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EINDRAPPORT

ONDERZOEK IN OPDRACHT VAN WODC

De rol en positie van het openbaar ministerie als justitiële autoriteit in Europees strafrecht
Een verkennende studie naar een toekomstbestendige vormgeving van de rol en de positie van het openbaar ministerie in de EU-brede justitiële samenwerking in strafzaken

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Summary¹

1. Cause

On 27 May 2019 the Court of Justice of the European Union (hereafter: Court of Justice) in the joined cases of *OG and PI* ruled that national public prosecution services that are subject to directions or instructions from the executive branch, for example a minister of justice, do not qualify as an 'issuing judicial authority' within the meaning of Article 6 of the Framework Decision on the European arrest warrant (hereafter: Framework Decision EAW) and are therefore not authorized to issue a European arrest warrant (hereafter: EAW).²

Building on the judgment in *OG and PI*, the Court of Justice in its judgment of 24 November 2020 in the case of *AZ* came to a similar conclusion in regard to the term 'executing judicial authority' in surrender procedures.³ As with decisions on the issuing of an EAW, a decision on the execution thereof should be taken by a judicial authority that is independent, while the procedure for taking this decision should be sufficiently judicial in nature. In the Netherlands, these judgments required changes to be made to the Surrender of Persons Act, the legislation through which the Framework Decision EAW was implemented into Dutch law. The power to issue an EAW and a number of powers to execute that had previously been conferred on the public prosecutor, were transferred to the investigating judge and court, respectively. Such changes were not necessarily intended to be permanent, however, given that the legislator first wanted to look into the possibilities for a structural solution regarding the role and position of the Dutch Public Prosecution Service in European criminal law in light of the case law of the Court of Justice. The purpose of this research is to provide an exploration of such possibilities.

2. Research and method

The central research question of this report is:

What are the different options for ensuring that the role and position of the Dutch Public Prosecution Service as the competent authority in issuing and executing requests for EU cooperation in criminal matters (especially EAWs and EIOs) is in line with the requirements ensuing from the case law of the Court of Justice, and how is each option to be appraised in light of both the substantive and practical consequences thereof?

The central research question can be broken down into the following three sub-questions:

Sub-question 1:

Which requirements ensue from the case law of the Court of Justice with respect to the role and position of the Dutch Public Prosecution Service as the competent authority for:

- a) the issuing of EAW-requests;*
- b) the execution of EAW-requests;*
- c) the issuing and execution of others requests for EU cooperation in criminal matters?*

¹ This summary is an abridged version of the original Dutch language summary.

² Joined Cases C-508/18 & 82/19 PPU, *OG and PI*, EU:C:2019:456.

³ Case C-510/19, *AZ*, EU:C:2020:953.

Sub-question 2:

Given the answer to sub-question 1, what are the different options as regards the role and position of the Dutch Public Prosecution Service as the competent authority for:

a) the issuing of EAW-requests;

b) the execution of EAW-requests;

c) the issuing and execution of others requests for EU cooperation in criminal matters?

Sub-question 3:

How should the options identified pursuant to sub-question 2 be appraised in light of both the substantive and practical consequences thereof?

The answer to sub-question 1 was obtained by desk research. The relevant preliminary rulings of the Court of Justice were identified, following which the requirements set forth by the Court of Justice for the competent issuing and executing authorities in the context of the EAW and the European investigation order (EIO) were analyzed.

The answer to sub-questions 2 and 3 were obtained by desk research and qualitative empirical research in the form of interviews. Partly on the basis of the overview provided by Eurojust of the implementation in the various EU Member States of the judgments of the Court of Justice,⁴ the following options were identified:

- 1) Making the Dutch Public Prosecution Service more or completely independent of the Ministry of Justice and Security;
- 2) Making some of the Public Prosecution Service's powers – those with respect to the issuing and execution of EAWs and other requests for EU cooperation in criminal matters – more independent of the Ministry of Justice and Security;
- 3) Making some of the Public Prosecution Service's powers – regarding the execution of certain investigative acts, whether national or international – more independent of the Ministry of Justice and Security;
- 4) The (further) transferal of duties to the investigative judge or judge;
- 5) The validation or approval by a judge of decisions taken by the Public Prosecution Service.

Pursuant to the interviews, two further options were identified for further exploration:

- 6) Converting the Public Prosecution Service into a so called 'autonomous administrative authority' (*zelfstandig bestuursorgaan*);
- 7) Conferring certain powers of the Dutch Public Prosecution Service on the delegated public prosecutor of the European Public Prosecutor's Office (hereafter: EPPO), namely the issuing of EAWs, the execution of EAWs and the issuing and execution of other requests for EU cooperation in criminal matters.

The interviews were held with professionals involved in EU cooperation in criminal matters in practice, as well as academics with expertise in the field of European criminal law and/or the positioning of the Dutch Public Prosecution Service. For the purposes of exploring the various

⁴ See Council doc. 7182/1/20, <https://www.ejn-crimjust.europa.eu/ejnupload/DynamicPages/st07182-re01.en20.pdf>.

options, interviews were also held with experts in Germany and Denmark. In addition, a written questionnaire was completed by an expert in Estonia.

In light of the exploratory nature of the research, the interviews were qualitative in nature. They took place on a semi-structured basis pursuant to a topic list that was sent to the interviewee in advance (which was tailored to the expertise and/or position of the interviewee in question). The purpose of the interviews was to identify as many options as possible regarding the role and position of the Dutch Public Prosecution Service as competent authority in the context of EU cooperation in criminal matters, as well as the advantages and disadvantages thereof.

3. The role and position of the Dutch Public Prosecution Service

With a view to answering the research questions, first an overview was provided of the current constitutional and institutional position of the Public Prosecution Service in the Netherlands. The Dutch Public Prosecution Service forms part of the judiciary. It is charged with the investigation and prosecution of criminal offences, including in the context of cross-border cooperation. While it forms part of the judiciary, the Public Prosecution Service is also an administrative authority. Moreover, the Minister of Justice and Security has the power to issue general and specific instructions to members of the Public Prosecution Service in the exercise of their duties. As a result, the Public Prosecution Service – unlike judges – can also be seen as forming part of the executive.

The power of the Minister of Justice and Security to issue instructions to the Public Prosecution Service has been the subject of fierce debate in recent years, with critics citing the (appearance of the) risk of political interference. The case law of the Court of Justice discussed in this report has further fueled this debate.

In addition, an overview was provided of the duties and powers of the Public Prosecution Service in the context of EU cooperation in criminal matters, in particular as regards the issuing and execution of EAWs and EIOs. Attention was also given to the changes made pursuant to the rulings of the Court of Justice cited at the beginning of this summary.

As stated above, the Framework Decision EAW was implemented in the Netherlands through the Surrender of Persons Act. While the Act does designate a judicial authority within the meaning of the Framework Decision EAW, it does not specify a central authority within the meaning thereof. While traditionally the Public Prosecution Service has had an important role in the issuing and execution of EAWs, as a result of the case law of the Court of Justice, this role has become more limited, given that as things currently stand, it is not competent to act as ‘judicial authority’.

4. The role and position of the Public Prosecution Service as judicial authority in the context of EU cooperation in criminal matters pursuant to the case law of the Court of Justice

Sub-question 1:

- Which requirements ensue from the case law of the Court of Justice with respect to the role and position of the Public Prosecution Service as the competent authority for: the issuing of EAW-requests; the execution of EAW-requests; the issuing and execution of others requests for EU cooperation in criminal matters?

Pursuant to the case law of the Court of Justice it is first of all clear that the requirements for the competent judicial authority to issue EAW requests are the same as those for the judicial authority to execute EAW requests within the meaning of Article 6 of the Framework Decision EAW. In order to qualify as a judicial authority:

1. The authority must be a judge or an authority that otherwise participates in the administration of justice in an EU Member State;
2. In case of an authority that otherwise participates in the administration of justice in an EU Member State, that authority must be able to act independently in the exercise of its duties.

Qualifying as a judicial authority, however, is not the only relevant condition within the EAW-procedure. Even in case of an authority that otherwise participates in the administration of justice that is able to act independently in exercising its duties, a judicial remedy must be in place by which the proportionality of the authority's decision can be challenged and scrutinized.

The Dutch Public Prosecution Service may be regarded as an authority that otherwise participates in the administration of justice. If a public prosecution service is able to act independently and there is a judicial remedy in place, the public prosecution service can act as competent issuing or executing authority in surrender proceedings.

That the Court of Justice sets further requirements for the authority that otherwise participates in the administration of justice is due to the fact that the EAW (potentially) entails a significant infringement of the right to liberty enshrined in Article 6 of the Charter of Fundamental Rights of the European Union (hereafter: Charter). The Court of Justice envisages a dual level of judicial protection in this regard. Pursuant to this system, checks and balances must be in place to ensure that even where the EAW is issued or executed by a public prosecution service, it is still possible to speak of a judicial procedure. The case law of the Court of Justice is, however, complex and still under development, as a result of which questions arise as to the various requirements' precise meaning.

As in the Framework EAW, in the Directive regarding the European Investigation Order in criminal matters, use is made of the term 'judicial authority'. However, the Court of Justice has made clear that the independence of the public prosecution service is not a requirement in order to qualify as the competent issuing authority in the context of the EIO. In this regard, the Court of Justice has pointed out that unlike an EAW, an EIO normally does not entail a (significant) infringement of the right to liberty enshrined in Article 6 of the Charter.

The Court of Justice has not yet ruled on other instruments of EU cooperation in criminal matters. Insofar as those instruments can be said to impinge on the right to liberty, it is very well possible that the Court of Justice will attach conditions of independence and the availability of a judicial remedy to their use.

5. Exploration of options as regards the role and position of the Dutch Public Prosecution Service in light of the case law of the Court of Justice

Sub-questions 2 and 3:

- *Given the answer to sub-question 1, what are the different options as regards the role and position of the Dutch Public Prosecution Service as competent authority for: the issuing of EAW-requests; the execution of EAW-requests; the issuing and execution of others requests for EU cooperation in criminal matters?*
- *How should the options identified pursuant to sub-question 2 be appraised in light of both the substantive and practical consequences thereof?*

In this report, seven options were explored as regards the role and position of the Dutch Public Prosecution Service as competent authority in the context of EU cooperation in criminal matters. For each of these options, the advantages and disadvantages were identified, with reference to principled and substantive arguments as well as arguments of a more practical nature. For the purposes of this exercise, the options were categorized as follows:

Options making it possible for the Public Prosecution Service to act as competent issuing or executing authority

- 1) Making the Public Prosecution Service more or completely independent of the Ministry of Justice and Security;
- 2) Making some of the Public Prosecution Service's powers – those with respect to the issuing and execution of EAWs and other requests for EU cooperation in criminal matters – more independent of the Ministry of Justice and Security;
- 3) Making some of the Public Prosecution Service's powers – regarding the execution of certain investigative acts, whether national or international – more independent of the Ministry of Justice and Security;
- 4) Converting the Public Prosecution Service into a so called 'autonomous administrative authority' (*zelfstandig bestuursorgaan*)

Options exploring whether, how and why the power to issue or execute could be conferred on the judge

- 5) The (further) transferal of duties to the investigative judge or judge;
- 6) The validation or approval by a judge of decisions taken by the Public Prosecution Service.

Miscellaneous

- 7) conferring certain powers of the Dutch Public Prosecution Service on the delegated public prosecutors of the European Public Prosecutor's Office (hereafter: EPPO), namely the issuing of EAWs, the execution of EAWs and the issuing and execution of other requests for EU cooperation in criminal matters.

In the conclusion, the advantages and disadvantages were weighed up against each other in an appraisal of each of the options.

6. Conclusion

The seven different options regarding the role and position of the Dutch Public Prosecution Service in issuing and executing EAWs and other request for EU cooperation in criminal matters can be appraised differently.

To begin with, the option entailing the conversion of the Public Prosecution Service into an 'autonomous administrative authority' (option 4) requires further investigation. In this research, it could only be looked into on a very exploratory basis, given that the expertise required to fully grasp the advantages and disadvantages thereof went beyond those of the interviewees and researchers.

It is far from clear whether the establishment of a procedure for validation or approval by a judge of decisions taken by the Public Prosecution Service (option 6), would meet the requirement that a judicial remedy must be in place by which the proportionality of the authority's decision can be challenged and scrutinized. For that reason, it presently provides no option for designating the Public Prosecution Service as 'judicial authority' in the context of EU cooperation in criminal matters.

As the option entailing the conferral of certain powers to the delegated public prosecutors of the EPPO (option 7) appears to be unattainable in both the short and long term, it was not researched any further.

As to the other options, a distinction could be made between those options making it possible for the Public Prosecution Service to act as 'judicial authority' and those making it possible for it to act as the 'central authority' while the judge fulfills the role of 'judicial authority'.

As to the first category, in order to be able to designate the Dutch Public Prosecution Service as 'judicial authority' in the context of EU cooperation in criminal matters where the right to liberty is at stake, the Public Prosecution Service must be sufficiently independent of the Minister of Justice and Security. This would require, at the very least, for the power of the Minister to issue specific instructions, i.e. instructions in concrete cases, to be scrapped. Options 1 to 3 provide for varying degrees of independence from the Minister of Justice and Security in this regard, but all would involve a constitutional repositioning of the Public Prosecution Service. The implications of such a repositioning are potentially far-reaching and any plans in this regard would therefore require extensive political and public debate. The case law of the Court of Justice, meanwhile, is still under development. Moreover, even if the power to issue instructions were to be scrapped, making it possible for the Public Prosecution Service to act as 'judicial authority', this would not automatically mean compliance with the case law of the Court of Justice, which demands the procedure to be sufficiently judicial in nature. Even if the Public Prosecution Service were able to act as 'judicial authority', a judicial remedy must be in place, while there are still questions outstanding as to what exactly is required in this regard, and as to the desirability thereof.

Without a constitutional repositioning, the Dutch Public Prosecution Service cannot qualify as 'judicial authority'. It could however act as a 'central authority'. The judge or investigating judge could then act as competent authority in EAW procedures (option 5). It reflects the status quo and would therefore not require significant changes. There is little by way of principled argument to pit against a construction which sees the power to decide on requests

for EU cooperation in criminal matters that (potentially) entail a significant infringement of the right to liberty vested in a judge. This makes option 5 the most sustainable option.

Regarding the role and position of the Public Prosecution Service in the context of other instruments of cross-border cooperation, a pertinent consideration in this regard is whether the decision in question raises issues under the right to liberty enshrined in Article 6 of the Charter. If that is (potentially) the case, care should be taken not to place too much emphasis on the degree of independence of the Public Prosecution Service vis-à-vis the Minister of Justice and Security and to overlook other aspects. While the requirement of independence is a preliminary condition for qualifying as 'judicial authority', the primary concern of the Court of Justice is that the procedure can be said to be (sufficiently) judicial in nature, i.e. allows for judicial scrutiny of decisions impinging on the right to liberty.