(1)(d), of the Regulation, when it was noticed that the lawyer cited the wrong ground from the MREMPCA[697]. Thus, the citing of the incorrect articles in national legislation by lawyers, as a result of the Regulation coming into force, seems to be rectified by judges. Art 19(1)(h) of the Regulation has the most "extensive" elaboration in case law. The court ruled in all cases that the CFREU did not violate fundamental rights[698]. As indicated in Recital 34 of the Regulation, this ground is an exception to the mutual trust that exists within the Union and to the assumption that all Member States comply with Union law, in particular fundamental rights[699]. This may be one of the reasons for not setting aside this ground lightly.

Recital 16 and 17 of the Regulation stipulate that the Regulation does not modify the obligation to respect fundamental rights and legal principles of the Charter and ECHR. As indicated in Recital 34 of the Regulation, this ground is an exception to the mutual trust that exists within the Union and to the assumption that all Member States comply with Union law, in particular fundamental rights[700]. Further, the grounds for refusal in Art 8(1)(f) and Art 19(1)(h) are premised on this.

Art 5.5.16 of the CCP and Art 36 of the MREMPCA make explicit reference to the grounds for refusal pertaining to freezing and confiscation orders outlined in the Regulation. Many of these grounds for refusal align with the previous mandatory grounds for refusal in Arts 24 and 24a of the MREMPCA that applied prior to the enactment of the Regulation. In addition, the Regulation has introduced a new ground for refusal for the situation where

[697] See Court of Noord-Nederland, Judgement of 13 December 2023, ECLI:NL:RBNNE:2023:5252.
[698] See Court of Noord Nederland, Judgement of 14 December 2022, ECLI:NL:RBNNE:2022:4959; Court of Noord-Nederland, Judgement of 14 December 2022, ECLI:NL:RBNNE:2022:4960; Court of Noord-Nederland, Judgement of 12 October 2022, ECLI:NL:RBNNE:2022:4188; Court of Noord Nederland, Judgement of 12 October 2022, ECLI:NL:RBNNE:2022:4190.
[699] See Court of Noord-Nederland, Judgement of 14-12-2022, ECLI:NL:RBNNE:2022:4959.
[700] Court of Noord-Nederland, Judgement of 14-12-2022, ECLI:NL:RBNNE:2022:4959.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

the execution of the confiscation order would lead to a manifest violation of fundamental rights contained in the Charter, which had not previously been enacted into legislation[701].

5.4.3 Execution procedure and cooperation between judicial authorities

Art 5.5.14(c) of the CCP[702] refers to the authorities mentioned in Art 2(9) of the Regulation as executing authorities. The Regulation states that "executive authority" means an authority that is competent to recognize a freezing order and to ensure its execution. Art 5.5.15(1) of the CCP designates the public prosecutor as executive authority. In addition, Art 5.5.15(2) specifies the manner in which the freezing order is executed, namely by seizure of property, with the application, *mutatis mutandis*, of the third section of Title IV of the First Book, unless otherwise provided for in this title. Chapter 4 of the First Book provides special coercive measures, more specifically, the third section provides rules about seizure in domestic matters. Furthermore, Arts 8 to 13 of the Regulation provide rules on the execution of a freezing order which are applicable in The Netherlands by virtue of direct effect.

Art 35(1) of the MREMCPA distinguishes between execution of an order referring to a sum of money and an order referring to an object, with respect to manner of execution in The Netherlands. Provisions are cited that apply only to the execution of an order that pertains to a sum of money or an object, respectively.

In the case of an order relating to a sum of money, enforcement must be carried out in accordance with Arts 6:1:1 to 6:1:5, 6:1:9 and 6:6:25 of the CCP, the second title of the Fourth Chapter of the Sixth Book of the CCP and the rules laid down by or pursuant to order in camera pursuant to Art 6:4:19 of the CCP, on the understanding that the claim for the application of the coercive measure of committal and the notice of opposition to the enforcement of a coercive order shall be filed with the District Court of North Netherlands. Art 6:1:1 of the CCP designates the Minister of Justice and Security as the authority to enforce court decisions and criminal orders. The public prosecutor shall provide the Minister of Justice and Safety with the decision to that effect at the latest fourteen days after it has become enforceable, attaching, if applicable, the judge's opinion on enforcement. In addition, Art 6:1:5(1) of the CCP grants the Minister of Justice and Safety

[701] Kamerstukken II 2019-2020, 35402, 3.
[702] Art 5.5.14(c) of the CCP: "Executive authority means the authority referred to in Art 2(9) of External link: Regulation 2018/1805."

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

the authority to issue general or special orders to officials or officers designated by the Minister for that purpose. By virtue of Art 6:1:9 of the CCP, Art 96a(3) of the CCP is also applicable, which ensures that, among others, the persons referred to in the aforementioned Arts 218 and 218a of the CCP, as this would contravene their duty of confidentiality, are not obliged to provide information.

In the case of an order relating to an object, the same provisions apply as those in respect of an order that relates to a sum of money, except for Arts 6.1.1 and 6.6.25. Based on Art 6.6.25 of the CCP, the public prosecutor may make an application to be authorised to apply the coercive measure of hostage-taking against the convicted person, if full recovery in accordance with Arts 6.4.4, 6.4.5 and 6.4.6 of the CCP is not possible in the case of (1) a fine imposed in a penal order; (2) an obligation to pay a sum of money to the state for deprivation of illegally obtained benefit. In addition to the Second Title of the Fourth Chapter of the Sixth Book of the CCP is not applicable. This Chapter provides a wide variety of provisions on national procedures relating to monetary penalties and sanctions, more specifically provisions on the collection of fines and compensatory measures, deprivation of illegally obtained profits, hostage-taking orders, the breakdown of a deposit and investigation into the offender's assets. However, the Fifth Chapter of the Sixth Book and Art 6.5.3 of the CCP are applicable. Chapter five of the Sixth book concerns provisions regarding confiscation and the costs of publishing a ruling. There is also one article that provides the basis for the Decree on Enforcement of Criminal Decisions[703], which contains provisions about, among other things, the payment of monetary fines and other monetary sanctions.

Art 35(2)(3) of the MREMCPA refer to provisions in the Regulation to be complied with in the execution of a confiscation order where the issuing authority has decided to return an object, or a corresponding sum of money, to the victim, or if the confiscation order is for the transfer of an object or sum of money to the issuing Member State.

Art 23(1) of the Regulation provides that an order shall be executed according to the law of the executing Member State. The aformentioned Dutch provisions make this practically possible. The provisions of the Regulation have direct effect, but in some cases specific provisions dealing with the practical execution of the Regulation in the Netherlands

[703] Besluit tenuitvoerlegging strafrechtelijke beslissingen, overheid.nl, https://wetten.overheid.nl/BWBR0042962/2024-07-01https://wetten.overheid.nl/BWBR0022604/2023-04-19.

define the manner in which an incoming confiscation order is executed, in particular which provisions of Dutch legislation apply to the execution.

5.4.4 Remedies

Due to the direct effect of the Regulation persons affected by a freezing order have the right to seek effective remedies in the executing Member State against the decision to recognize and execute the order (Art 33(1) Regulation). Art 5.5.18 of the CCP makes this appeal practically possible in The Netherlands[704]. To this end, reference is made to several articles that also apply in domestic proceedings, including Art 552a of the CCP, that also applies in the EIO complaint procedure. The notice of complaint shall be filed with the court of the district within which the seizure took place (Art 552a(4) CCP). In addition to the possibility of complaint under Art 552a of the CCP, the civil judge has jurisdiction to hear disputes regarding the application of Art 94d of the CCP, which concerns the retention of the right to recourse, by the public prosecution authority. If one of these remedies is raised by an interested party, the issuing authority must be notified (Art 33(3) Regulation). The court may not intervene in the examination of the basis of the freezing order and the complaint also has no suspensory effect[705].

Art 32 of the Regulation, which has direct effect, states that after the enforcement of a confiscation order, the executing authority shall without delay inform the persons known to it to be affected by the procedures in accordance with domestic law. That notice must indicate the remedies available to the affected persons[706]. Art 39 of the MREMCPA provides the practical possibility for convicted persons as well as interested parties to appeal the decision of the public prosecutor to recognize and enforce the confiscation order. The appeal must be filed with the District Court of Noord-Nederland. Arts 21 to 25 of the CCP, which deal with requirements for composition of the chambers and decision, are declared applicable. Appeals shall be lodged within seven days from the day on which the convicted person or interested party became aware of the decision recognizing and executing the confiscation order and, as in the case of appeals concerning freezing orders, shall not have a suspensive effect. Art 39 of the MREMCPA also indicates the provisions to

[704] Art 5.5.18 of the CCP: "(…) Arts 552a, 552c to 552d, subsection 1, and 552e, subsection 1, shall apply mutatis mutandis, on the understanding that the court shall not enter into an examination of the basis of the freezing order. The complaint shall have no suspensive effect."
[705] Kamerstukken II 2019-2020, 35402, 3.
[706] Kamerstukken II 2019-2020, 35402, 3.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

which third parties who believe they are entitled to objects from which recourse is taken may rely. These provisions are laid down in the Code of Civil Procedure, which has differing regimes for the settlement of seizure under foreclosure, distinguishing between movable property that is not registered property (Art 439 onwards) and immovable property (Art 502 onwards). For example, a third party may oppose the foreclosure sale of confiscated objects (Arts 456(1) and 538(1) Code of Civil Procedure). A third party may also claim a portion of the proceeds after the foreclosure sale[707].

There are certain principles that govern the assessment of an appeal pursuant to Art 39 of the MREMCPA: (1) the court must assess whether the public prosecutor could reasonably come to his decision to recognize the order; (2) the public prosecutor, in making his assessment, must not interfere with the proceedings and decisions made in another Member State; (3) the court, in making its assessment, must not interfere with the proceedings and decisions made in another Member State[708].

6 Conclusions

The analysis has shown compliance with the three instruments that has gradually increased over time. The journey from the inception of the EAW FD to its integration into Dutch law has been characterized by a continual evolution shaped by judicial rulings and legislative adjustments. Initially, the SPA mirrored all grounds for refusal and safeguards outlined in the EAW FD. However, the landscape gradually shifted due to the interventions of the Supreme Court of The Netherlands and, notably, the Court of Justice of the European Union. These interventions prompted revisions in the SPA and established interpretative guidelines for the EAW FD, leading to a more nuanced understanding of its provisions. Significant changes can be observed, such as the transformation of grounds and guarantees for refusal from mandatory to optional, except for those explicitly mentioned in Art 3 of the FD. A legislative proposal is expected to result compliance with the EAW FD for the most part, although there remains room for improvement, for instance with respect to the exception clause in Art 9 of the SPA, which could be clarified to establish specific criteria for refusal.

[707] Kamerstukken II 2019-2020, 35402, 3.
[708] See Court of Noord-Nederland, Judgement of 3 April 2024, ECLI:NL:RBNNE:2024:1448.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

The Dutch system has generally implemented the provisions of the EIO D into national law, specifically through the amendments to the Dutch CCP. The Dutch legislation incorporates the grounds for refusal, the procedures for issuing and executing an EIO, and the necessary safeguards for fundamental rights as stipulated by the EIO D. While the Dutch system demonstrates substantial compliance with the EIO D, certain aspects, such as the imperative nature of grounds for refusal and the short complaint period, may require further alignment to fully meet the EIO D's standards. Nonetheless, these discrepancies do not significantly hinder the overall functionality and compliance of the Dutch EIO D implementation.

The Dutch legal framework demonstrates substantial compliance with Regulation 1805/2018. Dutch legislation, specifically the Criminal Code of Procedure (CCP) and the Mutual Recognition and Enforcement of Monetary Penalties and Confiscation Act (MREMCPA), has been appropriately amended to accommodate the Regulation. While minor legislative updates are ongoing to further align with evolving EU directives, the amendments ensure the direct applicability of the Regulation while retaining necessary provisions for Member States not bound by the Regulation, such as Denmark and Ireland.

7 References

K H Brodersen, V Glerum and A Klip, 'The European arrest warrant and in absentia judgments: The cause of much trouble', New Journal of European Criminal Law [2022]

S Buisman, 'First Periodic Country Report: The Netherlands' https://stream-eaw.eu/wp-content/uploads/2022/01/STREAM-Country-Report_The-Netherlands.pdf accessed 17 July 2024

J H Crijns, S M A Lestrade, A W Ouwerkerk, K M Pitcher, 'Het OM uit de positie? De institutionele positionering van het Openbaar Ministerie ter discussie' [2022]

R Da Silva Athayde Barbosa, V Glerum, H Kijlstra, A Klip, C Peristeridou, M Wąsek-Wiaderek, A Zbiciak, European Arrest Warrant: Practice in Greece, The Netherlands and Poland (Boom Juridisch 2022)

T M de Groot, P van Glabbeek, 'Het Europees onderzoeksbevel: vergaande Europese samenwerking op basis van het beginsel van wederzijdse erkenning' [2022] 3 NTS

B de Jonge, 'Grensoverschrijdende misdaad. Wanneer moeten opsporing en vervolging de grens over' [2022] 3 Boom Strafblad

Eurojust, 'Report on Eurojust's casework in the field of the European Investigation Order' (Revisited version 24 November 2020) < https://www.eurojust.europa.eu/sites/default/files/assets/2020_11_eio_casework_report_corr.pdf> accessed 20 May 2024

P Geelhoed, J Ouwerkerk, 'The role and position of public prosecutors in the application of the European Investigation Order: A view from The Netherlands', in M Luchtman, F de Jong, F Kristen, K Ligeti, J Lindeman, S Tosza, Of swords and shields: due process and crime control in times of globalization (Eleven International Publishing 2023)

V H Glerum, 'De Overleveringswet op de helling: de herimplementatie van Kaderbesluit 2002/584/JBZ', Nederlands Tijdschrift voor Strafrecht [2021]

V H Glerum, N Rozemond, 'Overlevering', in R van Elst, E van Sliedregt (eds.), Handboek Internationaal strafrecht. Internationaal en Europees strafrecht vanuit Nederlands perspectief (3rd edn, Wolters Kluwer 2022)

E G Kurtovic, P M Langbroek, 'The EAW in The Netherlands' in B de Santos Sousa (eds), The European Arrest warrant in law and in practice: A comparative study for the consolidation of the European Law-enforcement Area (Coimbra 2010)

P P J van der Meij, 'Verschoningsrecht op grond van geheimhoudingsplicht' (in: T&C Strafvordering 2024, art. 218 Sv) accessed 20 May 2024

J van Eekelen, A Schild, 'Rechtsbescherming na beslag gelegd ter uitvoering van een Europees Onderzoeksbevel' [2018] NJB

P H P H M C van Kempen, 'Subsidiariteit, proportionaliteit en doelbinding als algemene beginselen: codificatie graag, maar meer volledig' [2018] 8 DD 85

M van Noorloos, J Ouwerkerk, P Verrest, 'Kroniek van het Europees strafrecht' [2023] 33 NJB