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### National Report Netherlands

Goudappel, F.; Langer, Jurian; Bonn, M.; Dane, N.M.; Geelhoed, Willem; Kranenborg, H.; Hijmans, H.; Kellermann, A.E.; de Lange, S.R.; Rijpma, J.J.

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## **FIDE 2012: Area of Freedom, Security and Justice and the Information Society - National report Netherlands**

National rapporteurs: *Flora Goudappel and Jurian Langer*

Contributors: *Marjorie Bonn, Marlèn Dane, Pim Geelhoed, Herke Kranenborg, Hielke Hijmans, Alfred Kellermann, Simone de Lange, Jorrit Rijpma, Corinna Wissels, Jaap de Zwaan*<sup>1</sup>

### **INTRODUCTION**

Generally, the Netherlands has been an active player in the area of Freedom, Security and Justice and in the Information Society.<sup>2</sup> This approach can best be described as follows: legislative action at Union level is preferred when obvious lacunas exist, while in other situations the leading principle should be harmonisation on the basis of the principle of mutual recognition. The Netherlands is furthermore ambitious towards the obstacles regarding mutual recognition and the need to enhance mutual trust; for that purpose, a discussion on an additional evaluation system was launched<sup>3</sup> and this Dutch initiative was incorporated in the Stockholm Programme.<sup>4</sup> Recently, the approach towards European initiatives is – in line with the general trend in Europe – more critical.

As to the protection of personal data, the Dutch approach has also generally been active but prudent. For example, the Dutch government took – together with other Member States – the initiative for the *Prüm* Treaty. This Treaty was later transformed into Council Decision 2008/615 facilitating massive exchange of DNA-data, fingerprints as well as vehicle registration data.<sup>5</sup> In these areas, it was understood that the EU should play a central role, in order to ensure that the work of police and justice is not hampered by absence of information.

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<sup>1</sup> This report reflects personal opinions of the authors and not the institutions or organizations they work for.

<sup>2</sup> For a comment on the Dutch position: P. de Hert & Th. A. de Roos, 'De positie van Nederland in het Europees strafrechtelijk landschap', in: *Justitiële Verkenningen*, no. 6, 2004, p. 124.

<sup>3</sup> M. Dane & A. Klip (eds.), *An additional evaluation mechanism in the field of EU judicial cooperation in criminal matters to strengthen mutual trust* (Tilburg: Celus legal Publishers 2009).

<sup>4</sup> Paragraph 1.2.5 of the Stockholm Programme: Document 17024/09 JAI 896 of 2 December 2009.

<sup>5</sup> Council Decision 2008/615/JHA of 23 June 2008, on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L210/1.

**1. What has been the impact of EU law (Framework Decisions 2002/475/JHA [2002] OJ L164/3 and 2008/919/JHA [2008] OJ L330/21) on the criminalisation of terrorism in your jurisdiction?**

Framework Decision 2002/475 was implemented in 2004 by introducing the Terrorist Offences Act.<sup>6</sup> This Act entered into force on 10 August 2004.<sup>7</sup>

The main amendments are the following. A new provision has been added to the Dutch Criminal Code defining terrorist crimes. Article 83 sums up crimes which constitute a terrorist crime. The additional provision, Article 83a, provides that a terrorist aim means the aim to seriously intimidate (a part of) the population of country and/or to unlawfully force a government or international organization into acting, to refrain from acting or to tolerate, and/or to seriously destroy or disrupt the political, constitutional, economical or social structure of a country or international organization. When crimes enumerated in Article 83 (*e.g.* manslaughter, serious assault, hijacking and abduction) are committed with a terrorism aim, the maximum duration of the prison sentence will be increased by 50%. For offences which can be sentenced with a maximum of 15 years, the sentence will be increased to a maximum of 20 years or life imprisonment.

With the Terrorist Offences Act, certain crimes have been separately defined as a terrorist crime. These include the recruitment of fighters (Article 205), conspiracy to commit a terrorist crime, membership of a terrorist organisation, leadership or support (both financially and materially) of a terrorist organisation and threatening to commit a terrorist crime. In addition, the maximum penalty is increased from one year to four years.

A remarkable element is that the Terrorist Offences Act has a broader scope than is required under Framework Decision 2002/475. In the Act, '*seriously intimidating a population*' has become '*a population or part of the population*'. The aim of this addition was to include certain forms of violent political activism, like the animal liberation movement.

As to Framework Decision 2008/919, the Criminal Code and Code of Criminal Procedure were amended in 2009.<sup>8</sup> The modifications entered into force on 1 July

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<sup>6</sup> *Wet Terroristische Misdrijven*, Stb. 2004/290.

<sup>7</sup> Stb. 2004/373.

2009.<sup>9</sup> These modifications include the extension of crimes linked to terrorist activities by reducing the dissemination of materials which might incite persons to commit terrorist attacks. The changes also expand the scope for removing persons from their profession, as an additional punishment and for a fixed period, if they are abusing their position by inciting or encouraging hatred or violence, insulting a group of people or recruiting for an armed struggle.

Also, authorities may now investigate or prosecute suspects if they have indications of a terrorist crime instead of a reasonable suspicion as is required for ordinary, non-terrorism crimes. Furthermore, the Terrorist Offences Act permits pre-trial detention for terrorism charges on the basis of an ordinary suspicion instead of the more stringent requirement of incriminating evidence as is required for ordinary, non-terrorism crimes.

The Terrorist Offences Act was applied in a number of cases. For the purpose of this report, it is interesting to note that the Appeals Court in The Hague acquitted the seven members of the ‘*Hofstad*’ group in January 2008 of participating in a criminal and terrorist organization, finding that there was no question of a lasting and structured form of cooperation, nor of a commonly shared ideology.<sup>10</sup> In February 2010, the Supreme Court annulled the appeals court verdict and referred the case for retrial to the Appeals Court in Amsterdam.<sup>11</sup> In December 2010, the seven members were finally convicted for participating in a criminal and terrorist organization.<sup>12</sup>

In October 2008, the Appeals Court in The Hague upheld the guilty verdicts of four members of the ‘*Piranha*’ terrorist group for participating in a terrorist organization.<sup>13</sup> Defense attorneys appealed the verdict to the Supreme Court, but the subsequent appeal was withdrawn.

## **2 What has been the impact of EU law (Framework Decision 2005/222/JHA [2005] OJ L69/67) on the criminalisation of attacks against information systems in your jurisdiction?**

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<sup>8</sup> *Wet van 12 juni 2009 tot wijziging van het Wetboek van Strafrecht, Wetboek van Strafvordering en enkele aanverwante wetten in verband met de strafbaarheidstelling van het deelnemen en meewerken aan training voor terrorisme, uitbreiding van de mogelijkheden tot ontzetting uit het beroep als bijkomende straf en enkele andere wijzigingen*, Stb. 2009/245.

<sup>9</sup> Stb. 2009/263.

<sup>10</sup> LJN: BC2576, Gerechtshof 's-Gravenhage, 2200189706, 23 January 2008.

<sup>11</sup> The Supreme Court dealt with seven separate cases, one for each suspect standing trial. The first case being: LJN: BK5172, Hoge Raad, 08/00623, 02 February 2010.

<sup>12</sup> LJN: BO8032, Gerechtshof Amsterdam, 2300074710, 17 December 2010.

<sup>13</sup> LJN: BF3987, Gerechtshof 's-Gravenhage, 2200734906, 02 October 2008.

Framework Decision 2005/222 was relatively easily implemented in the Netherlands. One of the reasons for this was that, at national level, the challenges of information technology in relation to criminal law had already led to various legislative responses.<sup>14</sup> As early as 1992, the Act on Computer Crime I was introduced. This act amended the Criminal Code, Code of Criminal Procedure and Civil Code by including information technology offences and enforcement competences for detection and prosecution in this area. The act entered into force in March 1993.<sup>15</sup> The implementation of Framework Decision 2005/222 was part of the modernisation of the Act on Computer Crime.<sup>16</sup>

One of the issues discussed during the implementation process was the obligation of article 2 to criminalise as a criminal offense intentional access without permission to any part of an information system. This provision allows Member States to punish illegal access dependent upon whether security measures of the system were violated. At the time, the Act on Computer Crime I made illegal access punishable in two situations: either when a security measure was violated or when technical interference had taken place by using for instance a false identity. Both requirements were dropped with the Act on Computer Crime II. The reason for this was that the Dutch government assumed that illegal access in the sense of Framework Decision 2005/222 includes both situations referred to under Dutch legislation.

Framework Decision 2005/222 and its implementation measures have been part of litigation before the Dutch courts at many instances, in particular the issue of illegal access. In February 2011, the Supreme Court ruled that taking advantage of security gaps in an information system is punishable as illegal access in line with the Framework Decision, even though the term security measure was dropped with the adoption of the Act on Computer Crime II.

In 2006, the Supreme Court was confronted with the interaction between the fundamental rights and the criminalisation of illegal access.<sup>17</sup> The author of a book on security issues in the banking sector had illegally accessed the information system of banks to demonstrate his point. The question was whether prosecution in this situation was a violation of article 10 ECHR. The Supreme Court held that criminalisation of illegal access was necessary in a democratic society to prevent similar crimes and

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<sup>14</sup> *Informatietechniek en Strafrecht*, Den Haag: Staatsuitgeverij 1987.

<sup>15</sup> Stb. 1993/ 33.

<sup>16</sup> Stb. 2006/301.

<sup>17</sup> LJN AY8343, Hoge Raad, 02811/05, 5 December 2006.

protect the rights of others. The Supreme Court concluded hence that there was no breach under article 10 ECHR.

**3. To what extent is there a need for new EU legislation to address gaps in legal response to cybercrime? To what extent does the Commission proposal for a new Directive on cybercrime (COM (2010) 517 final) address such gaps?**

For the Dutch government, the prosecution of cybercrime has priority.<sup>18</sup> As cybercrime is by nature a cross border activity, the Dutch government opinions that actions at EU level are to be preferred. The proposal by the Commission was warmly received in legal and political circles in the Netherlands, because the Commission's proposal complements Framework Decision 2005/222 by introducing additional elements.<sup>19</sup> Examples are the provisions regarding minimum and maximum penalties and information requests.

**4. What has been the impact of EU law (Framework Decision 2008/841/JHA [2008] OJ L300/42) on the criminalisation of participation in a criminal organisation in your jurisdiction?**

Framework Decision 2008/841 has not brought about any changes in the Netherlands, as Dutch legislation already fulfilled the requirements set out in the decision. Although article 1 of Framework Decision 2008/841 offers the option for the Member States to adopt more severe sentences, the Dutch legislator has not opted for this possibility. The reason was that in anticipation of the decision the maximum penalty was already increased with regard to the participation in a criminal organisation. For the Dutch government, the value of the decision therefore lies primarily in improving cooperation between the Member States and approximation of definitions.

**5. What has been the impact of EU law (Framework Decision 2008/913/JHA [2008] OJ L328/55) on the criminalization of racism and xenophobia in your jurisdiction?**

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<sup>18</sup> E.g. 'Ontwerp Nationale Infrastructuur Bestrijding Cybercrime', Den Haag, March 2006.

<sup>19</sup> BNC-fiche, *Richtlijn aanvallen op informatiesystemen*, 9 november 2010, Kamerstukken II 2010/2011, 22112, nr. 1082.

The impact of Framework Decision 2008/913 has been very limited in the Netherlands. The reason is that Dutch legislation already contained all criteria laid down in the Framework Decision. The Dutch Senate was willing to agree with the changes proposed on condition that the denial of genocide would not be criminalised in all circumstances. At present, a new and separate legislative proposal is being discussed in the Second Chamber to criminalise the denial of genocide in all circumstances.<sup>20</sup>

## **6. What have been the main challenges for the legal systems of EU Member States in implementing the EU *acquis* in the field of mutual recognition in criminal matters?**

A number of challenges can be identified and are as follows.

The first challenge relates to the sheer number of Framework Decisions in the field of criminal matters. The Union adopted nine decisions during the period 2002-2009.

The second challenge stems from the method of implementation itself. Member States were used to implement in the field of criminal matters treaty or convention obligations. This leaves room for (more) flexibility. As for the Netherlands, all relevant framework decisions have been implemented, with the exception of three decisions. At the time of writing this report, implementation measures are in the process of being adopted by Parliament with regard to: Framework Decision 2008/978 on the European evidence warrant<sup>21</sup>, Framework Decision 2008/909 on custodial sentences<sup>22</sup>, and Framework Decision 2008/947 on alternative sanctions.<sup>23</sup>

The third challenge relates to vague or complicated provisions used in the various Framework Decisions, resulting from compromises during negotiations in combination with the lack of experience applying the principle of mutual recognition in criminal matters. During the implementation phase, these challenges become apparent. The Dutch government prefers not to overcome this problem by simply

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<sup>20</sup> *Voorstel van wet van het lid Voordewind tot strafbaarstelling van het in de openbaarheid ontkennen, op grove wijze bagatelliseren, goedkeuren of rechtvaardigen van volkerenmoord (strafbaarstelling negationisme)*, 30 579.

<sup>21</sup> 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, OJ L350/72 (implementation date 19 January 2011).

<sup>22</sup> Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU, OJ L327/27 (implementation date 05 December 2011).

<sup>23</sup> Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to supervision of measures and alternative sanctions, OJ L337/102 (implementation date 06 December 2011).

copying the framework decision text in the national law. The rationale for this approach is that, in doing so, Parliament would pass on the challenges to judicial authorities. This would result in a variety of ad hoc solutions and/or result in time consuming legal discourses and/or court hearings.

The fourth challenge is that implementation is not limited to only drafting new legislation. In addition, organisational and training measures are required. As to the organisational measures, illustrative are the measures taken with regard to Framework Decision 2002/584 on the European arrest warrant. The principal challenge for the Netherlands was to design the surrender procedure within the time limits of Article 17 of the decision. The existing extradition procedure (including the appeal procedure) could last up to nine months in the Netherlands. It is not possible to expedite the appeal procedure in such a way that a final decision would be taken within the 60 or 90 days, as required by Article 17. It was decided therefore to limit the surrender procedure to one hearing. In order to guarantee uniformity, the handling of all European arrest warrants was concentrated in one court: the District Court of Amsterdam. A special appeal procedure at the Supreme Court was introduced in case of incorrect interpretations of Framework Decision 2002/584 or the Surrender Act.<sup>24</sup>

Fifth, Member States have to balance between legalistic techniques and practical needs. For instance, Framework Decision 2005/214 on financial penalties was implemented in the Netherlands in a separate Act.<sup>25</sup> The idea was that subsequent framework decisions in this field could be included in this act. This worked well from a legalistic perspective, but created difficulties for practitioners. When Framework Decision 2006/783 on confiscation orders was included in the same act, practitioners had to overcome the legal difficulties of a relatively new act that underwent substantial changes within a short period after the entry into force of the act.<sup>26</sup> In order to avoid further problems, it was decided to implement Framework Decision 2008/909 on custodial sanctions and Framework Decision 2008/947 on alternative sanctions in a separate act.

The sixth challenge relates to the fact that framework decisions do typically not include provisions for the transitional situation that one Member State has implemented the decision and another Member State not. The Netherlands seeks to

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<sup>24</sup> It is to be noted that the special appeal procedure will not influence the surrender decision already taken.

<sup>25</sup> Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L76/16 (implementation date 22 March 2007).



overcome this legal lacuna for instance in the Surrender Act by including transitional provisions. However, as to Framework Decision 2009/999 in absentia, the Netherlands did not include a transitional provision in the implementation act.<sup>27</sup> This makes clear that framework decisions should either include provisions for the transitional situation or realistic implementation periods.

## **7. What are the limits of mutual trust in the execution of European arrest warrants?**

Framework Decision 2002/584 on the European arrest warrant was implemented by the introduction of a new act: the Surrender Act. This act entered into force on 12 May 2004.<sup>28</sup> For this report, the following issues in this regard should be mentioned.

First, the centralised model whereby the District Court of Amsterdam deals solely with European arrest warrants has worked reasonably well.<sup>29</sup> In one case, the District Court has made a preliminary reference to the ECJ.<sup>30</sup> Since May 2004, nearly 3000 decisions to surrender have been taken by the executing judicial authorities. The number of decisions grew steadily: 2004: 74, 2005: 303; 2006: 385, 2007: 435, 2008: 433, 2009: 539; 2010: 580.

Second, the Surrender Act contains in article 11 a ground for refusal in relation to human rights. This provision was applied in three cases.<sup>31</sup> This provision was criticised by the Commission in its evaluation report in 2007, as such provisions complicate surrender.<sup>32</sup> However, in its evaluation report in 2011, the Commission emphasises the Member States' obligation to respect human rights and refrain from surrender in cases where unacceptable detention conditions in the Member State requesting surrender violate the fundamental rights of the person involved.<sup>33</sup> In six cases over the last years, claims of breaches of fundamental rights have resulted in the refusal of the requested surrender. Claims about bad prison conditions are examined

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<sup>26</sup> Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L328/59 (implementation date 24 November 2008).

<sup>27</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L190/18.

<sup>28</sup> See Act of 29 April 2004, Stb 195 as changed by the Act of 22 December 2005, Stb 2006, 24

<sup>29</sup> In only three cases, the special appeal procedure with the Supreme Court was applied. See HR 28 November 2006, LJN AY6631, AY6633 en AY6634 and NJ 2007, nrs. 487, 488 en 489

<sup>30</sup> Case C-123/08, *Wolzenburg*, ECR I-9621.

<sup>31</sup> Article 11 of the Surrender Act provides that surrender is not allowed in situations that granting the request would lead to flagrant breach of the fundamental rights of the person concerned.

<sup>32</sup> Report of 11 July 2007 COM (2007) 407 final, page 9.

in depth, but until now they did not lead to refusal of a requested surrender, because there was no flagrant breach of human rights in the specific case.<sup>34</sup>

A third point relates to article 26(4) of the Surrender Act. This provision obliges the court to examine a claim of innocence when such a claim is made at the hearing by the person against whom the European arrest warrant has been issued. On the basis of the information brought by the person concerned at the hearing, the District Court must assess if the person has immediately and irrefutably proven his innocence. In that event, the court must refuse the surrender of the person concerned. Although many persons have tried to convince the District Court of their innocence, the number of refusals over six years is only two cases. Despite this minimal application, the necessity of this provision may be demonstrated by a Belgian case in which a person was surrendered to Italy, although the executing authority in Belgium was aware that this was a case of a mistaken identity. In Italy, the person was released shortly after his surrender. The Belgian judicial authorities saw no legal ground to refuse the surrender.

Fourth, a balanced territoriality clause has been included in the Surrender Act as an optional ground of refusal.<sup>35</sup> On the one hand, a refusal on the basis of territoriality is possible and, on the other hand, the public prosecutor may ask the court not to apply this ground for refusal. Where the public prosecutor makes such a request to the court, the District Court will review whether the request of the prosecutor is not unreasonable. The Supreme Court has interpreted this possibility for judicial review in a restrictive way. It held that the District Court may not overrule the prosecutor's request on the basis of humanitarian grounds.<sup>36</sup> This does not prevent the District Court from refusing surrender – as discussed above – on the basis of an imminent risk of a flagrant violation of human rights.

In the last six years, surrender has been refused in seven cases on the ground of territoriality. In contrast, the Netherlands has surrendered in these six years 427 Dutch nationals, although in most of those cases the alleged offences mentioned in the

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<sup>33</sup> Report of 11 April 2011 COM (2011) 175 final, page 7 (“*article 1(3) of FD EAW does not mandate surrender when where an executing judicial authority is satisfied, (...) would result in the breach of a requested persons fundamental rights arising from unacceptable detention conditions*”).

<sup>34</sup> District Court Amsterdam 22 October 2010, LJN BO1448 and District Court Amsterdam 22 October 2010 (RK number 10/5605).

<sup>35</sup> See article 13 of the Surrender Act states in paragraph 1 that the surrender is not allowed if the European arrest warrant concerns an offence which: a) is regarded as having been committed in whole or in part in the territory of the Netherlands or outside the Netherlands on board a Dutch vessel or aircraft; or b) was committed outside the territory of the issuing state, while under Dutch law no prosecution could be brought if the offence had been committed outside the Netherlands. On the basis of paragraph 2, the public prosecutor may request a refusal of surrender to be waived, unless this request is unreasonably.

<sup>36</sup> Supreme Court 28 November 2006, NJ 2007, nrs. 487, 488 and 489.

European arrest warrant were partly committed on the territory of the Netherlands. The Dutch approach of territoriality is therefore rather flexible, because the public prosecutor can request the District Court not to apply this ground for refusal based on territoriality. This is in contrast with other member states that have implemented the clause as a mandatory ground for refusal.

The fifth element relates to the principle of proportionality. This principle was never discussed during the negotiations of Framework Decision 2002/584. On the contrary, the dominant idea was that surrender should be possible in nearly any case. After several years of application, proportionality has become an issue, also in the Netherlands. The question arises whether surrender should be applied in relation to minor offences like theft of a videotape or the breaking of a window. Another issue in practice is the widespread issuance of an European arrest warrant for the sole purpose to hear the defendant in order to take a decision whether to prosecute him or not. In these situations, the judicial authorities should use the instruments of mutual legal assistance. The European Investigation Order, now discussed in Brussels, should be used to facilitate the hearing of defendants and may therefore solve this problem.

The sixth element concerns the importance of the SIS alert. Most surrender cases start with the arrest of a person on the basis of a SIS alert. These alerts are therefore an essential tool in the surrender practice. To be a useful tool, the alerts should be correct. In practice, incorrect alerts happen. Another problem is that incorrect alerts are sometimes not corrected or deleted from the system. An incorrect alert for the purpose of surrender was the underlying issue in a preliminary ruling to the ECJ.<sup>37</sup> The referring Dutch court finally came to the conclusion, while giving the alerting judicial authority of another member state ample opportunity to give its opinion, that the alert was incorrect. Nevertheless, the alerting authority decided to ignore this ruling of the Dutch court and maintained the alert in the SIS-system.

## **8. To what extent are there gaps in the protection of fundamental rights in Member States of an Area of Freedom, Security and Justice based on the mutual recognition of judicial decisions in criminal matters?**

It appears that, in the Netherlands, possible gaps in the protection of fundamental rights of an Area of Freedom, Security and Justice based on the mutual recognition of

judicial decisions in criminal matters have so far mostly been discussed in relation to the European arrest warrant. Questioning the fundamental right protection in relation to surrender to other Member States like, for instance, Latvia,<sup>38</sup> Poland<sup>39</sup> or Sweden<sup>40</sup> by the defence, has led to case law in which the District Court of Amsterdam decided that all Member States are party to the ECHR and therefore have a system of human rights protection in place. Yet, in a recent case, the District Court has indicated that the surrender must be in compliance with fundamental rights. A Dutch national was held in a strict regime in pretrial detention in Sweden for more than a year, and returned to the Netherlands after being acquitted. The Swedish appellate Court issued an European arrest warrant in order to secure his attendance of the appeal procedure, but in deciding on the request for surrender the Amsterdam District Court decided there was a real risk that article 3 ECHR would be violated. Therefore, the Court ordered the public prosecutor to ask the Swedish authorities about the expected length of the procedure and the nature of the pretrial detention the requested person would have to undergo.<sup>41</sup> In the Dutch context, one might think of issues such as the protection of the expediency principle, which enables the Dutch legislator and Public Prosecutor to pursue a rational drug policy, which nevertheless is turning less liberal than it was some decades ago. Another issue that in the past has been regarded by the Dutch government as a fundamental aspect of its criminal justice system is the refusal of minimum sentences. The government no longer rejects these minimum sentences and is actively aiming for their introduction.<sup>42</sup>

As the system of surrender on the basis of a European arrest warrant is not a criminal trial, articles 5 and 6 ECHR do not apply. Only in case of a grounded fear of a flagrant violation of human rights in a specific case will this be applied by the District Court of Amsterdam. The District Court held that article 3 ECHR is applicable in these cases.<sup>43</sup>

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<sup>37</sup> Case C-150/05, Van Straeten, ECR I-09327.

<sup>38</sup> District Court of Amsterdam, 24 December 2004, LJN: AR8435, Rechtbank Amsterdam, 13/097228-04.

<sup>39</sup> District Court of Amsterdam, 26 October 2010, LJN: BO7692, Rechtbank Amsterdam, 13/706708-10.

<sup>40</sup> District Court of Amsterdam, 22 February 2011, LJN: BP5390, 13/706674-10.

<sup>41</sup> District Court of Amsterdam, 22 February 2011, LJN: BP5390, 13/706674-10.

<sup>42</sup> Both the expediency principle and the refusal of minimum sentences were regarded fundamental aspects of the Dutch criminal justice system that were not to be given up in the European context. See according to the government in its Communication titled '*Eurostrafrecht*', Kamerstukken II 1998/99, 26 656, nr. 1.

<sup>43</sup> District Court of Amsterdam, 22 October 2010, BO1448.

## **9. To what extent is it necessary for the EU to adopt minimum standards on the rights of the defendant in order to accompany the operation of the European Arrest Warrant system?**

The Netherlands does not link the operation of the European arrest warrant system to minimum standards on the rights of the defendant. In the Dutch view, linking rights of the defendant to the operation of the European arrest Warrant, as has been done recently, is neglecting the fact that the surrender procedure is not dealing with suspects. Subject of a surrender proceeding are persons who are wanted in the issuing member state, either for purposes of prosecution or the purpose of the execution of a sentence. In the executing member state, such a person does not have the status of the defendant. The surrender procedure itself is not governed by articles 5 and 6 ECHR, but the European Charter on Fundamental Rights is applicable, since the surrender procedure is an application of EU law.<sup>44</sup> Nevertheless, the Dutch surrender procedure itself contains safeguards such as legal assistance and interpretation. The wanted person does only have the status of defendant in the issuing State and in the relation to the issuing authority, provided the European arrest warrant has been issued for the purpose of prosecution. In that relation, his fundamental rights as a defendant are relevant. That type of violation of human rights may play a role in surrender procedures has been demonstrated in the answer to question 6 above. Having said this, it must be recognised that the measures to strengthen procedural rights of defendants are often promoted in the Netherlands by the issue of strengthening mutual trust which could have a positive influence on the working of mutual recognition.

In relation to the Directive on the right to interpretation and translation in criminal proceeding<sup>45</sup>, the Dutch government, while acknowledging that this Directive constitutes the rights of defendants as laid down by the ECHR in individual decisions and would thus lay down minimum standards, has indicated that there are different approaches to reach the goal of protecting these rights. Requiring written translations in all cases goes beyond the ECHR requirements<sup>46</sup> and could easily violate the fundamental right to have a trial without undue delay because the necessity to provide

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<sup>44</sup> District Court, 26 October 2010, LJN BO7692.

<sup>45</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280/1.

<sup>46</sup> Letter by the Minister of Justice to the Eerste Kamer, 28 May 2010, 5654791/10/6, to be found on [http://www.eerstekamer.nl/eu/behandeling/20100528/brief\\_van\\_de\\_minister\\_van\\_justitie/f=/vifkls60s5jm.pdf](http://www.eerstekamer.nl/eu/behandeling/20100528/brief_van_de_minister_van_justitie/f=/vifkls60s5jm.pdf).

written translations would prolong the criminal procedure. The implementation will only require limited amendments to the Code of Criminal Procedure.<sup>47</sup>

The second legislative proposal following from the Roadmap for strengthening procedural rights,<sup>48</sup> a Directive on the right to information in criminal procedures, has brought the Dutch government to give a reaction related to the above.<sup>49</sup> Several provisions of the Code of Criminal Procedure will have to be amended, but the Dutch government's reaction focuses on the necessity of all elements in the proposal from a fundamental rights point of view.

## **10. What has been the impact of the EC data retention Directive (Directive 2006/24/EC [2006] OJ L105/54) on the legal orders of EU Member States?**

As the Netherlands was late in implementing the data retention Directive (the deadline was set at 15 September 2007), the Commission brought a case before the ECJ for failure to implement the Directive. After the Act on the retention of telecommunications data entered into force on the first of September 2009, the case was withdrawn.<sup>50</sup> The Act on the retention of telecommunications data amended the Dutch Telecommunication Act, which constitutes the implementation of Directive 2002/58/EC (the e-Privacy Directive).

The data retention Directive leaves Member States much room to manoeuvre when implementing its provisions. Member States, for instance, could choose a period between six and 24 months for the retention of telecommunications data. At first instance, the Dutch legislator chose a retention period of twelve months for all types of data. However, when the Act on the retention of telecommunications data was adopted in the Senate, the government promised to take legislative initiative to lower the retention period of internet data to six months. This was done by Act of 6 July 2011.<sup>51</sup> Other elements which allowed diverging implementation between Member States concerned the purpose for the data had to be retained. In the Directive it is stated that data are to be retained for the purpose of investigation, detection and

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<sup>47</sup> As described by the Dutch government in *Fiche 2: Richtlijn inzake het recht op tolk- en vertaaldiensten in strafprocedures*, to be found on: [http://www.eerstekamer.nl/eu/behandeling/20100331/lidstaatinitiatief\\_voor\\_een/f=/vie7mpxx8too.pdf](http://www.eerstekamer.nl/eu/behandeling/20100331/lidstaatinitiatief_voor_een/f=/vie7mpxx8too.pdf).

<sup>48</sup> Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295/1.

<sup>49</sup> *Fiche richtlijn betreffende recht op informatie in strafprocedures*, Tweede Kamer, 22 112 nr. 1058, 8 September 2010, Nieuwe Commissievoorstellen en initiatieven van de lidstaten van de Europese Unie, to be found on: <https://zoek.officielebekendmakingen.nl/behandeldossier/32130/kst-22112-1058.html>.

<sup>50</sup> Stb. 2009, 333.

<sup>51</sup> See Stb. 2011, 350.

prosecution of serious crimes. What constitutes a ‘serious crime’, however, is left to the discretion of the Member States. In the Netherlands, serious crimes are therefore defined as crimes for which custody may be imposed. Member States also determine which competent authorities may have access the retained data. In the Netherlands, these are the public prosecutor, the investigating police officer and the intelligence and security services as referred to in article 126 of the Code of Criminal Procedure and article 28 of the Act on the Intelligence and Security Services 2002. Furthermore, the Directive does not contain any detailed rules on the modalities of access and further use.

In the Netherlands, the public debate on the privacy issues of the Directive appeared to be quite moderate in comparison with several other Member States. The privacy concerns relating to the measure were voiced most strongly in the Senate. After heavy debate in the Senate, the general retention period was reduced from eighteen to twelve months and the implementing Act was adopted only after the promise of the government, as mentioned, to reduce the retention period for internet data to six months. This flexible nature of the data retention Directive has been criticised during the recent evaluation process of the Directive which started with the publication of the Evaluation report of the European Commission on 18 April 2011.<sup>52</sup> The evaluation process is closely followed by the Dutch parliament. The standing Committee of the Senate on JHA scrutinised the input of the Dutch government to the Evaluation report of the European Commission. In a letter to the Dutch Minister of Justice and Security, this Committee criticised this input, stating that the Dutch government had not sufficiently put forward all points of view raised in the discussion preceding the adoption of the implementing act, as was promised by the Minister.<sup>53</sup> More in particular, the Committee pointed at the lack of differentiation in the information provided to the European Commission between telephone and internet data. Furthermore, the committee points at the lack of certain details which allowed an assessment of the proportionality of the measure. In general, the opinion in the Dutch Parliament seems to have become more critical, compares to the time the implementing Act was discussed.

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<sup>52</sup> Report from the Commission to the Council and the European Parliament of 18 April 2011, COM(2011)225 final.

<sup>53</sup> See letter of 8 February 2011, EK 2010-2011, 31145.

## **11. What has been the impact of EU measures facilitating the exchange of personal data between national police and judicial authorities on the legal orders of EU Member States?**

The Netherlands was one of the Member States taking the initiative for the so-called *Prüm* Treaty, which later on was transformed into a Decision within the former third pillar of the EU-Treaty. Already for some years, the Dutch authorities - in particular the Dutch Forensic Institute (*Nederlands Forensisch Instituut, NFI*) - are exchanging DNA-data with a number of other Member States. This system is considered - by the responsible authorities - as a success. The national law implementing the *Prüm* Treaty was quickly adopted; the adaptation to the EU Decision had less priority.<sup>54</sup>

One of the main issues in the application of the *Prüm* Decision is that some Member States - like the Netherlands - share DNA information in an automated way, without any specific request from the receiving Member State. There are more stringent, separate provisions for the transfer of DNA-related personal data (e.g. via regular mail upon request, or only via certain channels) etc., which as a rule are not shared automatically. The ECRIS-decision has not yet been implemented in Dutch national law, but legislation is in preparation, more in particular a proposed amendment of the Decision on Judicial Data. The Dutch authorities do already participate in a pilot for a Network of Judicial Registers.<sup>55</sup> Recently, a case on child abuse in a kindergarten in Amsterdam led to a public discussion on the absence of an appropriate exchange of criminal registers. How is it possible that a person convicted in another Member State for child related crime could work in child care in the Netherlands? This public discussion confirmed the relevance of the exchange of data from criminal records.

## **12. To what extent is the collection and transfer of passenger name records (PNR) compatible with the protection of the rights to private life and the protection of personal data?**

The discussions on PNR have always been dominated by questions relating to the compatibility with the fundamental rights. A PNR-instrument would clearly be a

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<sup>54</sup> Main pieces of legislation: *Besluit inzake de intensivering van de grensoverschrijdende samenwerking, in het bijzonder ter bestrijding van terrorisme en grensoverschrijdende criminaliteit* and *Besluit van 1 juli 2007 houdende de wijziging van Besluit DNA-onderzoek in strafzaken*, Stb. 2010/268.

<sup>55</sup> Letter of the Minister of Security and Justice of 21 January 2011 to the Parliament.



infringement to the right of privacy contained in article 8 ECHR, but the issue is whether this infringement can be justified. Necessity and proportionality of PNR Schemes have been the topic of many debates, also in the Netherlands.

On instigation of the *Meijers Committee*<sup>56</sup>, the Senate has posed a number of questions to the European Commission, mainly in relation to fundamental rights. It is also interesting to note that Dutch authorities already use PNR data<sup>57</sup> on a limited scale and on the basis of national law, despite the fact that the discussions on a European PNR-scheme are not yet concluded.

In general, the Dutch government has taken the view that a PNR scheme is needed for the combat of serious crime. It also emphasises the need for safeguards within this PNR scheme. However, in the political debates in the Dutch Parliament, this necessity was regularly questioned.

**13. To what extent do EU law and its implementation currently provide sufficient safeguards to ensure that the right to private life (as enshrined in the ECHR and the Charter of Fundamental Rights) and the right to data protection (as enshrined in the Charter) is fully protected in the development of the EU as an Area of Freedom, Security and Justice?**

Framework Decision 2008/977 has not yet been implemented into national Dutch legislation. A proposal for legislation<sup>58</sup> is pending before the Dutch Parliament. This proposal aims at amending two laws on police data and on judicial data.<sup>59</sup> Those laws already provide for many of the elements of Framework Decision 2008/977, but some modification is needed. It is good to realise that these laws apply to the cross border exchange of personal data, but equally to domestic situations. The two laws mentioned also ensure that the data protection obligations under Council of Europe Convention 108 were implemented in national law, and ensured at the same time that the main provisions of Directive 95/46 were also applicable to the police and justice sector. The general law on data protection excludes this sector from its scope of application.

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<sup>56</sup> The Standing Committee of Experts on International Immigration, Refugee and Criminal law, see Annual Report of 2010, to be found at <http://www.commissie-meijers.nl>, p. 9.

<sup>57</sup> Answer of the Minister for Security and Justice of 2 September 2011 on Parliamentary questions.

<sup>58</sup> A proposed modification of the Act on Police Data (*Wet politiegegevens*), TK 32 554 nr A, 15 September 2011.

<sup>59</sup> Act on Police Data and the Act on Judicial and Criminal Proceedings Data (*Wet justitiële en strafvorderlijke gegevens*), TK 32 554 nr A, 15 September 2011.

**14. To what extent have domestic courts used general principles of EU law (in particular indirect effect in the light of *Pupino*) when interpreting national legislation implementing EU criminal law?**

Generally speaking, it is difficult to get full insight in the acts and considerations of the national judiciary in practice when confronted with aspects of EU law. Of course, when courts refer explicitly in their judgments to the importance of application of EU law, the application can be tested. In cases of a silent *acte clair*, one cannot. This being said, it can be established that Dutch courts and tribunals respect their EU law obligations more and more over the last decades. For example, primacy and direct effect are well known and generally applied principles in Dutch case law.

One may assume that the same is true for the doctrine related to ‘indirect’ effect, the obligation of national courts and tribunals to interpret national law ‘in conformity with’ (the objective and wording of) applicable EU law.<sup>60</sup> We have not found any reference to a *Pupino*-like situation in Dutch case law, so that an answer to the particular aspects of this question cannot be given.

Since the abolishment of the so-called Third Pillar, the question regarding applicable EU law has been simplified in so far that now the traditional rules and procedures of EU law are of application on EU criminal law subject matters, thus no more the deviating mechanisms of the former Third Pillar. So, the question which was at stake in the ECJ’s *Pupino* decision<sup>61</sup> – the questionnaire refers to that case which was connected to the interpretation and application of a Third Pillar instrument – only arises during the now running transition period.

**15. To what extent does the entry into force of the Lisbon Treaty address deficits in the implementation of Union law and the protection of fundamental rights in the development of the EU as an Area of Freedom, Security and Justice?**

For the Area of Freedom, Security and Justice, many aspects have changed under the Treaty of Lisbon and are well-known. These changes will have an influence on both the negotiations and the implementation. Some difficulties concerning implementation

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<sup>60</sup> An example is the judgment of the Supreme Court of 8 July 2008, NJ 2008, 594 (with an annotation of M.J. Borgers) regarding the European Arrest Warrant Framework Decision.

have already been discussed above. Below, we will only focus on issues the Dutch delegation feels may be of interest for a general and comparative discussion.

First, an important reform concerns the traditional mechanism for control, to be exercised by the Commission, over the respect by Member States of their EU law obligations, the infringement procedure. This procedure will now be fully applicable on all legislation under the Area of Freedom, Security and Justice, and thus also on criminal law.

Second, the so-called emergency procedure concerning decision making related to criminal law cooperation has to be mentioned. According to this procedure, a member of the Council who considers that a draft directive concerning criminal law cooperation would affect fundamental aspects of its criminal justice system may request that the draft directive be referred to the European Council.<sup>62</sup> The idea is that the European Council within a period of four months refers the draft back to the Council, accompanied by its observations and instructions. Be that as it may, the simple existence of this procedure can have positive effects on the implementation of decisions which ultimately will be adopted. To put it differently, the application of the emergency procedure may prevent that decisions will be adopted which are difficult to implement at the national level.

The third element concerns the newly introduced Treaty provision according to which – in a situation whereby the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures – directives may establish minimum rules with regard to the definition of criminal offenses and sanctions in the area concerned.<sup>63</sup> This provision represents a consolidation of the doctrine of the ECJ developed in the cases C-176/03 and C-440/05.<sup>64</sup> Also in this case the emergency procedure may be invoked. That being said, it is clear that the introduction of the said definitions of criminal offenses or sanctions can have a positive effect on the way EU law obligations are implemented, and enforced, at the national level.

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<sup>61</sup> See Case C-105/03, Criminal proceedings against Maria Pupino, ECR I-5285.

<sup>62</sup> See articles 82(3) and 83(3) TFEU.

<sup>63</sup> Article 83(2) TFEU.

<sup>64</sup> Case C-176/03, Commission v. Council ECR I-7879 and Case C-440/05, Commission v. Council ECR I-9097.

Fourth, an additional element concerns the role of national parliaments. National parliaments will be informed about new legislative proposals<sup>65</sup> and get involved in the application of the principles of subsidiary and proportionality.<sup>66</sup> Especially, the yellow and orange card options, in combination with IPEX may influence the balance in decision-making. It needs to be noted that special rules and ceilings do exist – in the TFEU as well as in Protocol 2 – with regard to draft legislative acts concerning criminal law and police cooperation.<sup>67</sup>

Fifth, there are arrangements to be established by the Council on a proposal of the Commission whereby Member States, in collaboration with the Commission, conduct an *objective and impartial evaluation* of the implementation of the Union policies, in particular to facilitate the full application of the principles of mutual recognition.<sup>68</sup> It goes without saying that such arrangements, once established, may indeed facilitate the process of implementation of EU law obligations. National parliaments and also the European Parliament will be informed about these developments.<sup>69</sup>

Sixth, the questionnaire furthermore addresses the impact the entry into force of the Treaty of Lisbon has had for the protection of fundamental rights in the development of the European Union as an Area of Freedom, Security and Justice. Now, certainly the Lisbon Treaty has introduced new arrangements related to the protection of human rights and fundamental freedoms. The reference here is to the establishment of the European Charter of Fundamental Rights of the EU – having the same value as the Treaties for most Member States<sup>70</sup> – and the intended accession of the European Union to the ECHR.<sup>71</sup>

That being said, differences between the two innovations mentioned do exist. Whereas for example the ECHR is of general application, the provisions of the European Charter of Fundamental Rights of the EU are applicable on institutions, bodies and agencies of the Union as well as on the Member States (however, only) when they are implementing Union law.<sup>72</sup>

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<sup>65</sup> Protocol No 1 on the role of National Parliaments in the European Union, annexed to the Treaty of Lisbon. However, in fact the content of the protocol reflects an already existing situation.

<sup>66</sup> Protocol No 2 on the application of the principle of subsidiarity and proportionality, annexed to the Treaty of Lisbon.

<sup>67</sup> Article 69 TFEU and Article 7(2) Protocol 2.

<sup>68</sup> Article 70 TFEU. The text of this Treaty provision contains a reference to the working of the infringement procedure (see the wording 'without prejudice to Articles 258, 259 and 260').

<sup>69</sup> See the final sentence of Article 70 TFEU.

<sup>70</sup> Article 6(1), first sub-paragraph, TEU and Declaration 1 concerning the Charter of Fundamental Rights of the European Union, OJ C 115/337 of 9 May 2008.

<sup>71</sup> Article 6(2) TEU.

<sup>72</sup> Article 51(1) Charter. An interesting example of a wrong application of the Charter is delivered by a judgment of the Police magistrate (Politierechter) in the city of Almelo who applied (Article 50 of) the Charter – without any relationship with the implementation of EU law obligations- in a '*ne bis in idem*' criminal case. In the given case the judge declared the Prosecutor

Through these innovations the characteristics of the EU legal order as a separate, mature and supranational one have been reinforced. By the same token, the legal context for the protection of human rights in the EU framework has been extended. All in all it may be argued that in such a way the quality of the protection of human rights in the EU has been improved.

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non-admissible: Rechtbank Almelo, case number 08-021110-10, judgment of 8 July 2010, NJFS 201, 253. In a later judgment, however, the same judge changed his mind and explicitly withdrew this line of reasoning: Rechtbank Almelo, case number 08/710866-10, judgment of 23 June 2011.