



# Evaluation Law on Mutual Recognition and Enforcement of Custodial and Suspended Sanctions (in Dutch: the Wets)

Summary

Contactgegevens

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In 1999, the Tampere European Council decided that judicial cooperation in criminal matters between the Member States should be based on the principle of mutual recognition of decisions in criminal matters. This decision was based on the idea that mutual recognition provides a faster and more efficient form of cooperation than traditional legal assistance. The principle of mutual recognition results in the fact that a decision in criminal matters taken in another Member State is recognised and enforced as if it were a decision taken by its own national authorities.

A number of Framework Decisions have further developed the principle of mutual recognition of decisions in criminal matters, most importantly the Framework Decision which regulates the European arrest warrant and the surrender procedures between Member States of the European Union (EU) (OJEC 18 July 2002, L 190). In the field of enforcement of criminal sanctions, this is outlined in the Framework Decision on the application of the principle of mutual recognition to financial penalties (OJEU 22 March 2005, L 76) and in the Framework Decision on the application of the principle of mutual recognition to confiscation orders (OJEU 24 November 2006, L 328). The aforementioned Framework Decisions have been implemented in the Netherlands in the 2008 Law on Mutual Recognition and Enforcement of Criminal Sanctions.

Framework Decisions 2008/909/JHA and 2008/947/JHA completed the EU legislation on the transfer of enforcement of criminal penalties. Framework Decision 909 gives further substance to the principle of mutual recognition for custodial sentences, and with Framework Decision 947 this is done for suspended sentences and alternative sanctions. On 1 November 2012, both Framework Decisions were implemented in the Law on Mutual Recognition and Enforcement of Custodial and Suspended Sanctions (in Dutch: the Wets). As from that date, the Wets regulates the enforcement in the Netherlands of criminal sentences from EU Member States which, like the Netherlands, have implemented both Framework Decisions in their national legislation.

When the Wets came into force, the State Secretary for Security and Justice promised in the Lower House of Parliament, on behalf of the Minister, that the Wets would be evaluated five years after coming into force. On behalf of the Scientific Research and Documentation Centre (in Dutch: WODC), DSP-groep conducted this evaluation.

# Research design and implementation

The purpose of the investigation is to provide insight into the application of the Wets in practice. The following twofold objective was the guiding principle:

*How many Wets cases have been dealt with (both incoming and outgoing) since this law came into force, with what outcome, and what are the characteristics of these cases?*

*What is the procedure of application of the Wets and how is this experienced by the organisations involved?*

In order to answer the problem as defined, the research was carried out in phases. First, on the basis of the current laws and regulations and the available work instructions, a description was formulated of the formal framework of the Wets. Subsequently, with regard to the transfer of custodial sanctions, an analysis was carried out on data from the National Uniform Registration System for International Legal Assistance (in Dutch: LURIS). For the suspended and alternative sanctions, case studies were carried out at the International Legal Aid Centre (in Dutch: IRC) in Noord-Holland. In addition, some details of the Wets cases have been requested from the National Office of the Public Prosecution Service (Fact Factory). However, we have to note the following with the results of the quantitative study: The systems in which case data for the Wets cases are registered, are not designed to generate management information, as a result of which we had to work with assumptions on parts of the study. Therefore, some inaccuracy cannot be excluded.

After completion of the quantitative study, discussions took place with the main stakeholders of the Wets procedure. A total of 18 respondents were interviewed. Some parties provided written input.

The focus of the research was on the Netherlands. This means that we looked at the way in which Dutch litigants deal with Wets cases and which concerns they see. We did, however, look at their experiences with foreign countries, but it was not established what experiences foreign countries have with the Netherlands.

## Conclusions

In this section, we present the conclusions of our study, based on the research questions. By analogy with the Wets, a division is maintained between custodial sanctions on the one hand and suspended and alternative sanctions on the other. The conclusions often refer to 'incoming' and 'outgoing' Wets cases. These are not legal concepts, but terms that are common in the phraseology used by the Wets. "Incoming case" means a criminal case in which the competent authority abroad requests the Netherlands to take over the enforcement of a foreign judgment under the Wets. The term "outgoing case" refers to a case in which the Netherlands requests the competent authority abroad to take over a Dutch judgment.

## Custodial sanctions (KB 909)

### What are the characteristics of the incoming requests?

Since 2012, the number of incoming Wets cases involving custodial sanctions has increased significantly. Whereas the number of certificates formally received by the Netherlands was 79 in 2012 and 106 in 2013, this number increased to 360 in 2017. Most certificates were received from Germany, Belgium, Great Britain, France (including French Guyana) and Spain.

Not every certificate ultimately receives a positive recognition decision from the central authority, and not every positive recognition decision is followed by the actual transfer of the convicted person. Between 2013-2017, in 40-60% of the incoming cases, a convicted person was eventually transferred to the Netherlands. (The Wets was only implemented at the end of 2012. As a result, no transfer could occur in that year.) In the other cases, the convicted person often was already staying on Dutch territory, so that there was no question of transfer.

80% of the convicted persons for whom a certificate for transfer was applied, and whose nationality is known, have Dutch nationality. This was followed by convicts of Belgian, Moroccan and Polish origin. Detention of the cases that were actually transferred is relatively long compared to the Dutch averages for duration of detention. In the period under review, however, there is a decrease in the average duration of detention of 6.7 years (in 2012) to 5.0 years (in 2017). A large majority of the cases in which the crime was known convictions were for drug-related offences.

### Handling of incoming requests for transfer of custodial sanctions

*How are Wets cases handled within the organisations that are involved? How is the handling process structured and how is this perceived by the parties involved? Is the handling of Wets cases carried out in accordance with the applicable rules and work agreements?*

The decision on recognition of a judicial decision that has been forwarded is taken on behalf of the Minister of Justice and Security by the Custodial Institutions Service, Individual Cases Division, International Transfer of Judgments (in Dutch: IOS). IOS also exercises this authority on behalf of the Minister for outgoing cases. Because it concerns one competent authority for the whole of the Netherlands, we speak of one central authority for the Netherlands for the KB909 cases.

Before formally receiving a certificate, the necessary coordination with the competent authority of the issuing country and with the convicted person or his counsel has usually already taken place by the central authority. In this so-called preliminary phase, an initial assessment of the case is carried out, in order to determine whether it will not have to be rejected by the central authority on the basis of the (mandatory)

grounds for refusal. In this phase, it will also be assessed whether the Immigration and Naturalisation Service (IND) should not start a revocation procedure on the basis of the Aliens Decree with respect to foreign nationals with a residence permit. For this assessment, the Advocate General (AG) at the Arnhem-Leeuwarden Public Prosecutor's Office at the Court of Appeals is asked to provide an indication of the amount of the punishment under Dutch law for the offence on which the conviction is based. The IND will make an assessment on the basis of this indication. Where there is a need for a withdrawal procedure, the central authority shall reject the case out of hand. If it is established in this preliminary phase that the case does not need to be rejected out of hand, the Netherlands will formally receive the certificate. After receipt, the central authority asks the court to give an opinion on the request for transfer. This request shall be submitted via the AG. To this end, the central authority draws up a draft recommendation (including the form in which the sentence will be taken over by the Netherlands) and sends it to the Public Prosecutor's Office at the Court of Appeals, together with the certificate and the (translated) judgment. There, the documents are checked and supplemented and, if necessary, additional documents are requested (such as translations of the judgment or behavioural reports drawn up abroad). When the documents are in order, the AG forwards the documents to the Execution of Sentences Division of the Court of Appeals, Arnhem-Leeuwarden. In biweekly sessions specifically dedicated to Wets cases, incoming applications are assessed by the Execution of Sentences Division. In general, the central authority takes over the Court's final verdict in the recognition decision. The consent is then forwarded to the competent authority of the issuing State. The recognition decision states how the Netherlands will proceed with the execution of the sanction, and possibly the starting date of the conditional release (in Dutch: v.i.). It sometimes happens that the issuing country withdraws the certificate on the basis of the Dutch recognition decision. The reason for this may be that the foreign issuing country believes that the proposed sanction, after adaptation to the Dutch maximum amount of punishment per offence, does not do justice to the seriousness of the offences. As a general rule, however, the recognition decisions are accepted, and the Netherlands and the issuing country make concrete arrangements regarding the transfer of the convicted person. The actual transfer is done by the Royal Netherlands Marechaussee (KMar) in cooperation with the Department of Transport & Support (in Dutch: DV&O).

The work processes are largely carried out as prescribed and to the satisfaction of those involved. Only the statutory deadlines for the processing times of the assessment and, subsequently, the transfer, are regularly exceeded. The legal obligation to inform the competent authorities in the issuing country about the course and end of the process, as laid down in the Wets, is not actively fulfilled by the central authority, as it does not have this information at its disposal by default.

### What are the characteristics of the outgoing requests?

As with the incoming requests, the number of outgoing cases has increased significantly over the period 2012-2017. There were three cases in 2012, and 32 in 2017. Note, however, that the ratio of incoming/outgoing requests is particularly skewed and the ratio approaches 1:10. Most outgoing cases are offered to Belgium and Germany. As in the case of incoming cases, the competent authority to which the

certificate has been presented does not always take a positive decision, and sometimes there is even no response at all. And even when a positive decision is taken, the transfer does not always take place. Of the 47 certificates with which the Netherlands requested a transfer abroad, only five convicted individuals were physically transferred in 2016. (The other years show similar ratios.) Part of the explanation for this low number of physically transferred convicts is that the convicted person often already resides abroad. This means that a physical transfer cannot take place and that there is only a transfer of judgment.

A quarter of those convicted for whom the Netherlands has issued a certificate to a foreign country, have Dutch nationality. Furthermore, 16% have Belgian nationality and 14% have Polish nationality. There are no reliable data available on the detention period of judgments imposed in outgoing Wets cases. It does appear, however, that the underlying fact of the conviction often involves abuse/public violence and drug offences.

## Handling of outgoing requests for transfer of custodial sanctions

*How are Wets cases handled within the organisations that are involved? How is the handling process structured and how is this perceived by the parties involved? Is the handling of Wets cases carried out in accordance with the applicable rules and work agreements?*

There is no systematic selection of cases that are eligible for transfer under the Wets. Most of the outgoing cases are therefore initiated by the convicted person himself. Occasionally the central authority searches the prison process system. Sometimes the central authority is asked whether the transfer of the foreign national can take place under the Wets as a result of a case of criminal interruption (ex Article 40a RTVI, indefinite period of time).

If the central authority has established that the convicted person has no ties to the Netherlands, the Public Prosecution Service is requested to advise on the transfer. If there are no important interests against the transfer, the certificate shall be drawn up by (or on behalf of) the case officer, and it shall be presented by the central authority, together with the (translated) judgment, to the competent authority of the recipient country. Once it has notified its recognition decision to the Netherlands, and the central authority has agreed to the conditions under which the sentence will be enforced, the sentenced person will actually be transferred.

From a Dutch perspective, the process of outgoing cases is less standardised than the process of incoming cases. This makes it easier for the Netherlands to comply with the prescribed procedures. Partly as a result of this, the handling of outgoing Wets cases runs according to the applicable rules and work agreements. However, the stakeholders interviewed tell us that this does not mean that the implementation practice is optimal. Within the current work agreements, many convicted persons who are eligible for transfer simply remain in the Netherlands and convicted persons for whom the case is picked up have to wait a

disproportionately long time before a certificate is issued. Cooperation between local public prosecutors and the central authority could also be improved in this area of the Wets. Case officers and appointed public prosecutors often have little knowledge of the Wets, which means that documents are incomplete or not delivered.

## Conditional and alternative sanctions (KB 947)

### What are the characteristics of the incoming requests?

Compared to custodial sanctions, the number of certificates received for the transfer of conditional and alternative sanctions is limited. In 2016, the total was 17 and in 2017, 27 (reliable information is lacking for previous years). Most cases come from Belgium, followed at some distance by Germany. The majority of the cases lead to an actual transfer.

In approximately 60% of the incoming Wets cases, the convicted persons have Dutch nationality. This was followed by convicts of Belgian, Moroccan and Polish origin. Of the cases where the underlying offence could be identified, about a quarter were found to be drug-related. Approximately half of the incoming Wets cases relate to the special conditions. One quarter concerns community service or job sentences. Men are strongly overrepresented in the group of convicts for whom a transfer of sentence has been requested under the Wets. The average age is about 40. In 2016, 65% of cases with received certificate led to transfer of the judgment. In 2017, this percentage was 74%.

### Handling of incoming requests for transfer of conditional and alternative sanctions

*How are Wets cases handled within the organisations that are involved? How is the handling process structured and how is this perceived by the parties involved? Is the handling of Wets cases carried out in accordance with the applicable rules and work agreements?*

The decision on the recognition of a judgment on a conditional sentence or community service originating from another EU Member State, and on the transmission of Dutch judgments to another EU Member State, lies with the Public Prosecution Service. On behalf of the Public Prosecution Service, the IRC Noord-Holland in Haarlem is the competent authority. Because it concerns one competent authority for the whole of the Netherlands, we speak of one central authority.

The process of receiving the certificate, assessing and transferring conditional and alternative sanctions is very similar to that of custodial sanctions. It should be noted that the so-called pre-stage phase (the phase prior to formal receipt of the certificate by the central authority) is less extensive and that no external judgments are requested at the assessment stage. The start of an incoming Wets case with regard to conditional and alternative sanctions usually begins with the receipt of the certificate and the (translated)

judgment by the central authority. After the central authority - if necessary - has requested missing documents and completed the certificate in full, the case will be formally addressed. The first step is to check whether there are grounds for refusal. On the basis of a check in the BRP (Basic Registration of Persons), often supplemented by a check of address by a local police officer, it is established whether the convict has ties to the Netherlands. The other grounds are checked on the basis of the information on the certificate and the judgment. If it is established that there are no legal grounds for refusal, the central authority usually consults with the Foreign Affairs Office of the Parole Board on the possibilities of transfer of sanctions or supervision. In these consultations it will be determined in what way the conditions from the judgment may be fulfilled. These consultations may result in the conclusion that not all conditions will be adopted, or that the conditions will be implemented in a different way, so that the Dutch probation service will also be able to give effect to the supervision. Regularly, the central authority also coordinates directly with the competent authority abroad, in order to identify which adjustments to sanctions the issuing country will agree to.

As soon as the Dutch recognition decision has been accepted by the competent authority of the issuing state, the sentence can be implemented in the Netherlands. Because there is no custodial sanction, there is no question of the formal transfer of the convicted person.

After recognition and after the expiry of the 10-day period within which the foreign requesting state can still withdraw the certificate, the local public prosecutor's office is informed of the recognition decision. This is therefore independent of the sentenced person's arrival in the Netherlands. The local public prosecutor is requested to execute the transferred sanction in the same way as a Dutch sanction. The convicted person is expected to come to the Netherlands himself, but usually already resides in the Netherlands when the local public prosecutor's office is informed.

With regard to the routing of cases to the probation system, there is an essential distinction between incoming Wets cases that relate to community service and Wets cases in which special conditions and/or v.i. conditions for early release have been imposed. Community services and job sentences can easily be entered into GPS by the central authority. These sentences are then automatically visible in the local public prosecutor's work stock/order list. The local public prosecutor then releases the community service sentence to the CJIB, which in turn orders the probation service to summon the sentenced person. The situation is entirely different if the sanction only concerns special conditions and/or v.i. conditions. Unlike community service sentences, these cannot be introduced in GPS, because the system does not support the import of these sanctions. For this reason, the central authority must send the recognition decision for these cases by e-mail to the local prosecutor's office and the CJIB. The parties involved describe this as a difficult and sensitive process.

The work processes are largely in line with the prescribed regulations. Only the actual execution takes a long time, for the reason mentioned above and, in the absence of a suitable ICT infrastructure, leads to errors on a regular basis.

## What are the characteristics of the outgoing requests?

Unlike the KB909 cases, the number of outgoing requests is, due to the automatic selection in GPS, in fact higher than the number of incoming requests. The number of requests was 136 in 2016 and 101 in 2017. The majority of the cases are transferred to Belgium, followed by Germany.

In almost half of the outgoing Wets cases in which the nationality of the convicted person is known, the person concerned has Dutch nationality. In a third of the cases, they have Belgian nationality, and Polish nationality accounts for around 10% of cases. In about one third of the cases, the conviction is drug-related, followed by conviction for abuse and acts of violence in a public place. In terms of sanctions, a large majority of the outgoing Wets cases consist of community service or job sentences. As with incoming Wets cases, outgoing Wets cases mainly concern male individuals. The average age of convicted persons in outgoing Wets cases varies between 35 and 37 years.

## Handling of outgoing requests for transfer of conditional and alternative sanctions

*How are Wets cases handled within the organisations that are involved? How is the handling process structured and how is this perceived by the parties involved? Is the handling of Wets cases carried out in accordance with the applicable rules and work agreements?*

Unlike custodial sanctions, conditional and alternative sanctions eligible for transfer under the Wets are systematically selected and placed in the central authority's working stock. This is done in GPS based on the residential address, but only in cases that have been 'released' for processing by the local public prosecutor's office. The central authority assesses the content of the cases in the working stock and determines whether they are actually eligible for transfer. If this is the case, the necessary documents are requested from the local public prosecutor's office. This concerns a completed certificate and the judgment itself. In practice, the central authority has to send many reminders. In some cases there is no response, or responses come so late that the case is no longer eligible for transfer due to the expiry of the time limits.

Moreover, according to the work arrangements in force, the local public prosecutor's office itself should be the one assessing the cases and referring them to the central authority. In practice, this rarely happens. Thus, in most cases it is the central authority that urges the local prosecution service to formally apply the case.

When the judgment and certificate are received, the central authority reviews again and in detail whether the case is actually eligible for transfer. This is because the selection in GPS is fairly general and also results in cases that do not meet the transfer criteria (such as non-transferable sanctions or community service sentences of less than 80 hours). After that, it has to be established whether or not there are any ties to the Netherlands. This is done not only on the basis of the BRP check, but also by inspecting the official report. In

practice, the actual residential address may differ from the address registered in GPS. This can often be verified in the official report.

If the documents are in order, it is determined who the competent authority is in the country of the intended execution of the sentence. In the case of countries where transfers have taken place before, there are warm contacts. With Belgium in particular, the lines are short and good. For other countries, finding the right names and addresses may take a lot of time and effort. The period within which a member state submits a recognition decision also varies considerably from one country to another. For example, Belgium generally reacts very promptly, whereas reactions from Germany are often delayed. One of the reasons for these differences is that contacts between the central authority and the competent authorities in Belgium are much closer than those in Germany.

The work processes are largely as prescribed, but the coordination with the local public prosecutors in order to obtain the certificate and the judgment takes a lot of time, partly as a result of the fact that the execution departments at the local public prosecutors' offices often have little experience with the Wets and the associated procedures. This alignment process is hampered by the lack of an appropriate ICT infrastructure. This infrastructure can, for example, result in the execution already starting, while the central authority is still in the process of initiating the transfer of the execution.

## What are the bottlenecks in handling Wets cases?

The evaluation shows that in the past five years the necessary experience has been built up with the handling of Wets cases and that the numbers are steadily increasing. Various partnerships have been developed and a great deal has been learned from each other. Nevertheless, the evaluation has identified a number of points which can be improved.

### **1. Processing times**

The study has shown that the processing times for legally standardised process components are not always met, and that the processing times for non-legally standardised process components are sometimes disproportionately long, from the convicted person's point of view. These processing times are partly the result of external foreign factors, but in other cases, the increase in processing times seems to be related to the situation in the Netherlands. One of the reasons for this is the capacity problem at the AG and DV&O, which has led to backlogs. The limited knowledge of the Wets procedures in the execution department of the local public prosecutor's offices also plays an important role. The latter means that they do not provide the necessary information or do so only after repeated reminders.

### **2. Capacity issues**

Various parties within the Wets process indicate that they are understaffed. The AG states that no formative extension has ever taken place for Wets tasks, and the Court had not been allocated any additional capacity

until 1 January 2018 either. The central authority KB947 does have extra staff allocated, but this is almost half of what was calculated. Against the background of an ever-increasing caseload, this means that there are risks involved. In the first place, there are increasing processing times, but secondly, a shortage of staff means that little time remains for quality management and knowledge development at local public prosecutors, among others. The solution to this problem is, of course, sought in the expansion of staff numbers.

### **3. Sensitive information flows**

The Wets procedures have been incorporated into existing processes. As a result, organisational units that have little to do with the Wets perform a (middleman or intermediary) function. Due to the lack of knowledge and experience with the Wets, this can lead to errors, particularly in the local public prosecutors' offices. In practice, these errors relate to the calculation of the v.i. (early release) starting date, the failure to administratively close completed sentences so that an individual is wrongly called back for execution of the sentence, incomplete and/or incorrect entries in the Judicial Documentation, or a probation execution order while at that time the case is already being transferred abroad. In order to solve this problem, a targeted information campaign is proposed for this department of the public prosecutor's offices and, where possible, the appointment of permanent contact persons at the public prosecutors' offices.

### **4. ICT-Infrastructure**

GPS is the central system in which the primary registration of the Wets case takes place. However, the current functionality of the system has a number of obvious shortcomings. As regards conditional and alternative sanctions, it is inconvenient that no conditional sanctions and no v.i. conditions can be registered. Furthermore, it is desirable to finely reduce the selection function of the conditional and alternative sanctions eligible for transfer. Currently, non-relevant cases are also selected (e.g. community service or job sentences with a duration of less than 80 hours). Moreover, for a convicted person who has both an address in the Netherlands and an address in another EU member state, GPS sometimes sends a signal to the CJIB to execute the sentence in the Netherlands, and a signal to the central authority KB947 to present the case for transfer. Finally, it is also stated that GPS cannot register that it concerns a Wets case. This is a shortcoming for the creation of management information and for quality control of individual cases. In order to solve these problems, it is argued that the desired GPS adjustments should be put on the agenda of the Service Organisation of the Public Prosecution Service (in Dutch: DVOM) as a matter of urgency.

### **5. No systematic selection of outgoing KB909 cases**

At present, contrary to the conditional and alternative sanctions, there is no systematic assessment of which cases are eligible for transfer. As a result, the number of outgoing cases is ten times less than the number of incoming cases. This situation is undesirable not only from the point of view of costs (the Netherlands bears a disproportionate share of the costs of enforcement of those sentenced abroad) but also, and above all, from the point of view of the convicted person and society. After all, the idea behind the Framework Decisions is that the complete adoption of the enforcement of the sentence will help the social

rehabilitation of the convicted person, and ultimately of society. By not systematically selecting the cases that are eligible for transfer, the individual is deprived of an opportunity for social rehabilitation. On the basis of the current division of responsibilities, it is obvious that the Public Prosecution Service, as the institution that is ultimately responsible for the execution, will be responsible for the systematic selection of this category of cases.<sup>1</sup> It should be obvious that, by analogy with the systematic selection of KB947 cases, this selection should be included in the GPS system.

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<sup>1</sup> On the basis of the Revision Enforcement Criminal Decisions Act (In Dutch: USB Act), adopted on 22 February 2017, but not yet entered into force, the responsibility for the execution shifts from the Public Prosecution Service to the Minister. Once the law enters into force, it may be less likely that the Public Prosecution Service will still perform this signal function. Although, even then, one can still think of the circumstance that the Public Prosecution Service, as the prosecuting authority, has a lot of information about the detainee at the start of the detention and may therefore still be able to have a signal function, on the basis of this information position.

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