QUESTIONNAIRE *Improving Mutual Recognition of European Arrest Warrants for the purpose of executing in absentia judgments* (draft)

Introduction

This questionnaire is meant as a tool to:

- identify any practical problems issuing judicial authorities and executing judicial authorities may experience when deciding on the issuing or on the execution of EAW's regarding *in absentia* judgments of conviction and
- identify the roots of these problems.

In this draft the questions are based solely on the experiences of the *District Court of Amsterdam*, because in drafting the questionnaire the *District Court of Amsterdam* is in the lead.

[The *District Court of Amsterdam* is the sole executing judicial authority for the Netherlands. From 2004 on the *District Court of Amsterdam* on average has dealt with about 500 to 600 EAW's each year. Out of a Union wide total of 33 preliminary references on or related to the subject of the EAW[1] (6 of which concern EAW's which have been issued for the purpose of executing *in absentia* judgments of conviction)[2] 12 preliminary references were made by the *District Court of Amsterdam* (4 of which concern EAW's which have been issued for the purpose of executing *in absentia* judgments of conviction).[3]]

Of course, you will have ample opportunity to amend and/or supplement this draft based on the experiences of the issuing and executing judicial authorities of your Member State.

The questionnaire consists of five parts.

Part 1 concerns preliminary matters.

Part 2 concerns the national legislation of the Member State of each partner.

Part 3 concerns the actual application of the legislation implementing Framework Decision (FD) 2002/584/JHA, as amended by FD 2009/299/JHA.

Part 4 concerns statistical data on the actual application of the national legislation transposing the FD's.

In Part 5 the partners are asked to draw conclusions and offer opinions based on their experiences (or on those of their Member State's authorities). Furthermore, the Partners are invited to make any comments, put forward any information, pose any questions and make any recommendation they feel are relevant to the project, but which are not directly related to Parts 1-4.

[1] As of 16 January 2018 (not counting withdrawn preliminary references).
[2] *B.*, *Melloni*, *Dworzecki*, *Tupikas*, *Zdziaszek* and *Ardic*.
[3] *Dworzecki*, *Tupikas*, *Zdziaszek* and *Ardic*.

In answering the questions please refer to relevant (European of national) case law and legal literature, where available and applicable, otherwise provide your own expert opinion.

In this questionnaire the expression '*in absentia* proceedings' is used in its autonomous EU meaning (except when otherwise indicated). The expression therefore denotes proceedings during which the defendant did not appear in person (see, e.g., recital (4) of FD 2009/299/JHA and *Melloni*, par. 40). The expression 'judgment of conviction' denotes a judicial decision which finally sentenced (convicted) the requested person, whilst the expression 'conviction' denotes a judicial decision which consists of either a finding of guilt and/or the imposition of a penalty, or the modification of the nature or the *quantum* of the penalty originally imposed.

If a question concerns the expression '*in absentia* proceedings' *as defined by the national law of your Member State*, this will be expressly stated.

Part 1: preliminary matters

1. Please indicate who completed the questionnaire in which capacity and how much years of experience you have had in dealing with EAW cases, in particular whether you have experience as issuing and/or executing judicial authority.

Jan Van Gaever, advocate general, Prosecutor General's Office at the Court of Appeal of Brussels.
I have been dealing with EAW cases from 2004 on, first as issuing authority and from 2007 on as executing judicial authority.
I am national expert for Belgium on the topic of the EAW and preside the national work group on the EAW.
I published a book in 2013 translated as 'The European Arrest Warrant in practice". The book addresses both theory and practice, and holds in particular a review of the relevant Belgian jurisprudence of the first 9 years of application of the EAW.
I am also author of numerous contributions on Belgian criminal law and criminal procedure and international cooperation, esp. EAW and extradition proceedings.

Part 2: national legislation

2.1. National rules on service of summons, *in absentia* proceedings and possible recourses against *in absentia* judgments of conviction

Explanation

Part 2.1 concerns national rules on service of summons, *in absentia* proceedings and possible recourses against *in absentia* judgments of conviction.

These national rules are not covered by FD 2002/584/JHA and FD 2009/299/JHA, as these FD's do not seek to harmonize these rules.

National rules on service of summons, *in absentia* proceedings and recourses against *in absentia* judgments of conviction may have an impact on the application of the rules set out in Art. 4a FD 2002/584/JHA.

An example. In the experience of the *District Court of Amsterdam* national rules on service of summons seem to shape the way issuing judicial authorities interpret Art. 4a and section (d) of the EAW-form. Because in some Member States service of the summons on an adult member of the household of the defendant who undertakes to hand over the summons to the defendant constitutes a valid way of summoning a defendant, issuing judicial authorities of these Member States tick point 3.1.b of section (d) of the EAW-form (the requested person 'actually received official information of the scheduled date and place of that trial') even though there is no evidence to suggest that the defendant 'actually received official information relating to the date and place of his trial' (*Dworzecki*, par. 49).

In absentia proceedings are covered by Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. Member States must have transposed this directive by 1 April 2018.

[Ireland is not bound by directives regarding the area of freedom, security and justice and has not 'opted in' into Directive 2016/343 (Protocol (No. 21) Treaty of Lisbon; recital 50 of the preamble of Directive 2016/343. The Irish partner will describe the situation as it is without any regard to the directive and will explain why Ireland did not opt in.]
[Belgium, The Netherlands and Poland will not transpose Directive 2016/343, as these Member States are of the opinion that their national legislation is already in line with the directive. If you are of the opinion that your Member State should nevertheless transpose the directive (as regards *in absentia* proceedings), please answer the relevant question in Part 5.]

Service of summons

2.
a) Describe the ways in which according to the national law of your Member State the summons for the trial may be served on the defendant.

Summons in civil and penal cases are served in the same way with one exception. The interdiction of service on a Saturday, a Sunday or an official holiday, except in cases of urgency, is not applicable in penal cases.

The rules set out in the Judicial Code apply insofar not incompatible with the provisions and principles of the criminal procedure.

In Belgium a distinction is made between "kennisgeving"/"notification" and "betekening"/"service". Service means sending a document to another person via a government official, a bailiff ("gerechtsdeurwaarder"). In contrast to service, notification is effected when a court document (original or copy) is sent by post, i.e. without the involvement of a government official. The law specifies which documents should be notified and what method to be used (could also be a handing over – see answer to question 31).

The principle is that all judicial documents are served on the defendant in person, wherever he can be found. Consultation of available information on the actual whereabouts of the person concerned is obligatory (National Registry, prison database, elected address for service, …). The refusal to receive a copy of the document will be recorded by the bailiff and have no effect; the document is deemed to have been served on that person.

When service cannot be done in person, the summons are served to the domicile of the person concerned or when he has no domicile, to the residence of the person concerned. A copy of the document will be handed over to a relative or a member of the household. If no one is at home, a copy of the document will be left behind and the next day the bailiff will send a letter to that address mentioning his visit and the reason why and indicating that a copy of the document is available at the bailiff's office.
If the person concerned has neither domicile or residence, the summons are served to the public prosecutor.
If the defendant has a known address abroad, service of the document must be done at that address by registered letter unless an international treaty prescribes another procedure.
Applicable treaties are:
Treaty between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands concerning extradition and mutual assistance in criminal matters of 27 June 1962 as amended by the Protocol of 11 May 1974 (Chapter 2 esp. articles 22, 23.1, 24, 25, 30 and 31)
European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (Chapter III, esp. articles 7 and 10)
Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 17 March 1978 (article 3.a)
Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders of 19 June 1990 (Chapter 2 esp. articles 51-53)
Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 (esp. articles 1-6)
Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 16 October 2001 (esp. articles 5, 6.1, 8 and 9)
Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 8 November 2001 (articles 15 and 16)

If the person concerned elected an agent's address for service, service can be done at that address. Handing over the summons to the agent in person is considered to be equivalent to a personal service of the defendant (and has the same effects).
The prison director will serve the summons to an incarcerated defendant who has to sign for receipt.

Service done wrongly or at the wrong address is irregular and cannot lead to a conviction in absentia or an opposition not accepted for consideration (in the case of an opposition filed too late) (Cass. (Court of Cassation) 1 October 1997, Arr. Cass. 1997, nr. 380).

The notification of date, place and time of the court hearing can also take place in the report drawn up by the public prosecutor at the end of the interrogation of a suspect.

With regard to the hearing, the following applies:
* if the court finds the service to be invalid or declares it void, a new summons must be issued
* if, at the initial hearing, the case is postponed for whatever other reason, the date of the new hearing will be communicated orally to the defendant, if present, and his lawyer; the same goes for subsequent hearings. At the initial hearing a calendar of one, more or all subsequent hearings could also be made up.
* if the court changes the date for the subsequent hearing ex proprio, a notification in writing must be send to the defendant and his lawyer
* if the case is postponed sine die (without establishing a new date), a new summons must be issued in order to be able to continue the trial

b) Do any of the ways of serving a summons for the trial correspond to:

- 'personal service' – *i.e.* service as a result of which the defendant 'has himself received the summons' (*Dworzecki*, par. 45) – or

- service 'by other means' as a result of which the defendant has 'actually received official information of the scheduled date and place of that trial in such a manner that it is unequivocally established that he or she is aware of the scheduled trial' (see Art. 4a(1)(a) FD 2002/584/JHA)?

Served in person means that the defendant has himself received the summons. This is seldom the case as most summons are done at the address of the defendant.

Handing over a summons/document to a member of the family living under the same roof as the defendant or an employee or servant present at the time of service is not a personal service. The public prosecutor must establish by any means that that person actually handed over the summons to the defendant or informed him of the existence thereof. It must not be proven that the defendant actually read the summons.

Service by other means as a result of which "the defendant has actually received official information of the scheduled date and place of the trial in such a manner that it is unequivocally established that he or she is aware of the scheduled trial" corresponds in Belgian legislation to the situation of serving to the trustee/an agent in person. Handing over the summons to the agent in person is considered to be equivalent to a personal service of the defendant and has the same effects. The trustee usually is the lawyer acting on behalf of the defendant.

c) Does the national law of your Member State provide for a 'presumption' of serving a summons on the defendant? *E.g.*, is service of a summons deemed effective if the summons was sent to the address indicated by the defendant during the pre-trial stage of the proceedings (*e.g.* during police investigations) even when there is no confirmation that the defendant actually received the summons?

During pre-trial all documents will be notified (not served!!) to the official or last known address of the defendant.

The address given by the defendant when released from pre-trial detention can be used to send all notifications (including those concerning the proceedings and the end of the pre-trial stage determining if the case should be transferred or not to the court) and summons for the trial or service of judgments. All notifications and summons done at that address are valid till the defendant has send a registered letter to the public prosecutor indicating his new address or a new domicile was registered in the National Registry. Valid doesn't mean that service was done in person. The defendant is informed of the consequences of his choice of address.

Summons are served according to the above explained rules.

Serving the summons to the agent/trustee in person is legally considered to be equivalent to a personal service of the defendant and has the same effects. The trustee usually is the lawyer acting on behalf of the defendant. The presumption makes sense as all procedural steps undertaken by a lawyer are imputable to the defendant. So if the lawyer lodges an appeal, this is considered to be done on behalf of the defendant even if the defendant denies all knowledge of it or is not aware of it or claims to be out of contact with that lawyer.

***In absentia* proceedings**

3. Does the national law of your Member State provide for *in absentia* proceedings and, if so,

- what does the expression '*in absentia* proceedings' mean according to the national law of your Member State? Does this meaning vary from the autonomous EU meaning of this expression and, if so, in what way?

- under what conditions are '*in absentia* proceedings' possible?

Under Belgian criminal procedural law the defendant has a right to be present at the trial. He is under no duty to appear, even if he is detained. The court can however issue an order that he is brought to court, forcibly if need be (bevel tot medebrenging) and could, under specific circumstances, issue an arrest warrant (1° if the absence of the non-detained defendant is of his own doing and the case was in the pre-trial phase investigated by an investigative judge or 2° the defendant breached previously but still valid conditions imposed on him as an alternative for detention or 3° if the defendant is detained abroad and has personally asked to be able to appear in person before the court). The order to bring a person to the court is seldom used due to practical problems. The same goes for the arrest warrant issued in the situation of the absent defendant.

There is no legal definition of in absentia or in absentia proceedings. Case law defined the concepts.

The Belgian definition therefore has a broader sense than the EU definition which is (at least for the moment) limited to not appearing in person on his own trial.

The nature of the judgment is not defined by its wordings (Gent (Court of Appeal Ghent) 21 December 2006, T. Strafr. 2007, 201, annotation by B. Meganck).

In absentia is the situation where the competent court has been properly seized with a case (the summons, the referral decision or the report is in substance in accordance with the law), the defendant was summoned in accordance with the law (formal deadlines have been respected) and the defendant, optionally assisted or represented by a lawyer, did not have the opportunity to rebut or comment on the evidence or the charges brought against him due to his absence in court or by abstention from participation in the discussions before court (see Cass. 24 March 2010, Arr. Cass. 2010, nr. 2013 for the definition of judgment after trial).

Abstention from participation does not refer to the situation where the defendant is present at the hearing but refuses to answer questions from the court or refuses to challenge the evidence e.g. by invoking his right to remain silent.

There is one specific situation in which the judge is obliged to name his judgement after trial instead of in absentia. This is to sanction the behaviour of the defendant and to deny him the legal means of opposition. The following conditions must be met:

- the defendant or his lawyer was present at the initial hearing
- the case was postponed
- the court ordered the personal appearance of the defendant at the next hearing or issued an order to bring the defendant to court
- that order was properly served to the defendant or the order to bring the defendant to court could not be executed
- at the next hearing both the defendant and his lawyer remain absent

The Constitutional Court upheld this legislation (GwH (Grondwettelijk Hof – Constitutional Court) 31 May 2011, nr. 95/2011, www.const-court.be). Such judgments should be indicated in an EAW as judgments rendered in absentia but in a trial where it is unequivocally established that the defendant was aware of the scheduled trial (he or his lawyer was present at the initial hearing).

In absentia proceedings are possible if the aforementioned conditions on seizing the court and summoning the defendant are met.

4. If the defendant was not present at the trial itself but was present at the hearing at which the court pronounced judgment, are the proceedings considered to be *in absentia* proceedings (as this expression is defined by your national law)?

The presence or absence of the defendant at the hearing at which the judgement is pronounced has no impact on the nature of the judgement (Cass. 21 January 2015, P.14.1418.F, juridat (http://jure.juridat.just.fgov.be).

5. If in course of the trial several hearings are held and the defendant is present at some but not all of these hearings, which criteria determine whether the proceedings are deemed to be *in absentia* or not (as this expression is defined by your national law)? *E.g.*, does it matter what transpired at the hearings at which the defendant was present or is the mere presence of the

defendant at one of the hearings enough to conclude that the proceedings are not *in absentia* proceedings (as this expression is defined by your national law)? Can the defendant be present via telecommunication?

The nature of the judgment is determined by what happened at the hearing(s). Should it transpire that the defendant was absent at a hearing or abstaining from participating when evidence was presented, charges were brought or a debate on the penalty to be imposed was held, the judgment rendered must be an in absentia one.

If discussions arise as to what exactly happened at a hearing, the registrar's report of the hearing will be decisive (Cass. 19 June 1972, Arr. Cass. 1972, 992; Cass. 5 December 1995, Arr. Cass. 1995, 554).

Being present at a hearing doesn't include using means of telecommunication. Both audio- and videoconference are excluded as means for a defendant to appear at his own trial.

Defence by a legal counsellor in the absence of the defendant

6. Does the national law of your Member State allow for a defence by a legal counsellor (either a legal counsellor appointed *ex officio* or a counsellor chosen by the defendant) in the absence of the defendant? If so:

- does the defendant have to have any knowledge of the proceedings against him or the scheduled trial;

- what are the conditions under which a trial may take place without the defendant being there?

- does the defendant have to have instructed his legal counsellor to defend him in his absence, either expressly or implicitly?

- can the situation in which counsel is present and the accused absent be considered as "the defendant is present"?

- does a legal counsellor have the right to appeal or to ask for a retrial independently or does he need the consent of the defendant?

Belgian legislation only allows for an ex officio appointment of a lawyer in 4 circumstances: penal cases against minors, in case of interment proceedings, in case of conflict of interest in a penal case between a company and its manager/legal representative both summoned as defendant (which might become obsolete due to a very recent change in legislation) and in the preliminary proceedings of a procedure before the Court of Assizes (the latter two are not relevant for art 4a of the FD).

A lawyer can represent an absent client. When a lawyer represents the defendant, there is a legal presumption that the defendant has knowledge of the proceedings against him.

All procedural steps undertaken by a lawyer are imputable to the defendant (Cass. 24 January 1974, Arr. Cass. 1974, 576). So if the lawyer lodges an appeal, this is considered to be done on behalf of the defendant even if the defendant denies all knowledge of it or is not aware of it or

claims to be out of contact with that lawyer. The mandate of the lawyer cannot be questioned nor examined by the court.

7. If the national law of your Member State allows for a defence by a 'mandated' legal counsellor in the absence of the defendant, what does the concept 'mandate' mean and what powers does the legal counsellor have under such an 'mandate'?

All procedural steps undertaken by a lawyer are imputable to the defendant (Cass. 24 January 1974, Arr. Cass. 1974, 576). So if the lawyer lodges an appeal, this is considered to be done on behalf of the defendant even if the defendant denies all knowledge of it or is not aware of it or claims to be out of contact with that lawyer. The mandate of the lawyer cannot be questioned nor examined by the court.

The situation after a judgment of conviction has been rendered

8.

a) Describe the ways in which according to your national law an *in absentia* judgment of conviction (as this expression is defined by your national law) may be served on the defendant and whether and how the defendant is notified of the possible recourses against that judgment (such as appeal or opposition).

An in absentia judgement is served like a summons. In addition to the copy of the judgment the bailiff encloses a specific document (made up by the Board of Prosecutor Generals and the object of guideline COL 05/2008) containing the relevant information regarding the possible recourses. This document is in the same language as the judgment in absentia.

If the judgment cannot be served in person, service must be done at the domicile, residence or chosen residence (given address when released from prison if the defendant was in pre-trial detention, or the address of the trustee/agent). The bailiff leaves a copy of the writ on-site if nobody is present and sends another copy the next day by letter (registered or not). Should the bailiff establish on the premises that it is physically impossible to serve the judgment or should it appear that the defendant no longer lives there and omitted to register his new address, the judgment can be served at the public prosecutor who then will try, by all means possible, to hand over the writ to the defendant.
If the defendant has a known address abroad, service of the judgment must be done at that address by registered letter unless an international treaty prescribes another procedure (delivering the letter to the post office validates the service but sending a letter does not mean that service was done in person – Cass. 18 October 1994, Arr. Cass. 1994, nr. 436).
The director of the prison will serve the judgment to an incarcerated defendant who has to sign for receipt.

b) Do the same rules of summoning apply as before the trial starts?

yes

c) Describe the possible recourses against an *in absentia* judgment of conviction (as this expression is defined by your national law).

Opposition, appeal and when applicable, cassation. Other recourses are not mentioned here as it would only lead to confusion; they are only applicable if specific conditions are met. Those extraordinary recourses will also not be mentioned in the EAW nor should they be included when answering questions related to surrender proceedings on the basis of an in absentia judgment.

d) What are the formalities for contesting the judgment rendered after proceedings *in absentia* (as this expression is defined by your national law)? How is it established that the person concerned 'expressly stated' that he does not contest the judgment (compare Art. 4a(1)(c)(i) FD 2002/584/JHA)?

Opposition is done by bailiff's writ or if the defendant is incarcerated, by declaration made to the prison director or his representative. The writ is served to the public prosecutor at the court that rendered the judgment in absentia and mentions the date of the introductory hearing. Copy of the deed recording the declaration of the defendant is transferred to the aforementioned public prosecutor who will immediately bring the case before court again and notify the defendant hereof via the prison director.

Appeal: declaration at the registrar's office of the court that rendered the judgment or declaration made in prison (see opposition). The date of the hearing is set by the court and notified via the public prosecutor's office or the prosecutor general's office.

Cassation: declaration at the registrar's office of the court that rendered the judgment. The registrar's office at the Court of Cassation will notify the date of the hearing.

Not contesting a judgment in absentia will only be established in the situation of art. 4a(1)(c)(ii) or (theoretically) if the defendant would before for the court expressly waiver all recourses already set in motion by him against the judgement in absentia and there is no doubt that the waiver is done willingly by the defendant.

Possible recourses against an *in absentia* judgment of conviction

9.

a) Does your national law provide for a retrial or an appeal in case of an *in absentia* judgment of conviction (as this expression is defined by your national law)? If so, please describe:

- factually what a retrial or an appeal is under your system;

- whether the retrial or the appeal is a *full* retrial or a *full* appeal (*i.e.* a retrial or an appeal entailing a fresh determination of the merits of the charge, in respect of both law and fact);

- under what conditions and within what time frame the retrial or appeal is provided for.

Belgian law does not provide for an automatic retrial or an appeal.

b) If your national law does provide for the right to a *full* retrial or a *full* appeal, does this right depend on any of the following factors:

- the way the summons for the trial was served on the defendant;

- the fact that the defendant was defended by his mandated legal counsellor in his absence and/or

- the way the *in absentia* judgment of conviction (as this expression is defined by your national law) was served on the person concerned?

Opposition

Serving the judgment in absentia to the defendant in person or to his trustee/agent in person starts the ordinary 15 day period to oppose the judgment no matter on whose behalf the judgment has been served (public prosecutor or civil party). A prerequisite is that the service of the judgment was in conformity with the rules set out in the relevant legal dispositions (32 to 40 Judicial Code). A service declared void must be followed by a new service in order to start the aforementioned delay.
A delay ending on a Saturday, Sunday or public holiday will be extended to the next working day. There is no extension of the delay for defendants living abroad. A late opposition can be declared admissible in case of force majeure, being a circumstance, cause or event outside the control of the defendant that could not be expected or avoided.

In all circumstances where the judgment wasn't served in person, the defendant disposes of an additional delay (the so-called extraordinary delay) of 15 days starting the day after gaining knowledge of the service of that judgment (of better said, starts the day after expiry of the ordinary delay of opposition and ends the 15th day after the day the defendant gained knowledge of the service of the judgment in absentia). Opposition is possible till the execution of the sentence is statute-barred. Gaining knowledge about the service of the judgment differs from being informed about the conviction itself or the possible recourses against that judgment e.g. if a defendant acknowledges having being informed in prison about the existence of a conviction in absentia, it doesn't mean that he knows that his mother was previously served with that judgment at his domicile. As a result, a late opposition cannot be declared inadmissible if no further information is available. The prove of that knowledge must be provided for by he who claims the inadmissibility of the opposition on the ground that it is out of time. On the other hand: if the defendant states that his mother informed him about the service of the judgment and the document containing information about the possible recourses, it is not required that the defendant was informed about the content of the judgment nor that he received a copy of it.

If in such cases the defendant gains knowledge about the judgment or the service of the judgment because it was mentioned in an European Arrest Warrant or a request for extradition or if the defendant was arrested abroad before the expiry of the 15 day delay, a new delay of 15 days during which he can oppose the judgment in absentia starts after his surrender (his arrival on Belgian soil) or his (final) release from prison (to be interpreted as the release after the final decision on surrender or extradition).

The mere fact a recourse was used does not imply the defendant will get a full retrial.

First of all, the defendant can limit the scope of the opposition e.g. oppose the conviction only for one of the two charges for which he was condemned.

As a result of the opposition the judgment in absentia will be considered non-existent and a new "full" (within the limits of the recourse) trial will be held unless the opposition is declared inadmissible, is not accepted for consideration or is waived. The new decision on the merits of the case makes an appeal lodged against the judgement in absentia redundant.

The judge must first examine if the opposition is admissible (even if the defendant remains absent at the second trial):

- has the opposing party in fact been condemned in absentia?
- does he have an legitimate interest ?
- has the opposition been done in accordance with the linguistic requirements (the language of the proceedings/the judgment in absentia) and the formal requirements of the law? (the same goes for appeal and appeal in cassation)
- was the writ served or the declaration done within the legal time frame and was it served at the correct counterparts?

If this is not the case, the opposition must be declared inadmissible unless force majeure may be invoked. The judge must inform the parties of issues of admissibility and allow for a debate.

If the opposition is admissible, a new trial will he held but evidence collected during the first trial (in absentia) remains valid.

Although rare, the decision on admissibility can be the object of an - appealable - interlocutory judgment. In practice all obstacles for a new trial will be examined by the court at the first hearing(s) but the result of that examination will only be put on paper if that coincides with the ruling on the merits of the case.
Eliciting such an interlocutory judgment can be hazardous for the defendant.
If the first judge declares the opposition inadmissible and the appeal judge confirms that ruling, only an admissible appeal lodged against the judgment in absentia can give raise to a retrial. If the appeal judge declares the opposition admissible the case is continued before the appeal judge.
If the first judge declares the opposition admissible and on the sole appeal of the public prosecutor, the appeal judge declares the opposition inadmissible, only an admissible appeal lodged by the defendant against the judgment in absentia can give raise to a retrial. The case is sent back to the first judge if the appeal judge confirms that the opposition is admissible.

After having examined the admissibility the question arises if the opposition is acceptable for consideration.

A decision stating that the opposition is not accepted for consideration ("ongedaan verzet") is a decision that denies the defendant a retrial although his opposition is admissible.

Such a decision is taken:

- If the defendant cannot justify or show good cause for his absence in the trial that lead to the decision in absentia (by proving it is due to force majeure or invoking legitimate grounds) after it has been proven that the defendant, appearing at the opposition procedure in person or represented by a lawyer, had knowledge of the summons and of the scheduled date and place of the trial in a manner that it is unequivocally established that he was aware of the scheduled trial. The judge decides on the validity of the invoked

legitimate ground or situation of force majeure. The Court of Cassation stated in 2017 that a legitimate ground explaining one's absence is any invoked situation that can be understood and is not the result of a fault or negligence of the defendant. (Cass. 25 April 2017, P.17.066.N, juridat)

- If the defendant remains absent during the new trial regardless of the opposition already or not been declared admissible

The indictment chamber of the court of appeal will rule on the admissibility of the opposition against a judgment in absentia rendered by the Court of Assizes if the defendant or his lawyer is present. If neither one is present, the opposition will not be accepted for consideration. An admissible opposition will lead to a full retrial with a new jury. The judgment in absentia will however become final if the defendant or his lawyer remain absent at the new hearing of the Court of Assizes.

Appeal

Serving the judgment in absentia to the defendant (regardless if the service was in person or not) starts the 30 day period to appeal the judgment. There is no extraordinary delay of appeal.

The scope of the appeal can be limited and the defendant can waiver his appeal.

For the appeal to be admissible, the legal form holding the grievances must be completed and deposited at the registrar's office of the court before expiration of the delay to appeal. The sanction of the inadmissible appeal due to the absence of the grievances' form cannot be imposed if the lodged appeal concerns the situation that the opposition was not accepted for consideration.

If the opposition was preceded by an appeal lodged by the same defendant against the same judgment in absentia, the opposition will not be accepted for consideration unless the scope of the appeal was limited (and a remainder of the judgment in absentia forms the object of the opposition) or the appeal is inadmissible (e.g. too late) or the defendant waivers his appeal (unless the waiver was partial …).

In the situation where appeal follows opposition or both recourses were initiated the same day, priority will normally be given to the opposition.

A late appeal could be declared admissible if the defendant can prove force majeure prevented him lodging an appeal in due time.

Cassation

Delay of 15 days after the pronunciation of the decision in appeal (judgment after trial or on opposition).

Delay of 15 days starting the day after the expiry of the ordinary delay of opposition (against a decision in absentia of a court adjudicating at last instance) provided that the decision in absentia was properly served.

c) If your national law does provide for the right to a *full* retrial or a *full* appeal, is the time frame within which this right may be exercised dependent on any of the following factors:

- the way the summons for the trial was served on the defendant;

- the fact that the defendant was defended by his mandated legal counsellor in his absence and/or

- the way the *in absentia* judgment of conviction (as this expression is defined by your national law) was served on the person concerned?

The time frame to oppose the judgment is dependent on the way it has been served (see above under b).

From 9 June 2018 on a new statutory provision (art. 47 bis Judiciary Code) came into force stating that the time frame within which a legal recourse should be used cannot start if the service or the notification is void due to a violation of the provisions on how service or notification should be done.
This has no practical consequences in penal cases except that the law now takes over the consistent ruling of the judiciary.

10. Does the national law of your Member State provide for a *final instance* appeal on points of law (*cassation*)? If so:

- does the defendant have a right to be present at the hearing of the *cassation* court?

- after having quashed the judgment of the court below on a point of law, does the *cassation* court have the power to make a fresh determination of the merits of the charge, in respect of both law and fact, and/or to impose a fresh sentence?

- if so, please answer questions 2, 4, 5, 6, 7, and 8 with regard to these proceedings.

The defendant is allowed to be present at the hearing of the Court of Cassation if he is appellant. Appellant and his lawyer cannot develop new arguments, they must stick to the text of the written statements.

The Court of Cassation only addresses points of law and as a result does not have the power to make a fresh determination of the merits of the charge. If the judgment is quashed, the Court of Cassation indicates what court the case will be referred to (if possible the court that rendered the judgment albeit in another composition). That court is bound by the decision of the Court of Cassation and can only re-examine the case within the boundaries of the referral.

Transposition of Directive 2016/343

11. Has your Member State transposed Directive 2016/343? If not, why not?

No, Belgian law is considered to be already in conformity with this Directive.

12. If your Member State has transposed Directive 2016/343, what changes, if any, has this transposition effected?

National legislation

13. Please provide:

- the relevant national legislation concerning service of summons, *in absentia* proceedings and possible recourses against *in absentia* judgments of conviction in the official language of your Member State (in so far as this legislation is relevant to the project) and

- an English translation thereof.[4]

See annex 1.

2.2. Transposition of the FD's

Explanation

Part 2.2 concerns the national transposition of FD 2002/584/JHA, as amended by FD 2009/299/JHA. The questions aim to establish:

- the meaning of Art. 4a FD 2002/584/JHA in so far as this provision has not been elucidated by the Court of Justice of the European Union and

- whether the Member States have implemented Art. 2 FD 2009/299/JHA fully and in a timely fashion.

Whereas part 2.1 concerns *national criminal procedure law*, part 2.2 concerns *national law transposing Art. 4a FD 2009/299/JHA*. Although at first blush there may seem to be some overlap of questions in parts 2.1 and 2.2, the questions in parts 2.1 and 2.2. have quite distinct purposes. An example. The topic of absence at the trial, but presence at the pronouncement of the judgement is dealt with in both sections: question 4 and question 61. Question 4 tries to establish how absence at the trial but presence at the pronouncement of the judgment is considered from the perspective of your Member State's national criminal procedure law. Does absence at the trial but presence at the pronouncement of the judgment make the proceedings *in absentia* proceedings according to the national criminal procedure law of your Member State or not? Question 61 tries to establish how absence at the trial but presence at the pronouncement of the judgment should be viewed from the perspective of the national law of your Member State transposing Art. 4a. Does absence at the trial but presence at the pronouncement of the judgment mean that the person concerned did not appear in person at the trial resulting in the decision? The answer to question 4 is not necessarily the same as the answer to question 61. This because Art. 4a must be interpreted *autonomously* from national law and national law transposing Art. 4a must be in accordance with the *autonomous* meaning of that provision.

[4] The second part of this request does not apply to our Irish partner, unless the national legislation is provided in Irish.

[When referring to (provisions of) FD 2009/299/JHA please use the official English language version:
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:081:0024:0036:EN:PDF.]

A. General questions

14. Did your Member State transpose Art. 5 par. 1 FD 2002/584/JHA (the provision which was deleted by Art. 2 FD 2009/299/JHA)?

Yes

15. When did the national legislation transposing Art. 2 FD 2009/299/JHA enter into force?

14 May 2014, date of the publication of the law of 25 April 2014 (Act of 25 April 2014 containing various provisions relating to Justice).

16. Has your Member State implemented Art. 2 FD 2009/299/JHA fully, taking into account the case law of the Court of Justice (see footnote 2)? If not, please describe in which way the national legislation deviates from FD 2009/299 JHA.

Article 2 of FD 2009/299/JHA has been fully and in the same wordings implemented in Belgian legislation. The specific case law of the Court of Justice on judgments in absentia will not result in a change of the Belgian Act on the EAW as the judge must apply and interpret the law in conformity with the case law of e.g. the Court of Justice.

17. Was Article 4a FD 2002/584/JHA transposed as a mandatory or as an optional ground for refusal? Was there any debate on this when transposing Art. 2 FD 2009/299/JHA? If so, what were the motives for the final choice made?

Optional ground. There was no debate on this as the text of the Framework Decision was clear and the previous article 5 of the FD EAW held no mandatary ground neither.

Belgian legislation follows the logic of the Framework Decision and does not transform the 'possibility of non-execution unless (a) to (d)' into a 'requirement of non-execution unless (a) to (d)' (see also Opinion AG Bobek, 26 July 2017, paras 70-75 in the *Tupikas* case (C-270/17).

18. Given that Article 4a FD 2002/584/JHA is an optional ground for refusal, do the Member States have to transpose this ground for refusal?

Yes, given the nature of a Framework Decision (must be transposed into national law - FD is not an autonomous legal ground to base a claim on).
Maintaining it as an optional ground for refusal allows also to point out the difference between an infringement on fundamental rights, a mandatory ground for refusal, and the in absentia nature of a judgment as a trial in the absence of the defendant is not as such an infringement on his fundamental rights. The two grounds for refusal require a different approach from an executing authority.

19. If your Member State has transposed Article 4a FD 2002/584/JHA as an *mandatory* ground for refusal, will the executing judicial authorities of your Member State apply this optional ground for refusal *proprio motu* or not?

Not applicable

20. If your Member State has transposed Article 4a FD 2002/584/JHA as an *optional* ground for refusal, will the executing judicial authorities of your Member State apply this optional ground for refusal *proprio motu* or not?

In principle not but judges are independent and the law does not exclude an application *proprio motu*. In normal circumstances the public prosecutor will anticipate and verify if the information provided for in box D of the EAW, if ticked, is sufficient. If the person concerned makes no remarks in relation to the judgment on the basis of which the surrender is asked for or the information contained in box D of the EAW form (or even the total lack of such information), the courts will in general not proceed with an examination on their own initiative.
If the person sought consents to his surrender, the in absentia nature of the judgment will not be examined and neither can it prevent the actual surrender.

21. Which authority is/which authorities are responsible in your Member State for issuing and executing EAW's?

Issuing:
- investigating judge for prosecution of adults
- public prosecutor (generic name) for prosecution of minors, executing sentences and EAW's based on arrest warrants issued by courts in the trial phase

Executing:
- in case of consent to surrender: public prosecutor unless the investigative judge refuses surrender on the basis of a mandatory ground for refusal.
- otherwise: investigative courts- council chamber (raadkamer - chambre du conseil) and indictment chamber (kamer van inbeschuldigingstelling - chambre des mises en accusation)

B. Your Member State as issuing Member State

22.

a) Who exactly fills in EAW's within the issuing judicial authority?

The magistrate (judge or public prosecutor) or administrative staff under the supervision of a magistrate.

b) What are the formalities for issuing an EAW? Does your Member State have form sheets for that?

A widespread writeable word-version of the current EAW form must be used.
The Board of Prosecutor Generals decided in 2018 that EAW's for the execution of sentences will not be issued unless the sentence or the total of the sentences pronounced exceeds 3 years imprisonment (and 2 years remain to be executed). There are exceptions to that rule e.g. for

facts committed against minors, for specific types of crimes (e.g. sexual offences, terrorism, …) or in the event of multiple EAW requests.

c) How does the issuing judicial authority usually fill in part (d) of the EAW-form in case none of the options under 3. apply?

If none of the options under 3. apply and 2. is ticked, information should normally be included after 4.

d) Which information does the issuing judicial authority usually provide under 4. in section (d) of the EAW-form?

Usually a brief explanation of the reason why 3.1b, 3.2 or 3.3 has been ticked and/or repeating what in those sections already is mentioned (e.g. a lawyer, assigned by the defendant, represented the defendant at the trial or being served with the decision, the person concerned did not use a recourse (opposition, appeal) against the judgment within the legal time frame, …).

23. How does the competent authority of your Member State inform the surrendered person about his/her rights according to Article 4a(1)(d)(i and ii) FD 2002/584/JHA?

When being served with (copy of) the judgment the person concerned receives a specific document (made up by the Board of Prosecutor Generals and the object of guideline COL 2008/05 as revised in 2017) containing the relevant information regarding the possible recourses. This document is in the same language as the judgment in absentia.

24. How does the competent authority of your Member State ensure regular review of the custodial measures in accordance with the law of your Member State while the surrendered person is awaiting his/her retrial/appeal (Article 4a(3) FD 2002/584/JHA)?

There is no automatic review by a court as it concerns the execution of a sentence. The person concerned can deposit a request for release from the moment he was imprisoned; such requests will be treated by the court dealing with the recourse used against the judgment in absentia (opposition or appeal). The decision on release is susceptible for appeal or appeal in cassation. A delay of one month must be respected after a final decision rejecting a previous request.

C. Your Member State as executing Member State

25. How does your Member State ensure being able to "immediately" provide the accused with a copy of the judgment when s/he requests so, in cases where s/he had not been informed about the existence of criminal proceedings against him (Article 4a(2) FD 2002/584/JHA)?

Informed of the request made by the person sought, the public prosecutor must contact the issuing authority and ask for a copy of the judgment to be transmitted. After reception the copy will be handed over to the person sought (or to his lawyer if the person sought can no longer be reached).

D. EAW-form

Explanation

All Member States have now implemented FD 2009/299/JHA (Greece being the exception).

Art. 2 FD 2009/299/JHA inserts Art. 4a in FD 2002/584/JHA and amends section (d) of the EAW-form.

All issuing judicial authorities are obliged to use the EAW-form as amended by FD 2009/299/JHA (Art. 8(1) FD 2002/584/JHA). [One could argue that even Greek issuing judicial authorities are obliged to use the amended EAW-form, because the executing judicial authorities of all other Member States will apply the rules set out in Art. 4a FD 2002/584/JHA.]

The 'old' section (d) of the EAW-form is not tailored to the requirements of Art. 4a.

In the experience of the *District Court of Amsterdam*, some issuing judicial authorities persist in using the 'old' section (d) of the EAW-form, which is not tailored to the requirements of Art. 4a.

[The official EAW-forms in all official languages of the Member States (with the exception of Irish) are available at: https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=5.]

26. Does your national law oblige the issuing judicial authorities of your Member State to use the EAW-form as amended by Art. 2 FD 2009/299/JHA?

Yes (art. 2 § 4 last section of the Act on the EAW)

27. If the issuing judicial authority of another Member State uses the 'old' EAW-form, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

The national law does not address this situation. As a result using the old form cannot be sanctioned by the judge. If questions arise concerning a judgment in absentia, the issuing authority will be asked to provide the necessary information.

E. Language regime

Explanation

According to Art. 8(2) FD 2002/584/JHA the EAW 'must be translated into the official language or one of the official languages of the executing Member State'. However, a Member State may 'state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Communities'.

The Netherlands have made the following declaration: 'In addition to [EAW's] drawn up in Dutch or English, [EAW's] in another official language of the European Union are accepted provided that an English translation is submitted at the same time'.

In the experience of the *District Court of Amsterdam*:

- the issuing judicial authorities do not always use the official English EAW-form as a basis for the English translation of the original EAW, but rather provide for an *integral* English translation of the original EAW. In such cases the text of the English translation sometimes deviates from the official English EAW-form;

- the quality of some English translations is (very) poor.

[The official EAW-forms in all official languages of the Member States (with the exception of Irish) are available at: https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=5.]

28. Has your Member State made a declaration as provided for in Art. 8(3) FD 2002/584/JHA? If so,

- what does this declaration entail?

  An EAW send to the Belgian authorities must be translated in Dutch, French, German or English (meaning that the original sent is accompanied by a translation).

- where was it published? Please provide a copy in English.

  A declaration should have been made to the General Secretariat of the Council. Translation in English is only possible after the Act on the EAW was changed in 2014. The declaration made by the Belgian authorities cannot be found on the EJN-website. The handbook on how to issue and execute a European arrest warrant (Official Journal of the European Union, C 335, 6 October 2017) doesn't mention that Belgian authorities also accept EAW's send in English.

29. If the translation of the EAW deviates from the official EAW-form in the language of the executing Member State – or from the official EAW-form in the designated language –, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

The national law does not address this situation. See also the answer on question 61.

F. Multiple decisions

Explanation

According to Art. 8(1)(c) FD 2002/584/JHA the EAW shall contain 'evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect'.

Enforceability is decisive in determining the time from which an EAW may be issued (*Tupikas*, par. 71).

Art. 8(1)(c) corresponds with section (b) of the EAW-form ('Decision on which the warrant is based'). Only point 2 of section (b) is relevant ('Enforceable judgment').

Art. 4a(1) FD 2002/584/JHA refers to 'the decision'.

This decision is the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of an EAW (*Tupikas*, par. 74). [See also Part 2.2 (G.8) and Part 2.2 (G.9).]

The enforceable judgment/decision of Art. 8(1)(c) is not necessarily the decision which finally sentenced the requested person, although these decisions may in some cases coincide, depending on the national procedural rules of the issuing Member State (*Tupikas*, par. 71 and 76). [See also below, Part 2.2 (G.8) 'Proceedings at several instances'.]

An example: a decision to revoke the provisional suspension of the execution of a custodial sentence is not a decision as mentioned in Art. 4a, in so far as this decision does not modify the character and the quantum of the penalty which was originally imposed (*Ardic*). However, such a decision could be considered as an enforceable judgment/decision as mentioned in Art. 8(1)(c).

In the experience of the *District Court of Amsterdam* issuing judicial authorities regularly list multiple decisions with regard to the same proceedings in section (b)(2) of the EAW, but fail to mention which of these decisions section (d) of the EAW-form applies to. [See also Part 2.2 (G.8) and Part 2.2 (G.9).]

30. If section (b) of the EAW-form lists multiple decisions with regard to the same proceedings but section (d) of the EAW-form does not state which decision(s) it refers to, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

The national law doesn't address this situation. Requesting additional information will depend on the (clarity of the) information included in the EAW, the discussions during the surrender proceedings and the opinion of or a request from the court. If the person concerned consents to his surrender, no additional information will be asked.

G. The component parts of Article 4a FD 2002/584/JHA

G.1 Meaning of 'the trial resulting in the decision': confirmation of a deal between the defendant and the public prosecutor as to the penalty to be imposed (and other special proceedings)?

Explanation

Some Member States provide for special proceedings in cases in which the defendant confesses and makes a deal with the public prosecutor as to the penalty to be imposed. The public prosecutor then motions the court to impose the penalty agreed upon. The court holds a hearing in which the defendant and the public prosecutor may participate. If the court grants the motion, no evidentiary proceedings are conducted and the court convicts the defendant. If the court does not grant the motion, the case is remanded for a full trial.

In the opinion of the *District Court of Amsterdam* the decision to grant the motion and to convict the defendant falls within the ambit of Art. 4a FD 2002/584/JHA, but in the experience of the

District Court of Amsterdam in such cases the situations referred to in Article 4a(1)(a) to (d) rarely apply.

Other special proceedings may include so-called 'written proceedings' in which a penalty is imposed without having held a trial or proceedings in which other authorities than judges or courts impose a penalty.

31. Does a judicial decision confirming a deal between the defendant and the public prosecutor as to the penalty to be imposed come within the ambit of Art. 4a?

Yes, in the meaning of trial resulting in the decision.
When the public prosecutor reaches an agreement with the defendant, an act is signed and a copy of that act is handed over to the defendant. That act mentions date, hour and place of the hearing before the court and this handing over/notification equals a summons.
If the defendant of his lawyer remains absent at the hearing, the deal is rejected (art. 216 § 4 Criminal Procedure Code). That decision is final.

32. Does a judicial decision which imposes a penalty without having held a trial or a decision by an authority other than a judge or a court imposing a penalty come within the ambit of Art. 4a?

Not possible in Belgian legislation or at least not as a possible ground for a EAW. Besides, would there not be a discussion about the admissibility of the EAW or the validity of the invoked ground for the EAW (see *Kossowski*; *Poltorak*; *Kovalkovas*, *Özçelik*, *Bob-Dogi*)?

33. Does the national law of your Member State provide for:

- the imposition of a penalty without having held a trial; Not in circumstances were an EAW could be issued

- the imposition of a penalty by an authority other than a judge or a court? If so, how are the rights of the defence guaranteed in such proceedings? Not in circumstances were an EAW could be issued

G.2 Meaning of 'the trial resulting in the decision': the trial itself or the pronouncement of the judgment?

Explanation

In the experience of the *District Court of Amsterdam* issuing judicial authorities sometimes interpret the word 'the trial resulting in the decision' as the 'court date at which the judgment was pronounced'.

Given that one of the objectives of FD 2009/299/JHA is to enhance the procedural rights of persons subject to criminal proceedings (art. 1(1)), this raises the question whether this interpretation is correct or not. One could argue that, unless the trial and the pronouncement of the judgment took place at the same date and the defendant was also present at the trial, the mere presence of the defendant at the pronouncement of the judgment does not support a conclusion that the rights of the defence have been fully respected.

34. What is the meaning of the words 'the trial resulting in the decision' in Art. 4a?

The presence or not of the defendant at the date at which the judgment was pronounced has no impact on the nature of the decision (see our definition of trial in absentia – question 3) so this "interpretation" (the trial resulting in the decision = the court date at which the judgment was pronounced) should not be given by Belgian authorities, neither as issuing nor as executing authority.

In the *Tupikas* case the Court of Justice held that the concept of a 'trial resulting in the decision' must be understood as referring to the proceeding(s) that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of an EAW. Belgian authorities can be expected to interpret this in line with our definition of in absentia and therefore consider that this refers to the sessions of the trial at which the case was effectively dealt with (the merits of the case were examined) and the absence of the defendant would/could lead to an infringement of his right to a fair trial.

G.3 Trial consisting of several hearings

Explanation

In the experience of the *District Court of Amsterdam* particular problems present themselves when the court in the issuing Member State held several hearings before pronouncing a judgment and the defendant was present at one or more but not all of these hearings.

In some of these cases the issuing judicial authority ticks point 1 of section (d) of the EAW-form ('Yes, the person appeared in person at the trial resulting in the decision'), in others point 2 ('No, the person did not appear in person at the trial resulting in the decision'), without explaining why point 1 or point 2 was ticked.

35.

a) If the trial resulting in the *in absentia* judgment of conviction consisted of several hearings and the defendant was present at one or more but not all of these hearings, has the condition that 'the person did not appear in person at the trial resulting in the decision' been met?

According to our national law this would be met if the person remained absent at hearings where the merits of the case were discussed or charges were brought against him (see above). If his absence did in no way affect his rights of defence (e.g. case was merely postponed or his lawyer was present) the condition as indicated above would not be met.

b) Does it matter what transpired at the hearing(s) at which the defendant was present or is the mere presence of the defendant at one of the hearings enough to preclude the applicability of Art. 4a?

Yes it matters, see a)

c) If it does matter what transpired at the hearing(s) at which the defendant was present, on the basis of which criteria do you establish whether the defendant was present 'at the trial resulting in the decision'?

In absentia is the situation where the competent court has been properly seized with a case (the summons, the referral decision or the report is in substance in accordance with the law), the defendant was summoned in accordance with the law (formal deadlines have been respected) and the defendant, optionally assisted or represented by a lawyer, did not have the opportunity to rebut or comment on the evidence or the charges brought against him due to his absence in court or by abstention from participation in the discussions before court (see Cass. 24 March 2010, Arr. Cass. 2010, nr. 2013 for the definition of judgment after trial).

G.4 Personal summons

Explanation

Art. 4a(1)a requires that the defendant in due time:

(i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;

and

(ii) was informed that a decision may be handed down if he or she does not appear for the trial.

Art. 4a(1)a corresponds with points 3.1.a and 3.1.b of section (d) of the EAW-form.

In case of a summons in person as referred to in the first part of Art. 4a(1)(a)(i), the person concerned has himself received the summons (*Dworzecki*, par. 45).

It is not precluded that handing a summons over to a third party satisfies the requirements of the second part of Article 4a(1)(a)(i). However, in that case it must be unequivocally established that that third party actually passed the summons on to the person concerned and when the person concerned received this information. It is for the issuing judicial authority to indicate in the EAW – in section (d)(4) – the evidence on the basis of which it found that the person concerned actually received official information relating to the date and place of his trial. The executing judicial authority may also rely on other evidence, including circumstances of which it became aware when hearing the person concerned (*Dworzecki*, par. 48-49).

In the experience of the District Court of Amsterdam issuing judicial authorities regularly

- do not fill in the date on which the summons was served in person on the person concerned;

- do not indicate the evidence on the basis of which it found that the person concerned actually received the information about the date and place of the trial and when he received it or

- provide evidence which does not support the conclusion that the requested person actually received the information about the date and the place of the trial and when he received it (thus necessitating a request for supplementary information).

36. What is meant by the expression 'in due time'?

See consideration 36 of Directive 2016/343: "in due time" means leave sufficient time "to enable him or her to become aware of the trial".
The definition of "in due time" should however refer to more than just becoming aware of the trial. The person concerned should also dispose of sufficient time to be present at the trial and to exercise his defence in an effective way whether or not with the assistance of a lawyer.

Belgian law provides that a delay of at least 10 days must remain between the date of the service and the first hearing. That delay is shortened to 3 days if the person concerned is detained. For people who live abroad, the delay is 15 days if they live in the Netherlands, France, Germany or the United Kingdom, 30 days if they stay in another European country and 80 days when they live in another part of the world.

37.

a. What kind of evidence indicated by the issuing judicial authority would support the conclusion that the requested person has actually received the information about the date and the place of the trial? Would, *e.g.*, the fact that the third party who received the summons states that he passed the information on to the person concerned suffice? If so, what if the requested person denies having received the information?

The EAW form does not require additional information to be provided for in section 4 even if the date wasn't filled in in section 3.1.a. Conclusive evidence of a service in persons would of course be sending a copy of the summons or the document that contains the defendant's signature for reception of the summons. This is however not the purpose of the EAW. It should suffice for the executing authority that the issuing authority, when asked for additional information, mentions that the prove of the personal service has been added to the case-file.

Although the *Dworzecki* judgment states that the summons should be passed on to the defendant, it does not really define the concept "unequivocally established". Should passing the summons be narrowed to physically handing over the document itself or would a broader definition such as transmitting the relevant information to the defendant by whatever means of communication suffice? I would prefer the latter. Executing authorities should not intervene in discussions between the defendant and a third party, not present at the surrender hearing, who declared that he handed over the summons or the relevant information to the defendant.

Stating that it is for the issuing judicial authority to indicate in the European arrest warrant the evidence on the basis of which it found that the person concerned actually received official information relating to the date and place of his trial, should apply only if nothing else was filled in in box d), hence requiring further information to assure that the conviction in absentia would not stand in the way of a surrender.
In practice, it happens a lot that sections 3.1.b and 3.4 are ticked. In our experience this refers to the situation, not covered in the form, that:

- the person concerned was not served in person but was served at domicile or in another official way (meaning that the service was done correctly and in accordance with the law),
- it is not established that he himself actually received the information about the trial
- the defendant was not served personally with the judgment in absentia which could also refer to the situation where the judgement still has to be served
- and he disposes of a possibility to use a recourse that could lead to a retrial

Confronted with such a form, Belgian authorities would not inquire (again) about the conditions of the service of the summons if section 4 was not filled in and would be satisfied with the information that the defendant disposes of a legal remedy after surrender that could lead to a retrial.

b. What kind of 'other evidence, including circumstances of which it became aware when hearing the person concerned' would support the conclusion that the requested person has actually received the information about the date and the place of the trial? Would, *e.g.*, the fact that the requested person has declared that he actually received the information suffice?

Yes, it would suffice if that information was timely received and even more if a recourse remains possible after his surrender. The latter is what Belgian authorities are concerned about the most.

No further inquiries would be needed if it appeared that the defendant or his lawyer appealed the judgment in absentia and even more if the appeal court already confirmed the first instance ruling.

G.5 Defence by a legal counsellor

Explanation

Art. 4a(1)(b) FD 2002/584/JHA requires that the requested person being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial.

Art. 4a(1)(b) corresponds with point 3.2 of section (d) of the EAW-form.

In some Member States a legal counsellor may be appointed *ex officio* and without the defendant having any actual knowledge of this appointment; the legal counsellor may conduct the defence without having had any contact with the defendant.

In the experience of the *District Court of Amsterdam* in such cases some issuing judicial authorities tick point 3.2 of section (d) of the EAW-form ('being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial').

Given that 'Article 4a(1)(a) and (b) of Framework Decision 2002/584 lays down the circumstances in which the person concerned must be deemed to have waived, *voluntarily* and

unambiguously, his right to be present at his trial' (*Melloni*, par. 52, emphasis added), ticking point 3.2 under these circumstances does not seem to be in accordance with this provision.

Another problem with which the *District Court of Amsterdam* is regularly confronted is that issuing judicial authorities do not (completely) fill in point 4 of section (d) of the EAW-form ('If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide information about how the relevant condition has been met'). This makes it difficult to establish whether the condition set out in Art. 4a(1)(b) has been met.

38. What does the expression 'being aware of the scheduled trial' mean? Must the defendant have had actual knowledge of the date and the place of the trial (compare Art. 4a(1)(a)(i)) or is it enough that the defendant knew or must reasonably have expected that a trial would be held?

As said before, the mandate of the intervening lawyer cannot be questioned by the court. The court can also not question the defendant when he decided to appoint a lawyer. The appointment ex officio of a lawyer is, in the cases relevant for a EAW, in principle known by the defendant (or his parents, guardian, …) who can still appoint a lawyer of their own choice. The mandate of the ex officio appointed lawyer is limited to one instance; he does not have the competence to use a recourse (if he uses a recourse, he must be mandated by the defendant and as a result is no longer an ex officio appointed lawyer).

The non-inquiry of the lawyer's mandate will be sustained in surrender proceedings although it is not excluded that questions might arise in situations where an ex officio appointed lawyer intervened and it remains unclear whether the defendant could or should have been aware that this possibility of him being represented could occur and agreed to this representation albeit tacitly. Possible issues could be the enforceability of the acts of the lawyer and the possibility for a recourse or a review even if the lawyer already used one or all possible recourses. It would however be the meaning of the Belgian courts that these and alike issues must be dealt with by the competent authorities of the issuing state; Belgian courts are not the cassation instance of the foreign court that condemned the defendant and do not have the possibility of a holistic approach that might result in a compelling order to allow for an admissible recourse.

In my own opinion both proposed situations could offer an answer to the abovementioned question. A distinction might actually be made between the situation where the defendant was or could be aware of the possibility of a trial because of what happened during pre-trial (multiple interrogations, house searches, pre-trial detention, …) and the situation where the summons was in fact the first time the defendant could be (made) aware of the forthcoming trial (he was never interrogated or contacted by whatever authority). One could also examine if a lawyer already intervened before a summons was launched. Even if the lawyer's intervention during the pre-trial stage was limited to informing the public prosecutor/judge of his assistance of the defendant, the authorities would still inform him of the forthcoming trial. Does the executing authority in a surrender case have the competence to examine whether that lawyer, in accordance with the national law of the country issuing the EAW, is allowed to intervene in the proceedings without having to prove, by whatever means, that the defendant mandated him also after a summons or a judgment in absentia was served? And if so, on what basis of the FD or the jurisprudence of the Court of Justice would such power to inquire be based? Would this possibility to inquire not be in contradiction with mutual recognition and mutual trust, linchpins of the EAW?

39. What does the expression 'the person had given a mandate to a legal counsellor' mean?

A lawyer intervenes for the defendant. The national law does not require any proof, verbal or written, of such mandate. If questions arise the President of the Bar ("stafhouder") can be contacted or intervene to solve the issue (outside court).

40. In cases in which a legal counsellor was not appointed by the defendant but was appointed *ex officio*, do the words 'the person had given a mandate to a legal counsellor' imply that the defendant must have had actual knowledge of the appointment of the legal counsellor and must have had actual contact with the legal counsellor?

Knowledge of the appointment of and contact with the lawyer are both possible (e.g. in cases concerning minors: if they or their parents didn't appoint a proper lawyer, contact with the ex officio lawyer will be made at latest immediately before the hearing) and sometimes also not possible (in case of proceedings leading to a possible internment: in such cases a lawyer is appointed ex officio if the defendant has no lawyer or refuses to be assisted by a lawyer).
Belgian EAW's will very rarely be issued after a proceedings in which an ex officio appointed lawyer intervened.
As for "the person has given a mandate to a legal counsellor', there can be no other interpretation than that the defendant must have had contact with the ex officio appointed lawyer and has accepted to be represented by him. The FD requires a personal intervention of the defendant. If this has not been the case, the outcome cannot be a judgment after trial. Regardless of the name given to the judgment, a recourse that can result in a retrial should be available.

41. If the issuing judicial authority has failed to fill in section (d)(4) of the EAW-form or has filled in section (d)(4) incompletely, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

No sanctions. Maybe and at best additional information would be asked (where it concerns the topic of the lawyer).

G.6 The decision has been served

Explanation

Art. 4a(1)(c) FD 2002/584/JHA requires that the requested person has been served with the decision, but does not specify the way in which the decision must have been served ('after being served with the decision') (compare Art. 4a(1)(a)).

Art. 4a(1)(c) corresponds with point 3.3 of section (d) of the EAW-form.

The text of these provisions raises the question whether the decision must be served in such a way that the requested person has actually received the decision (and at such a time that he could still avail himself of the possibility of a retrial or an appeal).

The condition that the requested person must also have been 'expressly informed' of his right to retrial or an appeal seems to suggest that the requested person must have actually received

the information about his right to a retrial or an appeal and seems to confirm that the requested person must also actually have received the decision.

In any case, the requested person cannot expressly state that he or she does not contest the decision (Art. 4a(1)(c)(i)) without having had at least some knowledge of the decision and the available recourse against the decision.

In the experience of the *District Court of Amsterdam* some issuing judicial authorities:

- tick point 3.3. of section (d) of the EAW-form in cases in which on the basis of the information provided by the issuing judicial authority (in section (d)(4)) it cannot be established that the requested person actually received the decision and the information about his right to a retrial or an appeal;

- tick point 3.3 of section (d) of the EAW-form, but delete words which form an integral part of the standard text of point 3.3., *e.g.* the words 'and was expressly informed about the right to a retrial or appeal' or the words 'in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed'.

42. What do the expressions 'After being served with the decision' and 'being expressly informed about the right to a retrial, or an appeal' mean?

Based on the order of the points in section (d), point 3.3 is to be considered as the opposite of point 3.4. After being served with the decision must therefore relate to a service in person.

The expressions "being served with the decision" and "being informed about the right to a retrial or an appeal" should be interpreted according to the national law. Consideration 14 of FD 2009/299 holds that "provisions such as those relating to the right of a retrial have a scope which is limited to the definition of these grounds for non-recognition. They are not designed to harmonise national legislation."

In the context of surrender asked for on the basis of a judgment in absentia, the expressions in point 3.3 of section (d) of the EAW-form are to be interpreted as follows: "after being served with the decision" means, according to Belgian law, that the judgment was served to the defendant in person or to the trustee/agent in person (a service done to an employee of the trustee is not a service in person and cannot start the delay within which a recourse must be used – Cass. 18 January 2000, R.W. 2000-2001, p.268) and "being expressly informed about the right to a retrial or an appeal" means that the specific form, holding all information on possible recourses (as annexed to COL 2008/05 revised – see above) was served at the same time as the judgment.

One could argue that on the basis of the *Dworzecki* judgment "serving the judgment" is also to be considered as an autonomous concept of EU law. It remains to be seen.

43. If the issuing judicial authority has failed to fill in section (d)(4) of the EAW-form or has filled in section (d)(4) incompletely, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

As always, additional information should be asked when the omission influences the decision on surrender. It might be wise to consider that issuing a correctly completed EAW is an art in itself and that most magistrates who fill in a EAW form aren't experts on EAW legislation.

44. If the issuing judicial authority has ticked point 3.3 of section (d) of the EAW-form, but has deleted words which form an integral part of the standard text of point 3.3, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

In such case the EAW would not correspond with the official standard form, the latter being the only one that can be taken into consideration. Additional information should be asked from the issuing authority to verify the purpose of this action.

G.7 The decision will be served after surrender

Explanation

Art. 4a(1)(d) FD 2002/584/JHA requires that the requested person was not personally served with the decision but:
(i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;
and
(ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.

Art. 4a(1)(d) corresponds with point 3.4 of section (d) of the EAW.

In the experience of the *District Court of Amsterdam* a number of problems may arise if the issuing judicial authority has ticked point 3.4 of section (d) of the EAW-form:

- the issuing judicial authority has not filled in the number of days within which the requested person may request a retrial or an appeal;

- the issuing judicial authority has deleted words which form an integral part of the standard text of point 3.4;

- the issuing judicial has provided information *proprio motu* (point 4 of section (d) of the EAW-form is not applicable if point 3.4 has been ticked) that seems to contradict that the requested person has a *right* to a retrial or an appeal.

45. What does the expression '<u>right</u> to a retrial, or an appeal' mean? May Member States make an actual retrial or an actual appeal dependent on any <u>other</u> condition than that the requested person was not personally served with the decision and that the request for a retrial or an appeal is lodged within the applicable time frame and in the manner as prescribed by national law (*e.g.* the condition that the requested person did not have effective knowledge of the proceedings and/or the *in absentia* judgment of conviction or the condition that the requested person was not present at the proceedings due to circumstances beyond his control)?

Consideration 14 of FD 2009/299 holds that "provisions such as those relating to the right of a retrial have a scope which is limited to the definition of these grounds for non-recognition. They are not designed to harmonise national legislation." Point 3.4. therefore does not introduce an autonomous European Union law concept of a recourse that must be given a uniform interpretation in all Member States.

See also the answer to question 37: As mentioned in *Dworzecki* (par. 52), article 9 of Directive 2016/343 and the wordings of article 4a (d)(i) and (ii) FD EAW itself, the right to have a retrial means a possibility to request one (see also Cass. 14 April 2015, RW 2016-17, 622). It concerns having access to a recourse that, after surrender, could lead to a retrial.
The executing authorities do not have to assess if the recourse would be successful/effective. This line of reasoning is not in contradiction with consideration 11 of FD 2009/299. The legal remedy which is opposition is "aimed at guaranteeing the rights of the defence and is characterised by the following elements: the person concerned has the right to be present, the merits of the case, including fresh evidence are re-examined, and the proceedings can lead to the original decision being reversed" and is "guaranteed" (consideration 12) but that doesn't imply that an opposition must always lead to a retrial.
In accordance with Belgian law, the opposition will be not accepted for consideration if the public prosecutor can prove that the defendant had knowledge of the summons (the mere fact that the summons was served at domicile does not prove that the defendant had knowledge of the summons – Cass. 17 January 2017, P.16.0989.N, juridat). On the other hand, the appeal lodged by the defendant against the decision to not accept the opposition for consideration will automatically lead to a full retrial. So, while lodging an appeal against the judgment of not accepting the opposition for consideration will get the defendant in the end a retrial, the non-cooperative attitude of the deliberately absenting defendant will not be rewarded and the opposition (recourse provided for after surrender), although admissible, will not be taken into consideration. The same goes if the defendant remains absent again after having opposed the judgment in absentia.

46. If the issuing judicial authority has failed to fill in the number of days within which the requested person may request a retrial or an appeal, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

None. Point 3.4 of section (d) does not allow to make a distinction in possible recourses and their proper delays. Point 4 is not intended to provide additional information regarding point 3.4.
I always wondered why the number of days has to be filled in in the EAW form considering that the information about the delay and the recourse only has to be given after the actual surrender.

47. If the issuing judicial authority has deleted words which form an integral part of the standard text of point 3.4, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

That should be interpreted as not be able to comply with the conditions set out in the EAW form. We would ask for confirmation of this suspicion before refusing to surrender.

When applicable, Belgian authorities will add information to the section 3.4 namely the delay for the opposition (15 days) and the delay for appeal (30 days).

48. If the issuing judicial authority has provided information *proprio motu* which seems to contradict that the requested person has a right to a retrial, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

We would ask for clarification (see also the answer to question 86).

G.8 Proceedings which have taken place at several instances

Explanation

In cases in which the proceedings have taken place at *several instances* – first instance, appeal *et cetera* – which have given rise to *successive decisions*, Art. 4a applies to 'the instance which led to the last of those decisions, provided that the court at issue made a final ruling on the guilt of the person concerned and imposed a penalty on him, such as a custodial sentence, following an assessment, in fact and in law, of the incriminating and exculpatory evidence, including, where appropriate, the taking account of the individual situation of the person concerned' (*Tupikas*, par. 81, emphasis added).

Such a decision does not necessarily coincide with the enforceable judgment/decision as mentioned in Art. 8(1)(c) and section (b) of the EAW-form (*Tupikas*, par. 71 and 76). [See also above, part 2A 'Multiple decisions'.]

In the experience of the *District Court of Amsterdam*, issuing judicial authorities:

- do not always mention that proceedings have taken place at several instances, restricting themselves to mentioning the first or second instance decision which was upheld (in section (b) of the EAW-form);

- when mentioning that proceedings have taken place at several instances, do not always explain the nature of second or third instance proceedings and/or in section (d) simply refer to the first instance decision.

49. If the issuing judicial authority has not mentioned that the proceedings have taken place at several instances and have given rise to successive decisions, although it is apparent that proceedings have indeed taken place at several instances (*e.g.* on the basis of statements of the requested person), what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

Not mentioning that the proceedings have taken place at several instances would not lead to a refusal. Additional information would be asked if needed. If the requested person of course stated that he used all possible recourses but still cannot come to terms with his conviction, no further information would be asked for.
The final outcome in the *Tupikas* case (Rb. Amsterdam 30 August 2017, Rk number 17/1283) would probably have been different in Belgium. The surrender would have been allowed (lawyer seems to have been properly mandated).

Regarding par. 93 of the *Zdziaszek* ruling (In a case such as that at issue in the main proceedings, where, following appeal proceedings in which the merits of the case were re-examined, a decision finally determined the guilt of the person concerned and also imposed a custodial sentence on him, the level of which was however amended by a subsequent decision taken by the competent authority after it had exercised its discretion in that matter and which finally determined the sentence, both decisions must be taken into account for the purposes of the application of article 4a(1) of Framework Decision 2002/584): if the defendant remained absent, the decision of the appeal instance would be rendered in absentia and opposition would be possible (or cassation) unless the lawyer represented the defendant.

50. If the issuing judicial authority has indicated that proceedings have taken place at several instances and have given rise to successive decisions, but has not given any information as to the nature and/or outcome of all of these proceedings, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

Providing information about the existence and the outcome of the successive proceedings is obligatory esp. if no recourse is open. This can be brief if the recourses were used by the defendant or his lawyer. Just mentioning that the decision is final, is not sufficient anymore.

It is possible that a EAW form is filled in incorrectly in the absence of a clear indication in the judgment of the scope of the appeal being limited to the penalty imposed.

51. If the issuing judicial authority has indicated that proceedings have taken place at several instances and have given rise to successive decisions, but has not made clear to which of these decisions section (d) of the EAW applies, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

Additional information would be asked unless it would be assumed that section (d) only relates to the decision in first instance (EAW being based on the decision rendered in first instance). Anticipating on the possibility of a new surrender procedure on the basis of a new (and amended) EAW insofar the defendant hadn't left Belgian territory, it would be preferable to request any desired information in the first surrender proceedings.

G.9 Later proceedings which result in modifying the nature or the quantum of the penalty originally imposed

Explanation
In some Member States, after final conviction the nature or the *quantum* of the penalty originally imposed may be modified in later proceedings, *e.g.* proceedings in which one or more sentences handed down previously in respect of the person concerned are commuted into a single sentence. If these proceedings 'are not a purely formal and arithmetic exercise but entail a margin of discretion in the determination of the level of the sentence, in particular, by taking account of the situation or personality of the person concerned, or of mitigating or aggravating circumstances', they fall within the ambit of Art. 4a (*Zdziaszek*, par. 88).

If the *quantum* of the original penalty was amended in later proceedings in which the competent authority exercised its discretion with regard to the *quantum* of the penalty and finally determined the sentence, two decisions must be taken into account:

- the decision which finally determined the guilt of the person concerned and also imposed a penalty on him and

- the later decision modifying the *quantum* of the penalty originally imposed (hereafter: a *Zdziaszek*-decision) (*Zdziaszek*, par. 93).

The same applies *mutatis mutandis* to later decisions which modify the nature of the penalty originally imposed (*Ardic*).

A decision to revoke the provisional suspension of the execution of a custodial sentence is not a decision as mentioned in Art. 4a, in so far as this decision does not modify the nature and the quantum of the penalty which was originally imposed (*Ardic*) (hereafter: a *Ardic*-decision). Even though Art. 4a does not apply to such a decision, Member States are still obliged to respect fundamental rights. This obligation reinforces the high level of confidence between Member States. Issuing and executing judicial authorities must make full use of Art. 8(1) and Art. 15(2) in order to promote mutual confidence (*Ardic*, par. 88-91).

The *Zdziaszek*-judgment is fairly recent. After the *Zdziaszek*-judgment the *District Court of Amsterdam* has had to deal with a small number of cases in which the question arose whether a later decision amending the *quantum* of the original penalty fell within the ambit of Art. 4a. In some of these cases the issuing judicial authority:

- had not specified whether the competent authority had exercised its discretion in reaching the decision which modifies the *quantum* of the original penalty and/or

- had not applied section (d) to that later decision.

The *Ardic*-judgment is even more recent than the *Zdziaszek*-judgment. The *Ardic*-judgment raises the question to what extent the issuing and executing judicial authorities should provide or request information about decisions which do not fall within the ambit of Art 4a in order to establish that fundamental rights were observed in the proceedings leading to such decisions. Another important question which the *Ardic*-judgment raises, is what the executing judicial authority should decide if it is of the opinion that the fundamental rights of the requested person were not observed.

52. If the issuing judicial authority has mentioned a later decision which modifies the nature or the *quantum* of the penalty originally imposed but has not provided information on the basis of which the executing judicial authority can verify whether the conditions set out in the *Zdziaszek*- and *Ardic*-judgments have been met (see the explanation above), what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

I do not concur with the abovementioned interpretation of the *Ardic* ruling. The Court of Justice states: “Where a party has appeared in person in criminal proceedings that result in a judicial

decision which definitively finds him guilty of an offence and, as a consequence, imposes a custodial sentence the execution of which is subsequently suspended in part, subject to certain conditions, the concept of 'trial resulting in the decision', as referred to in Article 4a(1) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as not including subsequent proceedings in which that suspension is revoked on grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed."
If the revocation decision does not change the nature or the level of the sentence initially imposed, it is not within the ambit of article 4a. Examination of respect for fundamental rights must be done according to the rules set out in the *Aranyosi* (and following arrests) jurisprudence; the *Ardic* ruling cannot be considered as to allow for another set of questions the admissibility of which would not be limited by the *Aranyosi* jurisprudence.

With regards to a "*Zdziaszek*-case" further information needs to be collected in order to identify the countries whose legal systems allow for a revision by a court of the quantum of the penalty imposed and allow their courts a certain discretion in that regard (Poland, maybe Germany, others?). This would prevent wrong conclusions based on insufficient or inadequate information.
Another question would be if a legal recourse (ordinary or extraordinary) is available with regard to the decision to amend the quantum of the sentence.

There is no record of any Belgian court having performed whatever inquiry after the *Zdziaszek* ruling.

53. If the issuing judicial authority has mentioned a later decision which does not meet the conditions set out in the *Zdziaszek*- and *Ardic*-judgments, but has not provided information on the basis of which the executing judicial authority can verify whether the fundamental rights of the requested person were observed, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

The answer to this question would depend on the outcome of another one, namely: if it does not meet the conditions set out in the abovementioned judgments, how can article 4a be applicable?

If the latter decision was not taken by a court, how can there be a judgment in absentia?

A decision taken by an Italian public prosecutor to amend the remainder of the sentences to be served does not fall under the ambit of the *Zdziaszek* ruling. Neither does a petition for clemency where a margin for determination exists but the decision is not or not necessarily taken by a court as it does not concern the determination of an overall sentence.
What if a public prosecutor would dispose of a certain discretion in determining the remainder of the sentences to be served? Would an inquiry not risk coming to a conclusion that the national legislation of that country needs to be adapted? How far can one go asking questions and inquiring, inspired by its own national insights or principles or even by national legislation that transforms options into obligations, without acting in breach with mutual recognition and mutual trust?

And what would the outcome in a surrender case be if a public prosecutor would dispose of such a margin (which could fall under question 54)?

54. If the issuing judicial authority has mentioned a later decision which does not meet the conditions set out in the *Zdziaszek*- and *Ardic*-judgments and has provided information about the proceedings leading to that decision, but the executing judicial authority concludes that the fundamental rights of the requested person were not observed, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

Does not fall within the ambit of article 4a. Surrender proceedings are not intended to be a late cassation procedure by a foreign court or a general repetition for a subsequent procedure before the ECtHR.

G.10 Margin of discretion of the executing judicial authority

Explanation

Even after the executing judicial authority has found that the cases referred to in Article 4a(1)(a) to (d) FD 2002/584/JHA do not cover the situation of the requested person, it may take account of 'other circumstances that enable it to ensure that the surrender of the person concerned does not entail a breach of his rights of defence'. This is so, because Art. 4a provides for an *optional* ground for refusal (*Dworzecki*, par. 50-51; *Tupikas*, par. 96; *Zdziaszek*, par. 107).

The *District Court of Amsterdam* is prevented from taking account of such circumstances, because the Dutch legislator has transposed Art. 4a as a *mandatory* ground for refusal.

55. Does the national law of your Member State allow the executing judicial authorities of your Member State to take account of 'other circumstances that enable it to ensure that the surrender of the person concerned does not entail a breach of his rights of defence', after having found that the cases referred to in Article 4a(1)(a) to (d) FD 2002/584/JHA do not cover the situation of the requested person?

Yes

56. Taking into account the relevant case law of the ECtHR, what circumstances could support the conclusion that the surrender of the requested person would or would not entail a breach of his rights of defence? Would it, *e.g.*, suffice that the defendant was told during the police investigations that:

- in the event of a prosecution he would be summoned at the address given by him and

- he was obliged to notify the proper authorities of any change in residence? Or would it, *e.g.*, suffice that the defendant made a deal with the public prosecutor as to the penalty to be imposed?

The abovementioned circumstances might suffice for the summons to be valid but a valid summons does not mean that the outcome of the proceedings will be a judgment after trial.

Other circumstances could be related to the conduct of the defendant e.g. refusing to open the door in order to avoid being served with the summons in person, refusing to empty the mailbox, refusing to collect a registered letter at the post office, … or the diligence exercised by the authorities e.g. if all reasonably possible checks were performed to obtain the whereabouts of the person concerned.

See also *Demebukov/Bulgaria* (28 February 2008), par. 57 and 58: the Court likewise considers that through his actions the applicant had brought about a situation that made him unavailable to be informed of and to participate in, at the trial stage, the criminal proceedings against him. It refers in particular to the order restricting his freedom of movement, the most lenient restriction on his liberty which the authorities could have imposed in order to guarantee his appearance in court, and the violation of the same by the applicant soon after having been informed of the results of the preliminary investigation. Moreover, up to that stage of the proceedings he had been assisted by a lawyer of his own choosing and should reasonably have foreseen what the consequences of his conduct would be.
In the light of the foregoing, the Court considers that, regard being had to the margin of appreciation allowed to the Bulgarian authorities, the applicant's conviction in absentia and the refusal to grant him a retrial at which he would be present did not amount to a denial of justice.

H. National legislation

57. Please provide:

- the national legislation implementing Art. 2 FD 2009/299/JHA in the official language of your Member State and

- an English translation thereof.[5]

See annex 2

[5] The second part of this request does not apply to our Irish partner, unless the national legislation is provided in Irish.

Part 3: actual application of the national legislation implementing the FD's

3.1 General problems

Using the correct EAW-form

Explanation
See Part 2.2 (D).

58. Have the executing judicial authorities of your Member State had any cases in which the issuing judicial authority used the old EAW-form after your Member State had transposed Art. 2 FD 2009/299/JHA? If so, please state the decision taken by the executing judicial authority.

Yes we have. Belgian executing judicial authorities have no history of sanctioning the issuing judicial authorities for not having used the most recent form.
The public prosecutor will at the request of the court or on his own initiative ask for the additional information deemed necessary to decide on surrender. He can, at his own discretion, let the issuing authorities know that it would be greatly appreciated to use the correct form.
Greek authorities do not transmit the new form as they haven't transposed the FD 2009/299/JHA yet.

59. Have the issuing judicial authorities of your Member State reported any difficulties with the executing judicial authority regarding the version of the EAW-form? If so, please describe the difficulties and state the decision taken by the executing judicial authority.

In cases where the old form was accidentally used, additional information regarding the judgement in absentia and the circumstances of the trial was transmitted upon request. There have been no reports of refusal of surrender based on the use of the old form.

Language Problems	Explanation
See Part 2.2 (E)	

60. Have the executing judicial authorities of your Member State had any problems with translations of the EAW into the official language(s) of your Member State? If so, please describe the problems and state the decision taken by the executing judicial authority.

Yes, the translations can be of poor quality and at times be incomprehensible.

61. If your Member State has made a declaration as provided for in Art. 8(3) FD 2002/584/JHA, have the executing judicial authorities of your Member State had any problems with translations of the EAW in the designated official language(s)? If so, please describe the problems and state the decision taken by the executing judicial authority.

In 2014 English translation was added in the hope to improve the quality of translations (hasn't been the case) and to be able to speed up the transmission of the translated EAW (has been the

case). Problems still arise with the language regime of the proceedings in Belgium where English is not an accepted language in court as a result of which some investigative judges refuse to accept EAW's in English if they are not accompanied with a translation into the language of the proceedings.

In reality many extra translations are asked for by the public prosecutor, mostly because the translation received is not in the language of the proceedings (is a matter for the Belgian authorities not for the issuing authorities) but sometimes also because the translation send is of poor quality.

In cases where the standard part of the form send (original one and/or the translated version) deviates from the official EAW-form, the court will consider only the (standard part of the) official EAW-form (in the language of the proceedings) .
If discussions arise concerning the transmitted original EAW and/or its translation, the public prosecutor can/will ask an official translator to translate this part of the EAW again.

62. Have the issuing judicial authorities of your Member State reported any difficulties with the executing judicial authority regarding the translation of the EAW? If so, please describe the difficulties and state the decision taken by the executing judicial authority.

Difficulties were reported on finding a qualified person to translate in a very short time the EAW to the official (or accepted) language of the executing State. The quality of our translations can be an issue too.

Multiple decisions

Explanation
See Part 2.2 (F).

63. Have the executing judicial authorities of your Member State had any problems with EAW's which list multiple decisions with regard to the same proceedings in section (b)(2) of the EAW? If so, please state the decision taken by the executing judicial authority.

If multiple decisions are mentioned (e.g. first instance, appeal, supreme court), while box D doesn't indicate which decision it refers to, it will be presumed that box D relates to the proceedings in first instance. If a decision has been mentioned in Box (b) 1) and a judgment in box (b) 2, only the latter will be considered to be the base of the EAW.
In case of discussions, additional information will be asked.

64. Have the issuing judicial authorities of your Member State reported any difficulties with the executing judicial authority regarding EAW's which list multiple decisions? If so, please describe the difficulties and state the decision taken by the executing judicial authority.

Additional information has been asked in cases where the EAW was emitted by the public prosecutor at the sentence enforcement court ("strafuitvoeringsrechtbank") – see question 80.

3.2. The component parts of Art. 4a(1) FD 2002/584/JHA

Meaning of 'the trial resulting in the decision': confirmation of a deal between the defendant and the public prosecutor as to the penalty to be imposed (and other special proceedings)?

Explanation
See Part 2.2 (G.1).

65. Have the executing judicial authorities of your Member State had any cases in which the penalty was imposed by a judicial decision confirming a deal between the defendant and the public prosecutor as to the penalty to be imposed? If so, please state the decision taken by the executing judicial authority.

No information available.

66. Have the executing judicial authorities of your Member State had any cases in which the penalty was imposed without having held a trial and/or by other authorities than a judge or a court? If so, please state the decision taken by the executing judicial authority.

Not by other authorities than a judge – only some EAW cases where the Italian investigating judge imposed a penalty in accordance with Italian law (no issues reported).

67. Have the issuing judicial authorities of your Member State reported any difficulties with the executing judicial authority regarding EAW's relating to 'special proceedings' (e.g. confirmation of a deal with the public prosecutor, imposition of a penalty without having held trial and/or by another authority than a judge or a court)? If so, please describe the difficulties and state the decision taken by the executing judicial authority.

No

Meaning of 'the trial resulting in the decision': the trial itself or the pronouncement of the judgment?

Explanation
See Part 2.2 (G.2).

68. Have the executing judicial authorities of your Member State had any cases in which the issuing judicial authority seemed to interpret the words 'the trial resulting in the decision' as 'the court date at which the judgment was pronounced'? If so, please state the decision taken by the executing judicial authority.

There is no sufficiently accurate information available to confirm or deny this.

Trial consisting of several hearings

Explanation
See Part 2.2 (G.3)

69. Have the executing judicial authorities of your Member State had any problems with cases in which the trial consisted of several hearings and the defendant was present at one or more but not all of these hearings? If so, please describe the problems and state the decision taken by the executing judicial authority.

We have had many EAW's in which the trial consisted of several hearings but there is no specific information available to confirm that the EAW also mentioned that the defendant was not present at all of these hearings. There is however not a single refusal of surrender on such a basis reported.
If it would occur, action taken by the court would depend on what is mentioned in the EAW e.g. if a legal recourse dealing with the merits of the case was still possible, the court would be satisfied.

70. Have the issuing judicial authorities of your Member State reported any difficulties with the executing judicial authority regarding cases in which the trial consisted of several hearings and the defendant was present at one or more but not all of these hearings? If so, please describe the difficulties and state the decision taken by the executing judicial authority.

No, but as mentioned before: even if the judge would erroneously state the judgment was rendered after trial, an opposition against such a judgment could result in a retrial as the judge has to examine the nature of the opposed judgment and take into consideration the comments made by the defendant. The public prosecutor, informed hereof by the executing authorities when dealing with the EAW, will intervene when the defendant uses a recourse and inform the judge of the mistake made.

Personal summons

Explanation
See Part 2.2 (G.4).

71. Have the executing judicial authorities of your Member State had any problems with EAW's in which point 3.1.a or point 3.1.b of section (d) was ticked? If so, please describe the problems and state the decision taken by the executing judicial authority.

Yes we recently had a Greek EAW where the summons was sent to the last known address of the defendant. The defendant had fled Greece and there was no proof that he actually ever got the summons. In this case the court followed the reasoning that the appeal lodged by the defendant's lawyer against the judgment in absentia is imputable to the defendant and can also lead to the suspicion that the lawyer did have contact with the defendant at least after his conviction in absentia. No argument was raised by the defendant concerning the in absentia character of the first judgment. The surrender was allowed.

72. Have the issuing judicial authorities of your Member State reported any difficulties with the executing judicial authority regarding EAW's in which point 3.1.a or point 3.1.b of section (d) was ticked? If so, please describe the difficulties and state the decision taken by the executing judicial authority.

No (real) difficulties but a feeling of exaggeration in the number of questions asked/issues raised has been reported.

Defence by a legal counsellor

Explanation
See Part 2.2 (G.5).

73. Have the executing judicial authorities of your Member State had any problems with EAW's in which point 3.2 of section (d) was ticked? If so, please describe the problems and state the decision taken by the executing judicial authority.

The mandate of the ex officio lawyer has at occasions been challenged by the defendant. None of these discussions lead to a refusal of surrender. Either a recourse remained possible after surrender or the ex officio lawyer was in fact the lawyer chosen by the defendant himself or the defendant had agreed to be represented by the ex officio lawyer.

Discussions regarding the quality of the intervention of the ex officio lawyer have always been dismissed by our courts, considering this to be an issue for the issuing authorities.

In one case the court, interrogating the defendant, learned that he fled the country after he was served with the judgment. The judgment had become final. The argument that the lawyer who intervened for the defendant had not been mandated by the defendant and was an ex officio appointed lawyer, was dismissed by the court as irrelevant on the basis that the defendant could have acted against the so-called unmandated lawyer and could have asked for a revision of his trial if the conditions for such a revision would have been met, long before the question of the surrender was on the table.

74. Have the issuing judicial authorities of your Member State reported any difficulties with the executing judicial authority regarding EAW's in which point 3.2 of section (d) was ticked? If so, please describe the problems and state the decision taken by the executing judicial authority

No such issues have been reported.

The decision has been served

Explanation
See Part. 2.2 (G.6).

75. Have the executing judicial authorities of your Member State had any problems with EAW's in which point 3.3 of section (d) was ticked? If so, please describe the problems and state the decision taken by the executing judicial authority.

No such issues have been reported.

76. Have the issuing judicial authorities of your Member State reported any difficulties with the executing judicial authority regarding EAW's in which point 3.3 of section (d) was ticked? If

so, please describe the difficulties and state the decision taken by the executing judicial authority.

No information available.

The decision will be served after surrender

Explanation
See Part 2.2 (G.7).

77. Have the executing judicial authorities of your Member State had any problems with EAW's in which point 3.4 of section (d) was ticked? If so, please describe the problems and state the decision taken by the executing judicial authority.

No issues have been reported. The right to a retrial has always been considered as a possibility for a retrial, meaning that it is up to the defendant to undertake action.

78. Have the issuing judicial authorities of your Member State reported any difficulties with the executing judicial authority regarding EAW's in which point 3.4 of section (d) was ticked? If so, please describe the difficulties and state the decision taken by the executing judicial authority.

There have been many cases where executing authorities wanted to know if the retrial would be held automatically and if it would be a full retrial. The more important question the Dutch authorities forgot to ask is if it would be a retrial in all circumstances (May 2018); situation that has been addressed in this questionnaire.

3.3. Proceedings at several instances

Explanation
See Part 2.2 (G.8).

79. Have the executing judicial authorities of your Member State had any problems with EAW's relating to proceedings which had taken place at several instances and which had given rise to successive decisions? If so, please describe the problems and state the decision taken by the executing judicial authority.

There is no information available regarding EAW cases in which mention was made of a decision to revoke the provisional suspension of the execution of a custodial sentence that in reality also modified the character and the quantum of the penalty originally imposed.

The circumstance that box (d) does not state which decision, mentioned in box (b) of the EAW it refers to, has in our experience in all cases been related to the decision in first instance or the decision condemning the defendant to the penalty mentioned in box (c)2.
It is often mentioned that the decision in first instance was upheld in appeal (meaning not changed), accompanied or not by the mention that it was the lawyer of the defendant that lodged the appeal, and (occasionally) that cassation proceedings were unsuccessful. In such circumstances attention is drawn to the fact that it is the decision in first instance that becomes

executable and that only that one can be the object of the EAW. The mentions in box (d) then reflect on the situation in first instance. As a result, it can be understood why those mentions are or can be in contradiction with the fact that it was the defendant's lawyer that appealed the decision in absentia. As a result of the lawyer representing the defendant in appeal, the appeal decision would not be considered rendered in absentia.

80. Have the issuing judicial authorities of your Member State reported any difficulties with the executing judicial authority regarding EAW's relating to proceedings which had taken place at several instances and which had given rise to successive decisions? If so, please describe the difficulties and state the decision taken by the executing judicial authority.

Additional information has been asked in cases where the EAW was emitted by the public prosecutor at the sentence enforcement court ("strafuitvoeringsrechtbank") after a decision by the sentence enforcement court of revocation of a conditional release. Those questions were more related to the functioning and the competence of the sentence enforcement court. To my understanding, the problems were solved with the answer that the basis for the EAW is the previous decision of conviction and not the decision of the sentence enforcement court. The fact that the remainder of the sentence mentioned in the decision of the sentence enforcement court differs from the original sentence should not be interpreted as being the outcome of a review of the quantum of the penalty as it is in fact only the result of a deduction of time already served or application of legal rules that leave no margin for discretion.

So, as a rule a Belgian EAW for execution of a sentence is based on the last decision on guilt and/or penalty (the public prosecutor will in principle not launch a EAW for the execution of a decision of a court of appeal and the prosecutor general will not launch a EAW for the execution of a judgment of a first instance court);
The public prosecutor at the sentence enforcement court can group judgments from different instances (but will explain why this is done).

At present the sentence enforcement court doesn't have competence to change the quantum of sentences imposed.

3.4. Later proceedings which result in modifying the nature or the *quantum* of the penalty originally imposed

Explanation
See Part 2.2. (G.9).

81. Have the executing judicial authorities of your Member State had any problems with EAW's relating to *Zdziaszek*- or *Ardic*-decisions (see Part 2.2 (G.9)? If so, please describe the problems and state the decision taken by the executing judicial authority.

Regarding the *Zdziaszek*-cases, no difficulties were reported neither before the ruling or (for the moment) after the ruling.

The *Ardic* decision confirms the earlier jurisprudence of the Belgian courts (it is not the revocation decision but the original conviction that forms the basis of the EAW). No cases were

reported in which the revocation decision changed the nature or the level of the originally imposed sentence.

82. Have the issuing judicial authorities of your Member State reported any difficulties with the executing judicial authority regarding EAW's relating to *Zdziaszek*- or *Ardic*-decisions? If so, please describe the difficulties and state the decision taken by the executing judicial authority.

None were reported so far.
"*Zdziaszek*-proceedings" cannot occur in Belgium. The legislation that would allow for such proceedings has not entered into force yet and has become uncertain in the light of legislation in the pipeline.

3.5. Margin of discretion of the executing judicial authority

Explanation
See Part 2.2. (G.10).

83. Have the executing judicial authorities of your Member State actually taken account of 'other circumstances that enable [them] to ensure that the surrender of the person concerned does not entail a breach of his rights of defence'? If so, please state the decision and describe the circumstances on the basis of which the executing judicial authority reached the conclusion that the surrender of the requested person would not entail a breach of his rights of defence.

Yes. Faced with an in absentia conviction, an assessment is made if a recourse is available. If this is the case, all discussions will be fruitless and surrender will be allowed.

The conviction in absentia is due only to the person sought who leaving no known residence, could not be informed of the place and date of the hearing despite all efforts made by the issuing authorities. The alleged violation of article 6 ECHR cannot be upheld as the investigating courts who have to decide on surrender are not competent to assess the merits of the accusation (Brussels' indictment chamber 5 September 2008, KI/Folio 1894, not published; the cassation appeal was squashed on 17 September 2008, not published)

3.6. Requesting supplementary information

Explanation

Part. 3.6 concerns requests for supplementary information pursuant to Article 15(2) FD 2002/584/JHA regarding section (d) of the EAW.

If the executing judicial authority is of the opinion that 'it does not have sufficient information to enable it to validly decide on the surrender of the requested', this authority *must* 'apply Article 15(2) of Framework Decision 2002/584, by requesting from the issuing judicial authority the urgent provision of such additional information as it deems necessary before a decision on surrender can be taken' (*Zdziaszek*, par. 103).

However, if this request does not result in 'the necessary assurances as regards the rights of defence of the person concerned during the relevant proceedings', the executing judicial authority is not obliged to resort to Art. 15(2) *again* and may refuse to execute the EAW. This is so, because the executing judicial authority not only cannot tolerate a breach of fundamental rights, but also must ensure that the time limits laid down in Art. 17 FD 2002/584/JHA are observed (*Zdziaszek*, par. 104-105).

In the experience of the *District Court of Amsterdam* in the pre-*Zdziaszek* era applying Art. 15 (2) in some cases came close to flogging a dead horse: repeated requests did not result in any forward motion of the case. That is why the *District Court of Amsterdam* elicited the aforementioned ruling of the Court of Justice.

84. What kind of supplementary information (under Art. 15(2) FD 2002/584) do the executing judicial authorities of your Member State usually ask for in order to be able to validly decide on the surrender of the requested person and within what time frame?

If needed: detention conditions, further information about the underlying national arrest warrant or executable judgment (esp. the correct date), the facts, occasionally more information with regard to section (d)

85. Have the executing judicial authorities of your Member State had any cases in which, after having requested supplementary information (under Art. 15(2) FD 2002/584) *once*, they still could not verify whether the rights of the defence were observed? If so, please state the decision taken by the executing judicial authority.

Yes, but rare. Additional questions were asked, explaining even more what information was in fact needed.

86. When the issuing judicial authorities of your Member State are asked to provide supplementary information (under Art. 15(2) FD 2002/584) in order for the executing judicial authority to decide on the surrender of the requested person, what kind of information are they usually asked for?

Depends on the country and could go up to asking information on the Belgian legal system, impact of recourses, possibilities to use recourses abroad, articles of law, possibilities of provisional release, …, but the general finding is that most questions are the result of using the old form, omissions when filling in the EAW form or even misconceptions on how to fill in the EAW form such as not filling in Box (d), ticking all sections of Box (d) or ticking the wrong section.
An example of a misconception is mentioning the judgement in absentia in Box (b) (2) instead of (b)(1) leading to the question how a recourse as mentioned in Box (d) is compatible with the final nature of the judgment, because it was mentioned in Box (b)(2).

3.7. Time Limits

Explanation

Part. 3.7 concerns non-observance of the time limits of Art. 17(3) and (4) FD 2002/584/JHA in cases in which the information in section (d) of the EAW is insufficient to decide on the execution of the EAW.

The final decision on the execution of the EAW must, in principle, be taken with the time limits of Art. 17(3) and (4) FD 2002/584/JHA (*Lanigan*, par. 32), *i.e.* within 60 or 90 days.

In the experience of the *District Court of Amsterdam* in a not insignificant number of cases these time limits cannot be respected, because the information contained in the EAW is insufficient to decide on the execution of the EAW. This necessitates requesting supplementary information. In some cases the supplementary information does not answer all questions and/or raises new ones.

87. Have the executing judicial authorities of your Member State had any cases in which the time limits of 60 and/or 90 days could not be observed, because the information contained in the EAW was insufficient to decide on the execution of the EAW? If so, please state the decision taken by the executing judicial authority.

There has never been a refusal of surrender on the sole basis that the time limits of the FD could not be respected. According to Belgian law time limits are suspended during the period in which the surrender case has been postponed (at the request of defence council or because additional information is requested from the issuing authorities). Time limits cannot be used in an abstract way (e.g. interpreting them as calendar days) only to justify a refusal of surrender or an infringement on the rights of defence of the person sought. Furthermore, neither the FD or the national law sanction exceeding the time limits.

3.8. Additional observations on the application of the national legislation implementing the FD's

88. Do you have any additional observations on the application of the national legislation implementing the FD's (*e.g.* have the issuing and/or executing judicial authorities of your Member State experienced other problems)? If so, please describe them here.

No.

3.9. Methodology

89. On which type of research did you base your answers to the questions in Part 3?

Personal experience and knowledge, a collection of 14 years of jurisprudence related to the EAW and interaction with colleagues, staff and members of the National Work Group on the EAW.

Part 4: statistical data on the actual application of the national legislation transposing the FD's.

Explanation

Statistical data on EAW's for the purpose of executing an *in absentia* judgment of conviction may put the answers to the questions set out in Parts 1 and 3 in their proper context, may illustrate the frequency of the problems and the severity of their consequences and may demonstrate the need for common solutions.

Comparing data relating to the era before transposition of Art. 2 FD 2009/299/JHA with data relating to the era after transposition of Art. 2 FD 2009/299/JHA may provide us with an answer to the question whether FD 2009/299/JHA is well-suited to achieving its objectives (enhancing the procedural rights of persons subject to criminal proceedings, facilitating judicial cooperation in criminal matters and, in particular, improving mutual recognition of judicial decisions between Member States).

A limited review based on cases dealt with by the *District Court of Amsterdam* has shown that in a significant number of cases:

- application of the rules set out in Art. 4a EAW's is fraught with problems and
- these problems may lead to (multiple) requests for supplementary information, inability to observe the time limits and refusal to execute the EAW.

Some of the data may already be available at Union level [see: http://data.consilium.europa.eu/doc/document/ST-8414-2014-REV-4/en/pdf]. We shall ask Eurojust whether they can be of any assistance in collecting the data.

If you limit the temporal scope of your statistical research and/or select issuing/executing judicial authorities because you are unable to comply fully with the request for statistical data, please state the reasons why and the criteria on which you base the limitation of the temporal scope of your research and/or the selection of the judicial authorities.

90. Please provide the following data for each year in the period of 2008-2017 (preferably for your Member State as a whole, but if that is not possible, for your own court):

There is no possibility to collect, compile or publish the requested comprehensive, accurate, comparable, reliable and separate statistics, not on a national level and neither on the level of the Brussels' court.

- a. the total number of EAW's decided by the executing judicial authorities of your Member State in which the requested person did not consent to surrender

- b. out of this total number of EAW cases referred to under a.:
    - the total number of EAW's for the purpose of prosecution

    - the total number of EAW's for the purpose of execution of a custodial sentence or detention order

- c. out of the total number of EAW cases referred to under a.: the total number of cases in which either the 60 day time limit or the 90 day time limit could not be observed, broken down into prosecution-EAW's and execution-EAW's

- d. out of the total number of EAW cases referred to under a.: the total number of cases in which the execution of the EAW was refused, broken down into prosecution-EAW's and execution-EAW's

- e. of the EAW's for the purpose of execution (b.):

  Before transposition of Art. 2 FD 2009/299/JHA by your Member State
  - the total number of cases in which the EAW was issued 'for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia' (Art. 5 par. 1 FD 2002/584/JHA)

  - of those cases: the total number of cases in which the executing judicial authority demanded a guarantee that the requested person 'will have an opportunity to apply for a retrial of the case in the issuing Member State' (Art. 5 par. 1 FD 2002/584/JHA)

  - of those cases: the total number of cases in which the executing judicial authority either held that the guarantee was 'adequate' or held that the guarantee was insufficient and refused to execute the EAW on the basis of Art. 5 par. 1 FD 2002/584/JHA

  - the total number of cases in which the information in the EAW was insufficient to verify whether the conditions of Art. 5 par. 1 FD 2002/584/JHA had been met and Art. 15(2) FD 2002/584/JHA was applied

  - in case of application of Art. 15(2) FD 2002/584/JHA: the total number of cases in which either the 60 day time limit or the 90 day time limit could not be observed

  After transposition of Art. 2 FD 2009/299/JHA by your Member State
  - the total number of cases in which the requested person was present in person at the trial resulting in the decision

  - the total number of cases to which Art. 4a was applicable

  - the total number of cases in which the information in the EAW was insufficient to verify whether the conditions of Art. 4a FD 2002/584/JHA had been met and out of these: the total number of cases in which Art. 15(2) FD 2002/584/JHA was applied because the information in the EAW was insufficient to verify whether the conditions of Art. 4a had been met

  - in case of application of Art. 15(2) FD 2002/584/JHA because the information in the EAW was insufficient to verify whether the conditions of Art. 4a had been met: the total number of cases in which either the 60 day time limit or the 90 day time limit could not be observed

- the total number of cases in which the execution of the EAW was refused on the basis of Art. 4a FD 2002/584/JHA.

Part 5: conclusions, opinions, et cetera

91. What is your overall assessment, did FD 2009/299/JHA achieve its objectives of facilitating judicial cooperation and enhancing the rights of the defence? If yes, please explain. If not, please explain why and add what should have been done.

As a practitioner I would say: yes, the FD facilitated judicial cooperation. Whether the same can be said with the jurisprudence of the Court of Justice is another matter.

92. Did you notice a difference in the practice of *in absentia* EAW's before and after the implementation of the FD?

Before the implementation of the FD courts often subjected surrender to providing a guarantee for the possibility of a retrial, sometimes even in circumstances where a retrial could not be asked for. Determining whether the provided guarantee was sufficient or not was left at the discretion of the public prosecutor.
After the implementation of the FD all this changed and courts now examine if the conditions of article 4(a) have been met. If this appears to be the case, surrender will not be refused on the in absentia nature of the judgment. Defence lawyers now use two arguments:

- surrender should be refused because the judgment is rendered in absentia – reply: this is an optional ground for refusal subject to non-fulfilment of several conditions and optional ground for refusal means that it is at the discretion of the judge to take this into consideration or not
- surrender should be refused because there has been or will be an infringement on fundamental rights – falls outside the scope of article 4 (a) + The alleged violation of article 6 ECHR cannot be upheld as the investigating courts who have to decide on surrender are not competent to assess the merits of the accusation (Brussels' indictment chamber 5 September 2008, KI/Folio 1894, not published; the cassation appeal was squashed on 17 September 2008, not published)

93. Did you see (partial) refusals of *in absentia* EAW's of which you think they were not justified?[6]

I'm very much inclined to answer in a positive way but sadly I cannot refer to a specific case. I am pretty sure that surrender has been refused in a number of cases due to incorrect information being provided to the executing authorities.

94. Did you see surrenders granted in *in absentia* cases that should have led to a refusal?[7]

[6] This question relates to your own views and, if applicable, to national judgments rendered before particular guidance was given by the CoJ EU which would now be decided differently.
[7] (This question relates to your own views and, if applicable, to national judgments rendered before particular guidance was given by the CoJ EU which would now be decided differently.) If your Member State has transposed Art. 4a FD 2002/584 as an *optional* ground for refusal and if this optional character of the ground for

Could or should have led? Maybe. There have been cases where additional information should have been asked esp. in the light of the actual jurisprudence of the Court of Justice.
Courts don't like spending too much time neither on a EAW case. Surrender is the rule, refusal stays the exception.

95. Do requests for supplementary information by the executing judicial authority have an impact on the trust which should exist between the cooperating judicial authorities?

Yes, a lot. Question in the nature of "we will refuse surrender unless you provide us with …" are a source for frictions and unease. Too short time frames within which the answers must be given, capacity shortages and a very high workload only exacerbate this feeling.
The EAW has also become very complicated which makes fresh practitioners reluctant to invest the scarce time at their disposal to the study of international cooperation instruments.

96. What kind of questions should an executing judicial authority ask when requesting supplementary information on *in absentia* proceedings?

The executing judicial authority should only inquire if at least one of the conditions set out in article 4 (a) has been met. If none of these conditions have been ticked, the executing authority could send the text of article 4 to the issuing authority and ask them to examine and specify if and why one or more of those conditions could apply.

97. Do executing judicial authorities occasionally ask too much supplementary information on *in absentia* proceedings? If so, on what issues?

Depends on the country and esp. on the national approach regarding proceedings in absentia and the way the framework decision 2009/299 was transposed (namely as a mandatory ground for refusal). Some countries inquire a lot and can be surprisingly inventive in the "need" for additional information. Questions will not be restricted to section (d) but will usually relate to the proceedings in the whole (date of the facts, nature and description of the facts, fair trial, probable cause, pre-trial proceedings, …).
Some questions are without purpose e.g. when section 3.4 of box D was ticked, asking if the defendant has the right to be present at the retrial while this is a condition that has to be met before ticking that section.

98. Are there Member States whose *in absentia* EAW's and/or whose decisions on the execution of *in absentia* EAW's are particularly problematic in your experience? if so, what are the problems that emerge?

Old forms (not adapted after the entry into force of FD 2009/299 or still used because of the FD not being transposed) can pose problems. Polish EAW's can pose problems when based on judgments in absentia but cause more issues due to the late issuing of the EAW (e.g. issuing a EAW in 2018 for execution of a sentence of 2001).

A cause for concern is making the surrender dependent on the outcome of a recourse used in the issuing state. In a particular case in February 2017 the Amsterdam court decided to postpone

refusal makes it difficult to answer this question (*e.g.* because the decisions of the executing judicial authority do not give any reasons for *not* applying this optional ground for refusal), please make this clear in your answer.

the surrender proceedings in order to await if the Belgian court would declare the opposition admissible (and examine the merits of the case at a later date). As such and maybe unaware the court aided the person sought to escape surrender. If the opposition would be declared admissible, the judgment in absentia would in theory be (temporarily) lifted. The person sought could than argue that the EAW had no more base, obtain that the surrender proceedings were declared without relevance and afterwards remain absent in the continuation of the proceedings on opposition.
A variant of this scenario is where the person sought claims that there is no longer an executable title after he has lodged opposition and that the executing court is misled, having no regard to the fact that an order to arrest was pronounced by the court accompanying the judgment in absentia (discussions are even more vivid when the wrong section is ticked in Box B).

99. What is your opinion on the usability of the *HANDBOOK ON HOW TO ISSUE AND EXECUTE A EUROPEAN ARREST WARRANT* (COM(2017) 6389 final) for judicial practitioners as regards *in absentia* EAW's?

The handbook is not up to date anymore (*Tupikas*, *Zdziaszek* and *Ardic* are not mentioned) but one should keep in mind the disclaimer on pag. 6 of the handbook.

100. What relevance, if any, do your answers have for other framework decisions which contain a ground for refusal comparable to Art. 4a FD 2002/584/JHA (i.e. FD 2005/214/JHA, FD 2006/783/JHA, FD 2008/909/JHA and FD 2008/947/JHA, as amended by FD 2009/299/JHA)?

The autonomous EU meaning of a number of used expressions, as defined by the Court of Justice, applies also to the other framework decisions. The principles as set out above therefore also apply to the other relevant framework decisions. There is however no information available regarding the checks performed or questions asked by the Belgian executing authorities.

101. If your Member State will not transpose Directive 2016/343 and you are of the opinion that your Member State should transpose this directive (as regards *in absentia* proceedings), please state your reasons here.

/