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NOTE

from:	Netherlands delegation
to:	Delegations
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Subject:	Evaluation report on the fourth round of mutual evaluations: "The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States" – Report on the Netherlands

Dear Mr Bizjak,

A letter on 29 June 2010 from the then Presidency of the EU sought to inform you on the situation regarding the implementation of the recommendations which were put forward for the Netherlands within the framework of the fourth round of evaluations on the implementation of the Framework Decision on the European Arrest Warrant and the procedures for surrender between Member States of the European Union. I am now pleased to provide follow-up to that, as I see the evaluation process as a means of improving the application of the European Arrest Warrant, which is of great value for cooperation in criminal matters.

Before discussing the recommendations, I note that it is in the nature of an evaluation that it results in a snapshot of the state of application and implementation. For the fourth round of evaluation this means that it is carried out in a period in which experience with the application of the Framework Decision was still limited. In the meantime the judicial authorities in the Netherlands have gained extensive experience, because in the period between May 2004 and June 2010 decisions have been taken on almost 3000 European Arrest Warrants. This will also have been the case in other Member States. These experiences have also brought to light which arrest warrants related to matters of an ephemeral nature and which to structural aspects. In addition, it can be stated that during the six or seven years in which the Framework Decision has been applied, opinions on important aspects of it have undergone changes throughout the Union. This relates in the first place to the scope of the Framework Decision, in particular with reference to minor offences, but also to the importance of human rights in carrying out surrender procedures. These developments have been encountered by the Netherlands in implementing the recommendations.

With regard to the recommendations in the evaluation report on the Netherlands (15370/1/08 REV1 CRIMORG 185 COPEN 218 EJN 70 EUROJUST 93), I can report as follows.

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

The Netherlands' Prosecution Service works internally with what are known as instructions, which provide more detail for the application of legal provisions. The instructions of the Prosecution Service on the execution of European Arrest Warrants have been modernised. The instructions are available to all prosecutors.

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

The national training institute for public prosecutors and for magistrates and lawyers who support them in their work (the *Stichting Studiecentrum Rechtspleging* - Training and Study Centre for the Judiciary) arranges courses on international cooperation on criminal matters. An element in these is a module on the European Arrest Warrant. This course is a compulsory requirement for prosecutors and magistrates. In addition they participate in bilateral and Union-wide seminars and other events on the subject of the European Arrest Warrant. This applies especially to prosecutors in Amsterdam and members of the Amsterdam District Court, who deal with all incoming EAWs.

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

In 2006, the period under evaluation, there were certainly cases of alerts on the basis of Article 96 of the Schengen Implementing Convention for purposes of extradition. During the evaluation it was stated in talks with the team that these alerts would in time lapse, because SIS required periodic review of all outstanding person alerts. In reviewing alerts for extradition purposes, those which had been maintained would be converted into surrender alerts. This in fact happened in the previous years.

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

This recommendation originates in the finding of the evaluation team that a provision of the Law on Surrender would not be compatible with a provision of the Framework Decision. The incompatibility would lead to refusal of surrender in cases where this would not be permitted. More specifically, the provision of the Law on Surrender contains the condition that where the surrender is sought for execution of a sentence the remaining sentence must be for at least four months and that the sentence must have been imposed for an offence carrying a maximum penalty of 12 months' imprisonment. The Netherlands added the latter condition because it would prevent an EAW from being issued in the Netherlands or a foreign EAW being executed for offences carrying a penalty of less than a year's imprisonment or even for minor offences. The 12-month rule also existed in the EU extradition treaty of 2006.
In the past few years, on the basis of experience with the application of the Framework Decision, there has been a lively discussion on surrender for minor offences. This has since been rejected all over the Union, because in such cases the application of this drastic detention measure is out of proportion. The EAW Manual was amended to take account of this and the Commission also in 2011, in its evaluation report, pointed to the need to prevent the issue of EAWs for minor offences. The amendment to legislation intended in this recommendation would result in an expansion of the possibilities for the issue and execution of EAWs for minor offences. In view of radically changed opinions, the recommendation in question has lost its force. It is consequently no longer intended to adopt it.

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

Since this recommendation was made, we now have Framework Decision 2008/900/JHA, which in Article 25 contains a provision on the subject referred to here. The proposed law on the implementation of the Framework Decision was submitted to the Netherlands' Parliament in September 2010.

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

The recommendation refers to a practice which has been abandoned since 2008, following rulings by the Supreme Court of the Netherlands.

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

The Prosecution Service in Amsterdam, which bears the burden of processing all incoming EAWs, has stopped issuing guidelines for the SIRENE bureau on the method of recording an SIS alert, as laid down in Article 96(3) of the Schengen Implementation Convention. Instead, it is agreed that the SIRENE bureau shall in each case request permission in advance from the public prosecutor's office before making a request to the issuing state to add a flag. In this way it is ensured that an experienced judicial authority takes the decision on whether a flag is necessary.

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

Article 11 reads as follows: "Surrender shall not be permitted in cases where, in the court's opinion, there is justified suspicion that granting the request would lead to flagrant breach of the fundamental rights of the person concerned, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950". This provision was incorporated into the Law on Surrender in order to implement Article 1(3) of the EAW Framework Decision. During the period from May 2004 to June 2010, it was applied three (3) times out of a total of nearly 3 000 cases.

At the time of the fourth round of evaluations and the Commission's evaluation reports relating to that period, criticism was directed at Member States which had implemented Article 1(3) by means of an explicit provision in their implementing laws. Such criticism was linked to views prevailing at that time regarding the scope of mutual recognition obligations. Since then, attitudes in that respect have changed throughout the EU. Refusal to surrender on the basis of a violation of human rights in a specific case is no longer regarded as inconceivable – a position which has been strengthened as a result of the Charter becoming binding on Member States and institutions following the entry into force of the Treaty of Lisbon. In its 2011 evaluation report, the Commission, referring to the case-law of the European Court of Human Rights, draws attention to this and states that "it is clear that the Council Framework Decision on the EAW (which provides in Article 1(3) that Member States must respect fundamental rights and fundamental legal principles, including Article 3 of the European Convention on Human Rights) does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of a requested person's fundamental rights arising from unacceptable detention conditions".

Such a drastic change in views means that this recommendation is no longer valid, and there are therefore no plans to comply with it.

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

This recommendation has been implemented by means of a careful analysis of surrender practice, and in particular the use of the abbreviated procedure. In that connection, no evidence has been found to support what the evaluation team claims to be the negative link between surrender by means of the abbreviated procedure and the automatic abandonment of protection under the speciality rule.

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

After examining this recommendation in more detail, the Netherlands has reached the conclusion that, under the law, detention for the purposes of surrender is not restricted to cases where there is a risk of absconding.

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

This practice was abolished by the court shortly after the evaluation. The court works on the basis of a faxed copy of the original EAW, together with a translation where necessary.

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

During the discussions held in connection with the evaluation, members of the Amsterdam District Court said even at that stage that they could see no justification for the evaluation team's suggestion that a decision by the public prosecutor to refuse transfer should be subject to a court review. The evaluation team nevertheless turned its suggestion into a specific recommendation, and the issue was therefore re-examined, revealing that the opinions of the judicial authorities most closely involved in the execution of EAWs remain unchanged. For this and other reasons, it has therefore been decided not to act on the proposed recommendation.

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

The Netherlands is among the top four recipients of EAWs. Every year, Amsterdam District Court is confronted with an increasing number of cases, amounting to almost 550 cases in 2010. In the early years there were problems adapting the trial capacity to the increasing number of EAWs. Since that time, the trial capacity has been expanded. It should be noted, however, that if the number of EAWs continues to rise, particularly as a result of extremely high numbers of EAWs received from individual Member States, it is possible that the court and public prosecutor's office will no longer be able to cope. This is all the more likely at a time when government expenditure is being restricted as a result of the general economic situation. For this reason too, an effort should be made to reduce the use of EAWs for minor offences.

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

Release from custody after 90 days, as provided for in the Law on Surrender, was intended by the legislator to support the time limits referred to in the Framework Decision. Moreover, practice has shown that such release does not present an obstacle to surrender. The recommendation was made in 2008 on the basis of concerns that the 90-day time limit was frequently being exceeded during the period in question. In fact, as a result of the expansion of the court's capacity, the situation has changed so much since then that it is very rare for the 90-day time limit to be exceeded. Consequently, the objective sought by the legislator has been achieved. In view of those circumstances, it is not considered appropriate to amend the law in that respect.

For the Minister for Security and Justice

J. Demmink
Secretary-General