Criminal Law in the European Union: a Giant Leap or a Small Step?

The Dutch Report for the Dublin Congress of the International Federation for European Law

1 Introduction

In this contribution, attention is given primarily to the manner the Netherlands has reacted to a number of initiatives that have been taken with regard to the European Union (EU) regarding both criminal law and criminal procedure in the Member States and regarding their mutual cooperation in the area of criminal law. We will consider this question from the perspective that has been determined by the “questionnaire” of the general reporter and that is reflected in the title of this contribution. We note here directly that the question posed hardly offers room for an analysis of the role that the Netherlands has actively played in the design and the formation of the policy that is being pursued on these two points in the framework of the EU. We will largely have to ignore this proactive role of the Netherlands. With this one-sided approach to the question, we will note that it would be wrong to think that, in EU policy in criminal law matters, it is a matter of a kind of one-way traffic from the EU to the Member States. It is obvious that the Member States labour precisely in the early stages in this politically very sensitive area to shape the intended policy to their desires.

In conformity with the framework of questions posed to us by the general reporter, we will deal with the following questions in detail here:

- the influence that the European Union has had in the recent past in a number of areas of criminal law and procedure in the Netherlands (Section II);
- the measures that the Netherlands has taken in order to make the establishment of Europol and Eurojust a success on the national level (Section III);
- the manner in which the European arrest warrant has been introduced in the Netherlands (Section IV);
- and dealing in the future with frictions in the collaboration in criminal matters between the Netherlands and the other Member States (Section V).

The discussion of these four questions will be rounded off in the conclusion (Section VI) with a Dutch response to the general question that is central in this contribution: In the EU in the field of criminal law, has a giant leap forward been made or has only a small step been taken?

Apart from that, for a good understanding of our findings and conclusions, it is important already here – by way of a preliminary point – to stress that, in past years, the successive Dutch governments have always been favourable in principle toward far-reaching involvement of the
EU with national criminal law and procedures. However, this favourable attitude encountered and encounters a limit in the criterion that the European involvement must be necessary in view of smoother collaboration as regards criminality between the Member States and/or a more efficient combating of transnational, organized criminality. They have stated this position explicitly in various letters to Parliament. In a memorandum of 5 July 2001 on European cooperation in criminal law, for example, it is stated that the Netherlands adopts in principle an “active and positive attitude” in negotiations on framework decisions in which a more uniform description of crimes and the determination of minimum prescriptions for the accompanying sanctions are concerned. Likewise, it is stated here that rules of national criminal procedural law must, if necessary, be modified if they constitute a hindrance to smooth criminal-law cooperation with other Member States. And it is also important that this letter defends the position that while the Netherlands is a proponent of expanding and intensifying this cooperation, it does not find it necessary for the time being that the staff of Europol be given executive powers.  

In any event, this last example demonstrates well that the accommodating position that the Netherlands takes in general in the area of criminal law may not be explained as an unconditional form of readiness to place the future of national criminal justice systems in the hands of the EU. In the recent discussion with the Parliament on the European Convention, the government, therefore, has also declared unambiguously that it will hold fast to “decision making by unanimity” in the European Council in the area of mutual cooperation in criminal matters (in any event within the ‘Third Pillar’).  

Finally, we must note that the question of the organizers to limit this contribution to about 8000 words has meant that we have had to keep restrict the note apparatus more than we think desirable.

II The framework: the influence of the European Union on Dutch criminal procedure in the preceding decade

The first, preliminary, question the general reporter posed in this regard concerns the role and the significance of treaties and other European legal sources within the Dutch legal system. A two-fold distinction needs to be made in this regard. Insofar as it concerns the well-known EU instruments like framework decisions, directives, and regulations, we will not consider their binding force or the manner in which they must be implemented in the national legal order. These questions are the same for all of the Member States and the information in their regard is

2 In Section II below, we will go into the question of the criteria that, according to the Dutch government, must apply for the evaluation of initiatives for the harmonisation of criminal law.
3 TK, 2002-2003, no. 28 473, no. 5, p. 8. See also ‘Europa in de steigers’, 28604, no. 3, pp. 5-7. Moreover, the Netherlands is not unsympathetic towards the possibility of criminal law harmonization within the First Pillar. See, inter alia, Kamerstukken II, 22112, no. 207, p. 13.
generally accessible. The matter is different for “specifications of treaties and decisions of international law organizations that bind everyone”. These specifications and decisions have a special constitutional status within the Dutch legal order. In Art. 94 of the Constitution, it is laid down that valid national legal prescriptions are not applicable if this applicability would be incompatible with the contents of these international sources. From this it follows that the Dutch national criminal law or criminal procedural law is also inapplicable if it is incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) or similar conventions of the Council of Europe.

In the introduction, we have already noted that the Dutch government is indeed positive with respect to a certain Europeanization of criminal law but that this does not imply an unconditional readiness to part with the future of criminal procedure entirely. Of importance here is that the Minister of Justice informed the Parliament of the criteria that will have to be complied with when there is talk of desirable initiatives for forms of harmonization of criminal law. This concerns, briefly summarized, the following standards:

a. the principle of subsidiarity (factual scope of the problem and consensus about the desirability of an European approach to it);
b. no duplication of specifications or repetition of provisions from other international fora;
c. application of the ECHR guarantees regarding a fair trial;
d. preservation of the Dutch principle of opportunity with respect to the prosecutorial decision;
e. judicial supervision of the investigatory activities;
f. special minimum sanctions are rejected.

Against this background, important areas within Dutch criminal law and criminal procedure can be distinguished where developments have occurred in previous years as a result of the obligations with regard to the EU. We shall point out the most characteristic examples, whereby we note that the space allowed to us inhibits a truly substantive discussion of the changes introduced.

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5 In relation to EU law, there is discussion about the positive or negative effects on national criminal law; see G.J.M. Corstens & M.I. Veldt-Foglia, ‘Communautarisering van het straf- en het strafprocesrecht’, Delikt en Delinkwent 2003, pp. 103-177 (especially p. 119).
7 Here it must be noted that the Dutch government has in the meantime by way of compromise with Member States that disagree, agreed to the construction of the so-called “minimum maximum penalties”.
As regards the substantive criminal law, we first point to the Law implementing the anti-boycott regulation, 8 which implemented the EU Regulation of 22 December 1966 (OJ 96 L 309). By adding this law to the Economic Crimes Act (WED: Wet op de Economische Delicten), a new economic crime was created. In the same line, the accentuating of some common criminal provisions and prescriptions in the Copyright Law in order to better combat counterfeiting and piracy are all measures that are based on an EU regulation. 9

Other characteristic examples are situated in the area of physical violence (weapons, terrorism) and in the area of property criminality (money laundering, counterfeiting). 10 Thus, the Weapons and Ammunition Act was adapted under the influence of the EU Directive concerning the control of the acquisition and the availability of weapons. 11 The combating of terrorism was even intensified on the basis of EU instruments from both the first and the Third Pillar. Non-compliance with Regulation 2580/2001 of 27 December 2001 concerning specific restrictive measures against certain persons and entities with a view to the struggle against terrorism was here made punishable on the basis of the Terrorism Sanction Regulation 200 here in the country. And within the Third Pillar, the draft Framework Decision on the Combating of Terrorism led in the Netherlands to the so-called Law to Combat Terrorism. 12 With respect to the protection of property components, we point to the Framework Decision regarding protection against euro counterfeiting, which, among other things, led to an amendment of the Dutch Art. 214 Criminal Code. 13 As the last example in this sector, we can cite the Framework Decision of 26 June 2001 on the basis of which – summarized very briefly – the Member States are obligated to make or to apply no reservations in relation to the already existing Treaty of the Council of Europe of 1990 regarding laundering, tracing, seizure, and confiscation of the proceeds of crimes. 14

Next, something about the influence of the EU law on criminal procedural law. It is generally assumed that this influence is less than in the field of substantive law. Of itself, this is very understandable – and also rightly so – that such is thought. Indeed, there are no Union instruments on the basis of which investigatory powers are added or harmonized in national law. And the Member States still always have great freedom in the institution of the actual criminal procedure before the judge. But we have to be careful that the appearance does not deceive. In our

10 The complete data on these examples have been worked out by G.J.M. Corstens & M.I. Veldt-Foglia, loc. cit.
13 Framework Decision of 29 May 2000 (2000/383/JBZ, PB L 140/1); see also the Framework Decision of 6 December 2001 whereby this decision was amended and the Framework Decision of 28 May 2001 concerning fraud and forgery with regard to payment by other means than cash (PB 2001, L 149/1).
opinion, it is precisely in the area of criminal procedural law where a creeping and often *indirect* influence may not be underestimated. Thus, in the first place, there is the general requirement that violations of Community law must be handled and punished under the same material and formal conditions as corresponding violations of the national law. From this principle of non-discrimination, assimilation, equivalence or equality\(^\text{15}\) flow already some striking restrictions regarding the freedom to shape law enforcement as one chooses. A similar general restriction on the freedom of choice flows from the judgement of the Court of Justice that all citizens of the EU have to be offered the opportunity for indemnity under the same conditions for the subjects of the Member State in which the crime is committed.\(^\text{16,17}\) An entirely other form of indirect influence in the criminal procedure law has arisen as a result of international cooperation. The mutual cooperation between Member States, for example, has made an unmistakable contribution to the introduction of legal concepts that were not there in the past. We can point to the possibility of observation or infiltration by foreign investigating officials. These new legal concepts, their absence being no longer conceivable, consequently oblige their standardization in national codes of criminal procedure.\(^\text{18}\)

The following cases show a more direct influence on criminal procedure law:
- Various proposals with separate measures that lead to a better (and separate) protection of the financial interests of the EU;\(^\text{19}\)


\(^{17}\) Even more broadly, the general reporter posed the question of the role the Court of Justice could play in the future. In the Netherlands, attention is being given in this regard primarily to the interpretation of national law in the light of EU instruments. See F.G.H. Kristen, ‘Over de betekenis van de richtlijnconforme interpretatie voor het strafrecht en de uitbreiding daarvan tot kaderbesluit en kaderwet’, in: *Glijdende schalen (Liber amicorum J. de Hullu)*, Nijmegen: Wolf Legal Publishers 2003, pp. 387-409. The question of whether the Court of Justice would be able to perform other tasks in the future in the framework of the Third Pillar – for example, testing whether the Member States have sufficiently implemented Framework Decisions – cannot be answered in a few paragraphs in this article.


\(^{19}\) In particular, the Green Paper concerning the criminal procedural protection of the financial interests of the Community and the creation of a European public prosecutor (11 December 2001, COM (2001) 715 def.); and the draft Directive concerning the criminal law protection of the financial interests of the Community (PB 2001, C240/125). The most important question flowing from this, the possible introduction of a European Prosecutor, is dealt with separately below.
- The Green Paper on “Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union”,
- Various Framework Decisions, including those regarding the status of the victim in criminal proceedings; on the European arrest warrant (see below, Section IV); and proposals in the area of mutual recognition of monetary sanctions and the execution of judicial decisions.

In this regard, some questions must still be answered to round off this section. The first of them concerns the legal protection of persons subject to criminal proceedings. Has the influence of the EU, according to the understandings applicable in the Netherlands increased legal protection or precisely put pressure on it? Here, we would first state that the term “legal protection” may not be understood too narrowly. Thus, it must be noted that European unification can indisputably contribute to more effective combating of serious forms of criminality, which can be seen as legal protection for victims, real or potential. In addition, we would not want to see legal protection restricted to procedural guarantees. The concept also embraces, in our judgement, respect for basic characteristics of the national criminal justice system in force.

So considered, concern is being repeatedly expressed – particularly from the scholarly literature – about the compatibility of EU legal instruments with the points of departure of the Dutch criminal law system. Here, too, for the sake of brevity, the citing of a few examples will have to suffice. Thus, according to academic authors, all sorts of directives and framework decisions are at odds with traditional legal principles. Insufficient justice is done to the principle of guilt (requirement of mens rea), for example, in the draft Framework Decision on the drug trade. In the Framework Decision on combating terrorism insufficient account is said to be taken of the character of a “criminal law on acts” in which there is no place for the criminalization of evil thoughts or intentions. And from the principle that a criminal law must have the character of an ultimum remedium, criticism is expressed on, inter alia, the Framework Decision on counterfeiting and the draft Directive for criminal protection of the environment. About some EU influences, such as the Directive about combating money laundering, it is even

20 Dated 19 February 2003, COM (2003)75 def., about which we will have more to say later.
21 Dated 15 March 2001, 2001/220JBZ, PB 2001, L82/1; we will not go into this below because in practice it has not led to substantial modifications of national systems of criminal procedure.
said that, upon the national implementation, this leads to tension with the principle of legality, the presumption of innocence, as well as with the nature of the criminal law as a last remedy.  

If the concept of legal protection is conceived somewhat more traditionally with an emphasis on procedural guarantees for a fair trial, then one must point primarily to the “Procedural Safeguards for Suspects and Defendants in Criminal Proceedings” already cited In a previous publication, we have argued extensively that this involves more problems than there are solutions to be expected. The added value when compared to the ECHR is hardly explained, while some of the rights listed in it (particularly the right to “appropriate protection for particularly vulnerable groups of suspects”) are so difficult to operationalize that confusion is primarily to be expected. All in all, the conclusion is that experts in the field of Dutch criminal law are concerned about the preservation of a reasonable level of individual legal protection as a result of the on-going influence of the EU.

The second important question that was put forward by the general reporter is whether the now available instruments are sufficient for achieving effective mutual cooperation in criminal cases. With respect to this, it must first be stated that the Brussels institutions often seem to proceed axiomatically that this is not the case. We think that a more nuanced approach is appropriate here. To begin with, there has been no in-depth or large-scale empirical research into the functioning of the present instruments. And insofar as partial studies have been conducted, their results are distinctly encouraging. Deficiencies in the present forms of cooperation are often not due to the legal infrastructure but to all kinds of logistical problems or to practical obstacles of an organizational nature. Later on (in the conclusion of this section and in Section V), we will return to this question.

The last question to be discussed here concerns the desirability of the creation of new institutions whereby – in the light of the well-known Green Paper of 11 December 2001 – naturally one must think primarily of the possibility backed by many of the institution of a European Public Prosecutor (EPP). This question has energized many pens. In the Netherlands, opinion is divided. Authoritative authors, generally with carefully chosen words, have expressed

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themselves positively about this idea. Other authors – as well as the Dutch government – reject in advance the establishment of an EPP. We will give an extremely abbreviated review of the most important arguments that have heretofore governed the discussion.

The proponents of an EPP argue that this would promote a more effective combating of EU fraud. And in general, organized criminality can be tackled by reducing divergences between criminal systems. Better cooperation between Member States would not be able to offer a sufficient solution when investigation, prosecution, and jurisdiction remain splintered. The setting of priorities must take place on a central, European level. The reserved attitude of Member States with regard to (partial) transfer of sovereignty is, according to this line of thought, obsolete because the influence of Community law on national criminal law is already a fact. An EPP would, moreover, be good for the legitimacy of the EU and would so have an important symbolic value. In addition, it is also argued that it would lead to better legal protection for suspects in the proposed system – working with “delegated prosecutors” in the Member States – the suspect could seek his rights in his own country, and language problems would thus not play a role.

As counter arguments, primarily the following objections are put forth. The appeal to the threat of organized crime is insufficiently supported. Insofar as systematic investigation in this regard is already in place, the indication is no rarely precisely in another direction. For example, the production of synthetic drugs, the distribution of illegal goods (weapons, stolen automobiles, contraband cigarettes) and both the recruitment and the exploitation of women for the sex business take place in large measure on the local level. The combating of them requires precisely strong local and national authorities that are well provided with people and resources that might be able to work across borders or assist foreign colleagues. And if all this would be different, then the provisional restriction of the working area of an EPP to EU fraud cannot be justified. Then one must begin rather with matters like the drugs, people, or weapon trafficking, which are a greater threat to society. A separate point is then that the possibilities for member-state cooperation are grossly underestimated (see Section V below). And the organizational imbedding of an EPP in the EU and within the Member States confronts us with irresolvable problems. Examples of this are the uncertainty of the ultimate political responsibility for the actions of a European public prosecutor and the unclear position of “delegated prosecutors”. The

31 See G.J.M. Corstens, ‘Europees strafrecht. Een Europees O.M. en het subsidiariteitsprincipe’, in: Justitiële Verkenningen 2001/2, pp. 103-111 (which supports a “phased” introduction, depending on the type of crime); H. de Doelder, ‘Europese opsporing en vervolging’, Delikt en Delinkwent 2002, pp. 712-725 (which argues for an “integral treatment” and a “reorientation of the various institutions and services”, which leads him to propose merging OLAF and Europol into form a new police organ that can work under the everyday direction of an EPP); M.I. Veldt, ‘Een Europees Openbaar Ministerie: de oplossing voor EU-fraude?’, Nederlands Juristenblad 2001, pp. 666-671 (with as a special suggestion that the Court of Justice could be charged with monitoring the job performance of the EPP); and Conny Rijken, loc. cit.

latter would be seen in their own country as outsiders in the prosecutorial apparatus. And as long as they have no say about the allocation of time and money by the police, their effectiveness will be very limited. In addition, an EPP is only possible if—complementarily—important components of the existing criminal justice systems are violated. Thus, the legality principle should apply everywhere, and there would be no more room for the principle of expediency. For a number of countries, this is difficult to accept. The same applies for the idea coupled to the proposal to harmonize essential components of the law of evidence. There are technical legal objections to this that have been insufficiently thought through.33

Probably, the least important is that we ourselves, upon consideration of these arguments, have come to the judgement that an EPP should not be established prematurely. Virtually all the Dutch authors who have written on this subject link the right to exist of an EPP to a well thought-through and well-regulated relationship to other organs and institutions of the EU and of the Member states (Europol, Eurojust, OLAF, “the politics”, the controlling judge). Insofar as we can see, at this time, virtually nobody is of the opinion that this basic condition has been fully met.34

III      The organization and operation of Europol and Eurojust on the national level

III.1 The Dutch involvement in Europol

The approval of the 1995 Europol convention by the Dutch Parliament took a great deal of work. But however extensive the political exchanges on a number of questions—such as the protection of personal information and the democratic control of this institution—may have been, the law ultimately adopted in December 1997 was brief and forceful, namely that the convention (along with the accompanying declaration and the accompanying protocol) was approved for the Netherlands.35 This law thus further contained no adaptations of the Police Act or the Code of Criminal Procedure. The legal implementation of this agreement, therefore, actually did not amount to much.

Articles 4 and 5 of this convention, however, did contain a number of specifications that also obliged the Netherlands to carry out a certain adaptation of its police organization. In Article 4, the Parties are obliged, among other things, to establish a national unit that, under certain conditions, can be assigned tasks that are listed elsewhere in the article and in particular, to provide on its own initiative information to Europol that it needs to carry out its task and, inversely, to comply with requests from Europol for information in its work areas. Complementary to this obligation, Article 5 states that each national unit must delegate one or more liaison officers to Europol who are authorized to promote the interests of the national unit within this institution and more particularly, of course, as regards the exchange of information and the coordination of measures that can flow from it.

33 See on this last point Fijnaut & Groenhuijzen, op. cit. 2002, as well as Section V below.
34 Regarding the various obscurities, see also P.J.H. de Hert & F.M. Tadic, ‘Het Openbaar Ministerie eindelijk in het Europese beeld maar de ontvangst is geenszins helder: over Eurojust en het Europees justitieel netwerk’, Strafblad 2003, pp. 43-54.
The Netherlands has not established a national unit that as such constitutes a clearly distinguishable component of the Dutch police. The interests of Europol are here entrusted to the Dienst Internationale Netwerken (DIN: International Network Service), which, in its turn, is a division of the Korps Landelijke Politiediensten (KLPD: National Police Services Corps). The DIN constitutes – as the name already suggests – the national window for all international investigation authorities (in addition to Europol, also Interpol, for example) respectively for many routine investigation activities (for example, on the basis of the Schengen Implementation Agreement of 1990). The organization of this service rests on the idea that the cooperation with these authorities or the support of the intended activities must take place in an integrated way – hence, the abandonment of the idea of the formation of a separate national unit for Europol.\(^{36}\) This service employs in total 152 people. A number of them, however, form the Dutch Desk at Europol in the Raamweg in The Hague. These staff members, in other words, provide the liaison function indicated in Article 5 of the Europol convention. At this Desk, a total of 5 staff members of the DIN are employed: the head of the team, 2 police officers, and 2 administrative staff.\(^{37}\)

An empirical study has never been done of the role that the DIN or the Dutch Desk actually plays in the criminal-law cooperation between the Member States and the European Union. Therefore, nothing can be said about their actual influence on the application of criminal law in the Netherlands or on the progress of criminal cases in other countries. Some raw data are indeed available on the number of criminal cases in which the Netherlands has been involved via the Dutch Desk and also the number of requests that this office has dealt with in the past years.

As regards the number of criminal cases “with Dutch involvement”, there were in total 1001 cases in 2001. In 2002, there were 1193, and in 2003 1430. Thus, year after year, this amount in absolute numbers is thus increasing. Relatively speaking, for that matter, this number of cases constitutes an important, albeit decreasing, portion of the criminal cases with which Europol dealt with in the respective years: in 2001 1001 out of 2429 (42%), in 2002 1193 out of 3432 (32%) and in 2003 1430 out of 5258 (27%).

As regards the requests, a distinction must be made between the number of requests that were sent by the Dutch Desk and the number of requests that it received. In 2001, 2002, and 2003, it sent 487, 428 and 496 requests respectively. In these years, however, it received 1504, 1806, and 2158. Thus, while the number of requests sent remained all in all on the same level, the number of requests received increased from year to year. Most of the “Dutch cases” about which information was exchanged via Europol were related to drugs criminality. For the rest, primarily matters regarding illegal immigration and terrorism were involved.

As we have noted, the Netherlands has always held the position that the staff of Europol for the time being must not be given executive powers. In the framework of the international and domestic discussion on the implementation of the Treaty of Amsterdam and the related conclusions of the European Council of Tampere about police cooperation, it has repeated this position to the Lower House of Parliament in somewhat other words: the development of Europol into an “integrated police service that together with the national services is charged with the

\(^{37}\) These and other data were provided to us by the head of the DIN, H. Trip, who is cited in the previous note.
struggle against international terrorism and organised criminality” must not be considered
excluded for ever and ever, but, in the short term, such an evolution is “undesirable”.38

For that matter, the government has always been positive in the framework of this
discussion on the implementation of the two important amendments to the Europol Convention
that the Treaty of Amsterdam contains with respect to Europol. Requests from Europol to the
Netherlands to initiate criminal proceedings will be judged in the first instance by the national
public prosecutor when appropriate. In the second instance, however the College of Procurators-
General will decide itself whether or not the request will be honoured. And as far as the
participation of Europol staff in the multinational investigation teams is concerned, the
Netherlands has no difficulty if they are actively involved in the application of investigative
powers, but it does attach two conditions here: the first is that they “do not undertake activities
independently and on their own initiative”, and the second is that they in such cases cannot
invoke the general immunity that the Europol Convention provides them.39

Finally, it can be noted that the Dutch government has already openly declared that it
favours the further changes in the status of Europol that are provided for in the draft Protocol for
the amendment of the Europol Convention that is presently still being discussed by the Council of
the European Union.40 This means, among other things, that it favours eventually allowing
Europol be able to make direct contact with police services in the member states – thus apart from
the national units – and, what is no less important, allowing these services in the future to be able
to consult the information system of Europol under certain conditions.41

III.2 The Dutch involvement in Eurojust

It is not the task of the national reporters to delve here into the status of Eurojust as this has been
described in the Decision of the Council of 28 February 2002. It is important in this regard is to
point to Article 9, Paragraph 3, of this Decision because here it is stated that each Member State
itself will establish the nature and scope of the judicial powers that it grants to the national
member of Eurojust on its own territory. The reference to this stipulation is here particularly
appropriate as the Netherlands has not considered it necessary to describe the powers of its
national member formally in one way or another. For a good understanding of this policy, it
must here be added that this does not constitute an exception to the rule: the Decision to establish
Eurojust has not been specifically implemented in its entirety in Dutch law. Parallel to this, it can
be noted that, while the establishment of Europol led to much discussion in the Parliament, the
establishment of Eurojust hardly attracted any attention here.42 This striking difference in political
appreciation of the two institutions is actually difficult to explain. Does it have to do with the
difference in terms of reference (compilation of information as opposed to coordination of
criminal cases)? Or also with the difference between the institutions involved (police as opposed

40 Council of the European Union, Europol 53, Brussels, 4 November 2003, no. 13650/03.
42 See TK, 2001-2002, 23490, no. 211.
to the Public Prosecution Service)? Or also with historical differences between police and judicial cooperation in Europe (perhaps with memories of totalitarian police states)?

In any event, the Dutch government has never explained why it did not find implementation legislation necessary in the case of Eurojust. Probably, however, this is wholly a matter of its image of this institution. Indeed, in its eyes, it concerns an institution that may function only as a consultation platform between the prosecuting authorities of the Member States. Eurojust can and may not, according to the Dutch government, infringe on the national powers or criminal proceedings, let alone function as a kind of European public prosecutor with independent prosecutorial powers.\footnote{12}

Since Eurojust has actually been effectively functioning only for a few months, it is certainly not surprising that no empirical studies have been done about its \textit{de facto} activities. Not much can be said about the involvement of the Netherlands in Eurojust. A few basic facts will have to suffice here.

The Dutch Desk – to use a big word for it – in Eurojust consists of the national member, a chief prosecutor NN, who is assisted by a full-time secretary. In addition, an alternate for the national member has been appointed who will also carry out tasks related to Eurojust for a day or up to a day and a half per week. For the rest, she works with the National Public Prosecutor’s Office where she also serves as one of the Dutch contact points in the European judicial network.\footnote{44}

It has been agreed that the Dutch member of Eurojust in principle only comes in contact with other branches of the Public Prosecution Service in the Netherlands via the National Public Prosecutor’s Office. In emergency cases, however, direct contact is also made with judicial authorities in the country and the National Public Prosecutor’s Office is informed later about what occurred. And if the Dutch member hears from colleagues in Eurojust that a Dutch request for judicial assistance must be supplemented at one or another point, then he will, for the sake of the speed of the international cooperation, correct this deficiency himself immediately if possible and inform the prosecutor or examining magistrate about it later on.

In the course of 2003, a total of some 300 cases were handled by Eurojust. In almost 40 cases, the Netherlands was involved. In this period four requests for legal assistance were made by the Netherlands and in total 35 were received. These numbers demonstrate that the Netherlands – as in the case of Europol – is also an important participant in Eurojust in the criminal law cooperation within the EU.

\section*{IV The introduction in the Netherlands of the European arrest warrant}

The introduction of the European arrest warrant and the accompanying procedures for rendending people between the Member States was combined with separate implementation of the related Framework Decision in the Dutch legal system by means of a special law, the so-called


\footnote{44} These and other data were provided to us by Mr. R. Manschot, the Dutch member of Eurojust.
“Rendition Act”. The draft of this act, after extensive preliminary consultation with the magistracy and the legal profession – was submitted on 12 September 2003 to the Lower House. After a quite extensive discussion in this House, the bill was submitted on 2 December 2003 in a slightly modified form to the Upper House for approval.45

The discussion in the Lower House concerned, among other things, the possibilities of continuing to test rendition requests against the Convention for the Protection of Human Rights and Fundamental Freedoms,46 about the necessity to arrive at agreements in the EU about the minimum rights of suspects in criminal procedures, about the quality of the criminal procedure in a number of prospective Member States, and about the organizational consequences of the implementation of the Framework Decision.

It was rejected that the legal implementation of the present Framework Decision would be done by adapting the existing Extradition Act because the many changes that would have to be made would not have led to a clear regulation. The current Extradition Act thus remains in force in its present form with a view to relations with the non-EU countries. The Council of State, moreover, has judged that no prior amendment of the Dutch Constitution was/is necessary for the realization of this supranational Framework Decision. Nor does its implementation encounter constitutional problems.

Because the present Framework Decision is intended to replace the present extradition treaties in the Council of Europe and the EU, it contains little that is new at many points for the Netherlands, which is a party to all these treaties. Only at some four points can one speak of important innovations. First, for a large number of crimes, the standard of double criminality is no longer held to. However, this renewal must not be objected to too much: with the crimes cited, this standard would not have caused problems anyway. Second, the starting point that extradition is a matter that occurs on the level of the government is abandoned: in the future, it will become primarily a matter between the judicial authorities.47 Third, there is a thoroughgoing simplification of the extradition request. And fourth, there is a very considerable shortening of the procedures. Where now an extradition procedure requires eight months (five months of which for the processing of the cassation appeal), the rendition procedure will be completed in two months (sixty days).

In line with the last point, one can point out immediately that there is no provision in the Rendition Act for the filing of an appeal against rendition by the person requested. First, such a provision would make it impossible in practice to achieve the time limit of sixty days. Second, it would be directly opposed to the objective of the Member States to create an integrated European

space for justice in which there is no place at all any more for a extradition procedure. Likewise, it will probably no longer be possible to submit a rendition request to a judge in (civil) summary proceedings because it is assumed that the rendition judge will rule on the rendition in all its aspects. With this, the question of the general reporter about whether a possibility is created for the requested person to file an appeal with the European Court of Justice is answered in the negative. Also because the traditional extradition continues to exist alongside the rendition, only the extraordinary legal remedy – cassation in the interest of the law – is opened.

Against this background, it is not surprising that primarily the organisational consequences played a great role in the discussion about the implementation of the present Framework Decision. Briefly and correctly stated, this discussion yielded the following:

- The settlement of the rendition procedures is – because of efficiency but also in the interest of legal uniformity – concentrated in one single court, the district court of Amsterdam respectively the public prosecutor at this court; for this purpose within this court the already present extradition chamber is expanded by three judges and five support staff and also, within the public prosecutor’s office, public prosecutors will be especially charged with this task;
- The Minister of Justice will in general no longer play a role in the decision making regarding the rendition of a person on the basis of a European arrest warrant. Only in special cases, for example with a concurrence of requests, will he decide what has to happen;
- In the case of a summary procedure – in which the arrested person agrees with his rendition – does the arrested person not always need to be transferred to Amsterdam. When his arrest took place in a border district, the rendition to a bordering country can take place directly;
- The introduction of the rendition will not really entail additional expenses for Justice in general because the number of extradition requests to the other courts (other than Amsterdam) will drop sharply, the Supreme Court will have to handle significantly fewer cassation appeals, and the Ministry of Justice will no longer have to prepare orders for EU cases. Only the costs for the transport of the arrested persons to Amsterdam will increase.

Finally, it can be noted that, on the basis of the present number of extradition requests from other Member States, it is estimated that the number of requests for rendition of a person will be around 350 per year.\(^{48}\)

\(^{48}\) This number was given to us by the head of the International Legal Assistance Office of the Ministry of Justice in The Hague, Mr. P. Spaan.
and the states that use a civil law system. As was already noted above and will be further discussed directly, most of the problems in the field are, in our opinion, not the result of a legal regulation of police powers or of other aspects of the standardization of the preparatory investigation or of cross-border police operations. The primary source of problems, on the contrary, lies on the policy and executive level. All the same, there remain difficulties that flow from the legal system.

Even though the differences between common law and civil law have become significantly smaller in the last few decades in all sorts of areas – for example, as a result of the case law of the ECHR in Strasbourg – nevertheless there remain differences in approach that can have far-reaching consequences. This appears in the field of evidence law and elsewhere. In many countries, for example, problems arise when foreign police-undercover agents have to be heard as witnesses. Another example concerns the non-acceptance of telephone conversations, tapped on the continent, as proof in a criminal procedure in the United Kingdom. The solution for these problems in a European context that is cited the most often is to minimize the consequences of the existence of different national legal systems. In the concrete, this means that it is recommended that evidence that is gathered properly in the one Member State is admissible in the rest of the EU in the criminal procedure. As we have explained elsewhere in more detail, there are considerable objections against this general starting point.

Insofar as it is of importance here, the disadvantages can be summarized as follows. First, it places a premium on the concentrating of investigatory activities in countries with inadequate or not updated legislation with respect to the standardization of investigatory powers. Second, the starting point requires that the national judge would have to test the legality of the investigatory actions in function of foreign law. It is very questionable whether the judge is capable of doing this – a problem that becomes all the more urgent with the present expansion of the number of Member States of the EU. And finally, the problem remains that recognition of the legality of obtained evidence does not yet always resolve the problem of the manner in which such material must be presented to the court within a national legal system. As long as we do not have a general – compulsory – recognized European affidavit missible everywhere as evidence in a criminal case, the present proposals are clearly deficient. And the introduction of such uniform evidence includes in fact a harmonization of a crucial component of procedural law that goes so far that we do not expect unanimity within a foreseeable period of time.

49 In common law-countries, ever more criminal procedure law is being anchored in positive law; in a number of Member States with a moderate inquisitorial system, emphasis is being placed more than previously on the principle of immediateness and oral conduct of cases. Cf. Nico Jörg, Stewart Field, Chrisje Brants, “Are Inquisitorial and Adversarial Systems Converging?”, in: Phil Fennell et al. (eds.), Criminal Justice in Europe. A Comparative Study, Oxford 1995, pp. 41-56.


51 Fijnaut & Groenhuijsen, op cit. 2002.
This brings us directly to the second question posed, that is, the question of the extent to which harmonization of regulations can lead to substantial improvement of police and judicial cooperation in criminal cases. We seriously doubt that harmonization offers the key to the introduction of essential improvements. In our judgement, the crux of the matter lies elsewhere. As already mentioned briefly, it is primarily a matter of policy – that is to say, the introduction of priorities in the areas relevant for the EU – and the availability of people and resources for this purpose. In addition, there are at present all kinds of organizational hindrances that may seem trivial from a legal point of view but that can be of the greatest importance for the law in action. We have in mind, for example, the lack of clarity in the formalities to be respected, the identification of the competent organs in other countries, language problems, and the frustrations that can arise if laborious procedures have to be followed in essentially minor criminal cases.52

The next question posed by the general reporter concerns the adequacy of the sources for the protection of human rights in situations in which inter-state police and judicial cooperation are involved. In Section II above, we have already mentioned concerns regarding the general level of legal protection as a result of the increased influence of the EU on national criminal law enforcement. We need not repeat here the reasons for this concern. For the Dutch situation, we do want to bring up two points that are of importance for the assessment of the development of law. First, there is the general international safety net of the ECHR and the jurisprudence based on it of the Strasbourg Court. This constitutes an outer limit of respect for human rights that may never be infringed upon and also not in the EU context. In addition, mention must be made of a large-scale research project that was conducted in the Netherlands in the last 5 years under the title ‘Criminal Procedure 2001’ (Criminal Procedure 2001). The project was focussed on a systematic reform of the criminal procedural law.53 The objective was to develop the systematic desiderata on the basis of which a new code of criminal procedure can be written. Of course, within the limits of this article, it would be impossible even to give the main lines of the large series of recommendations that have been made by the researchers. We have to limit ourselves to two points that directly touch on the development of EU criminal law in relation to the protection of human rights.

As regards the content, in this regard it is important that it is proposed that the legal protection of suspects in a criminal procedure be legally regulated already in an earlier stage than is now the case. According to the present law, the full spectrum of defence rights– including, for example, the requirement of transparency within the investigation – is only applicable when an

52 See further, Conny Rijken, op cit. pp. 170 ff.
investigating magistrate becomes involved in the case. The Criminal Procedure 2001 project proposes guaranteeing the full range of human rights protection from the moment that someone is interrogated for the first time as a suspect.

Another element that must be noted here is the relationship between criminal proceedings, international cooperation, and international legal assistance. The researchers have concluded that the traditional concepts that have traditionally characterized this relationship are no longer functional and must be again thought through. This has led to a new conceptual structuring of the material with recommendations for what should and what should not be regulated in a domestic code of criminal procedure or a law on international legal assistance. The starting point of this new structure is that one must speak of “national criminal proceedings” if the investigatory action is directed to obtaining a decision by a Dutch criminal court. One has “legal assistance”, however, when, at the time of the investigation it is established that a possible criminal procedure will take place in a foreign country. In the cases in which it is still unclear at the time of the action whether one or another jurisdiction will be used, the research group proposed that the standards of the Dutch code of criminal procedure must always be observed. This theory formulation could also be of importance for other Member States in the framework of a consistent protection of human rights upon a further expansion of the EU involvement in the national criminal law procedures.  

Finally, the question was raised by the general rapporteur about the influence that could proceed from the draft European Convention on police and judicial cooperation in criminal cases. Of course, some reserve is appropriate on this point, precisely because at this time there is only talk of a draft and the negotiations are seriously stagnated at the time of this writing. With this reservation in mind, a number of observations can still be made. First, as has repeatedly appeared above, the designing of new legal frameworks and instruments is usually not the most effective way to bring about changes. Investing in already existing possibilities can achieve more direct effects in this regard. Second, the possible introduction of a European Public Prosecutor would, of course, drastically affect the nature of the cooperation. We have already spoken of its desirability above. Third, the content of the European Convention will also have operational consequences for the cooperation between the Member States if in this area the principle of unanimity of decision making is abolished and/or insofar as the distinction between the first and the Third Pillar de facto is abandoned. The space we have available makes it impossible for us to reflect on the degree to which this could be the case.

VI Conclusion

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54 For a good understanding of the practical significance of the proposals of the research group, it is useful to mention that the Minister of Justice has notified Parliament that the criminal procedure will be adapted in phases in the coming years and that the results of Strafvordering 2001 will apply as one of the important guidelines. See the ‘Algemeen kader herziening strafvordering’, Kamerstukken II 2003/04, 29271, no. 1, 22 October 2003.
The overarching question posed to all of the reporters is: ‘Criminal Law in the European Union - A Giant Leap or a Small Step?’ On the basis of the sections above, it is obvious that one must avoid or suspend a choice between these two extremes.

To begin with, a judgement of the progress that has been or is being made in the Third Pillar depends in part on the time perspective. Compared with the situation and the expectations of the eighties, a great deal was achieved in the nineties in the sphere of police and judicial cooperation – consider the Schengen Implementation Agreement, the establishment of Europol, the supplementary EU legal assistance treaties, the development of a criminal policy in a number of crime sectors. Considering the developments in recent years, then the introduction of the European arrest warrant is a substantial step forwards in the direction of the creation of a European legal space on the level of (confidence in) the magistracy. In the same period, we have also seen an enormous upgrading in other respects – and thus also from the same perspective – of the concept of the mutual recognition of criminal law decisions. Eventually, this could lead insidiously to erosion of the requirement of subsidiarity as we have known it until recently and have experienced as relatively normal. On the other hand, it can be stated that the expansion of the role of Europol and the establishment of Eurojust could, for the time being, be assessed as relatively small steps, although it could be intermediary steps that prepare the ground for far-reaching leaps. Indeed, both authorities will be directly or more directly involved in dealing with important criminal cases in the EU. The experience, the confidence, the adaptation and so on that emerge could under certain conditions – an increase of serious crime problems – lead to more structural changes, such as a Europol with executive powers in a number of areas or a European Public Prosecutor.

The binary choice between a “giant leap” and a “small step” is thus not justified. Perhaps a more appropriate metaphor for the development of the EU influence on criminal law is a “hop, step, and jump” (this is the “tri-jump” in athletics). For the direction of this development is in large part established. The tempo, however, is variable and uncertain, and the final point as well as the intervening stages nobody can at present clearly predict.

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