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[1] As of 16 January 2018 (not counting withdrawn preliminary references).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.

Mariana Radu - Central Authority
Mihaela Vasiescu senior judge within CA Targu Mures – both issuing and executing
Adriana Ispas senior judge CA Constanta - executing authority
Filimon Florin senior judge CA Oradea (I have mentioned by mistake Galati) both issuing and executing

All of us are dealing with EAW as of 2007

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.

Summoning procedure is subject to Chapter 1 Title VI of the Romanian Criminal Procedure (Articles 257 to 267). Specific provisions are to be found at Article 344 para. 2 (Title II - Preliminary Chamber Procedure), and Articles 353 and 361 (Title III on Trial - Chapter 1)

Summoning is to take place in written by post or, if the defendant agrees, by email or any other system of electronic messaging. Additionally summoning can take place by telephonic or telegraphic note, with a report being written. Once appeared in person the summoning for next court hearing may be made also orally.

As a rule, place of summon is at the address where the accused lives and if that is unknown, then at the address of his or her employment, via the human resources department of that employer. If during the course of the criminal proceedings the defendant has indicated for being summoned a specific address then the summons is to be made at the respective indicated address. If the accused is represented by a chosen lawyer and if he or she failed to appear after the first summoning procedure was legally fulfilled, he or she may be summoned at the address of the law office of the respective chosen lawyer. However - art.353 al.2 C.p.p. "(2) The party or any other principal subject to the proceedings, present in person, through representative or through retained counsel, at any court hearing, as well as the person who was served the summons in person, through their representative or retained counsel or by the clerk or the person in charge with the mail, were lawfully summoned to appear in court during a hearing shall not be summoned for the subsequent court hearings, even if they would miss any of such hearings, except for the situations when their presence is mandatory. The military personnel and the prisoners shall be summoned ex officio for each court hearing".

If the accused lives abroad for their first appearance the summons shall be made in accordance with the provisions of international criminal law applicable in relation with the requested state. In the absence of such provisions or in case the applicable international law allows it, the summons shall be sent by registered letter with acknowledgment of receipt. In that case the recipient's signature on delivery of the registered letter or the refusal to take delivery of said letter shall be deemed proof of completion of the summons procedure. For his or her first appearance, the accused shall be informed in the summons that he or she have the obligation to indicate a mailing address on the territory of Romania, an e-mail address or an electronic messaging address where he or she is to receive all communication concerning the trial. In case he or she fails to comply with this obligation, the communications shall be sent to them via registered letter again, and the receipt for that letter at the Romanian postal service, listing the documents being mailed, shall serve as proof of completion of the procedure. Additionally, in case the accused lives abroad, in setting the day to appear consideration shall be given to applicable international law in the relation with the state on whose territory accused is located, and in the absence of such rules consideration shall be given to the need that the summons be received 30 days before the date of appearing at the latest.

The rule is that summon shall be served in person to the accused person, wherever he or she is found, and he or she shall sign for having received it. If the accused refuses to receive the summons the person in charge of serving the summons shall post a notice on the recipient's door, and shall write a report about the circumstances. If the accused, when receiving the summons, refuses to sign for having received it or is unable to, the person in charge of serving the summons shall put that down in their report.

If the accused person is not at home, the procedural agent shall hand the summons to the spouse, a relative or any other person that lives with them or that habitually handles their

correspondence. The summons cannot be handed to a juvenile under the age of 14 or a person lacking mental competence. If the accused person lives in a building of several apartments or in a hotel, in the absence of persons referred above the summons shall be handed to the building's administrator, doorkeeper or person who habitually replaces them.

The receiver of the summons shall sign a proof of reception, and the procedural agent, attesting their identity and signature, shall write a report. If proof of reception is denied or cannot be provided, the agent shall post the summons on that dwelling's door and write a report about it. *(4) In the absence of persons described before the agent shall make inquiries as to when the accused can be found so as to hand him or her summons. When the accused cannot be found, the agent shall post a notice on the recipient's door.* If the summoned person lives in a building of several apartments or in a hotel, if the summons does not mention the number of the apartment or room the person lives in, the agent shall investigate in order to find it. If their investigations are fruitless the agent shall post the summons on the main door to the building, write a report about it and describe the circumstances that made it impossible to hand the summons.

In case the registered letter related to summons of an accused person living abroad cannot be handed to him/her, and also in case the law of the state of the recipient does not allow summons send by post, the summons shall be posted at the head office of the court. The summons can also be sent via the jurisdictional bodies of the foreign state, if: a) the address of the accused is unknown or inaccurate, b) it was not possible to send the summons by post; c) sending the summons by post was ineffective or inappropriate.

When serving the summons cannot be performed, because the building does not exist, is uninhabited, or the recipient no longer lives in that building, or when the communication cannot be performed for other similar reasons, the agent shall write a report about it, describe the situation they found and submit it to court that issued the summons.

Article 353 states the rule that *the court proceedings may take place only if among others the accused person has been legally summoned and the summoning procedure is fulfilled*. The accused is summoned ex officio in court. The presence of the accused, in person or through a representative or chosen or ex officio lawyer, if the latter contacted the accused he or she represents, shall cover any irregularity related to the summoning procedure. The accused present in person, through representative or through a chosen lawyer, at any court hearing, as well as the accused who was served the summons in person, through their representative or chosen lawyer or through the civil servant or the person in charge with the mail, was lawfully summoned to appear in court during a hearing shall not be summoned for the subsequent court hearings, even if they would miss any of such hearings, except for the situations when his or her presence is mandatory. The military personnel and the accused in detention shall be summoned ex officio for each court hearing. The failure of the summoned parties (accused person) to appear in court shall not prevent the adjudication of the case. When the court considers it is necessary for one of the missing parties to appear in court, it may take steps for the party to appear in court, thus postponing the adjudication of the case. Throughout the court proceedings, the defendant may apply, orally or in writing, for the court proceedings to take place in his or her absence, in which case, they shall not be summoned any longer to appear in court for the following hearings. When the court proceedings are postponed, the parties (accused person) and the other persons who participate at the trial shall be informed of the date of the following court hearing. During the trial stage, the president of the panel has the responsibility to check whether the provisions concerning the service of documents were

fulfilled and, as the case may be, shall either supplement or remake them (Article 361 para. 6 of the RO Criminal Procedure Code).

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)?

Yes. See above.

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?

As indicated above, during the course of the criminal proceedings (pre-trial or trial) the accused has the right to indicate for being summoned a specific address while the judicial authorities are under the obligation to summon him or her at the respective indicated address. Consequently the accused person is under the obligation (Article 108 para. 2 b of the RO Criminal Procedure Code) to communicate in writing, within 3 days, any change of address. Failure to comply with this obligation is that summons and any other documents communicated to the first address shall remain valid and shall be deemed as brought to his or her knowledge. Also, Article 353 para. 1 of the RO Criminal Procedure Code states that the presence of the defendant, in person or through a representative or chosen or ex officio lawyer, if the latter contacted the accused he or she represents, shall cover any irregularity related to the summoning procedure. In addition, Article 358 para. 2 of the RO Criminal Procedure Code provides that the parties (accused person) may appear in court and participate in the court proceedings even if they had not been summoned to appear or they had not received the summons, whereas the president is under an obligation to determine their identity.

***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?

Yes, the Romanian national law provides for *in absentia* court proceedings (Article 364 of the RO Criminal Procedure Code). The rule set by Article 364 is that the court proceedings is taking place in the presence of the accused person and that it is mandatory to bring the accused under detention at the court proceedings. It is considered as being present, the accused under detention who with his or her consent and in the presence of his or her chosen or ex officio lawyer and, if the case, of an interpreter, attends the court proceedings from his or her place of detention trough videoconference.

Further on, the same article states that the court proceedings may take place in the absence of the accused person, if the latter is missing, flees justice or changed his or her address without informing thereupon the judicial bodies (court) and, following the controls carried out, his or her new address remains unknown. The court proceedings may also take place in the absence of the accused person if, even though lawfully served the summons, the accused provides no justification for his or her absence from the trial of the case. Throughout the court proceedings, the accused, including when deprived of liberty, may request, in writing, to be tried in absentia and be represented by a chosen or ex officio lawyer. When the court deems it necessary for the accused to be present, it may order the former's presence including by issuing a bench warrant.

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)?

This question distinguishes among the procedural stages of the court proceedings which from the perspective of the RO system are as follows: court inquiry, debate, deliberation and pronouncing the judgement. The judicial inquiry starts when the parties are present or, although absent, the summoning procedure has been legally fulfilled, the preliminary activities have been carried out, the requests, the exceptions and the proposals have been solved, meaning the case is in *a state of trial*. The court inquiry has as its object the re-administration and verification of all the evidence gathered during the pre-trial stage and the administration of any other evidence. During the court inquiry the first voice to hear is that of the accused person if present while within the stage of debates his or her voice is the last one (last word of the accused person). Court inquiry and debates can take place in the same day or at different dates depending on the circumstances or complexity of the case. Further on, according to Article 391 of the RO Criminal Procedure Code, deliberation and pronouncing the judgement shall take place on the day when the debates took place or later, but no later than 15 days since the closing of debates. In exceptional cases, when, due to the complexity of the case, the deliberation and pronouncing the judgement cannot take place in the time frame mentioned above, the court may postpone the pronouncing the judgement once for no later than 15 days at the latest. If so, the president of the judicial panel shall inform the parties present during the debates when the judgement is to be pronounced.

From the perspective of the RO court proceedings although still part of the court proceedings pronunciation of the judgement it is not a hearing per se. However, taking place in public session the accused person may attend during the pronunciation of the judgement.

Article 466 para 2 of the RO Criminal Procedure Code states that the following shall be deemed as tried *in absentia*: the convicted person who was not summoned to appear in court and had not been informed thereof in *any other official manner*, respectively, the person who even

though aware of the criminal proceedings in court, was justifiable absent from the trial of the case and unable to inform the court thereupon. The convicted person who had appointed a chosen lawyer or a representative shall not be deemed tried *in absentia* if the latter appeared at any time during the court proceedings and neither shall the person who, following the notification of the conviction verdict, according to the law, did not file an appeal, waived filing an appeal or withdrew their appeal. Consequently the defendant that has formally asked for court proceedings to take place in his or her absence is not considered as being tried *in absentia*.

If the defendant was present at the hearing at which the first instance court pronounced judgment and he did not file an appeal, waived filing an appeal or withdrew his appeal, the proceedings as such, although in absentia will not lead to the reopening of the criminal proceedings at the request of the convicted person

If the defendant was present at the hearing at which the appelate instance court pronounced judgment, the proceedings, in absentia will lead to the reopening of the criminal proceedings at the request of the convicted person if the conditions stipulated in Article 466 (2) of the RO Criminal Procedure Code are met.

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?

See above.

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?

Yes, it does. Article 89 of the RO Criminal Procedure Code states that a suspect or a defendant **has the right to be assisted** by one or more lawyers all along the criminal investigation, the preliminary chamber procedure and the trial, and judicial bodies are under an obligation to inform them on such right. Legal assistance is ensured when at least one of the lawyers is present. A person detained or arrested has the right to contact his or her lawyer, and confidentiality of communications shall be ensured to them, in compliance with necessary measures of visual supervision, guard and security, and the conversations between them shall not be wiretapped or recorded. Evidence obtained in breach of this paragraph shall be inadmissible. In addition, there are several situations when the legal assistance is mandatory *ex lege* and therefore having a lawyer even if the defendant is present is mandatory.

Thus, Article 90 of the RO Criminal Procedure Code states that legal assistance is mandatory a) when a suspect or defendant is underage, is admitted to a detention centre or an educational centre, when they are detained or arrested, even in a different case, and when in respect of such person a safety measure was ordered remanding them to a medical facility, even in a different case, as well as in other situations established by law; b) when a judicial body believes that a suspect or defendant could not prepare their defense on their own; c) during the course of

preliminary chamber and trial, in cases where the law establishes life detention or an imprisonment penalty *exceeding 5 years* for the committed offense.

In these situations listed under Article 90 if a suspect or defendant did not select a lawyer, the judicial body shall take steps to provide them with an ex officio one. During the entire course of criminal proceedings, when legal assistance is mandatory, if the chosen lawyer is unjustifiably absent, does not ensure a replacement or refuses unjustifiably to ensure the defense, even though the use of all procedure rights was ensured, the judicial body shall take steps to obtain appointment of an ex officio lawyer to replace him/her, by providing such replacement with a reasonable term and with facilities required for the preparation of an effective defense. This aspect shall be mentioned in a report or, as applicable, in the hearing report. During the course of the trial, when legal assistance is mandatory, if the chosen lawyer is unjustifiably absent from the hearing term, does not ensure a replacement or unjustifiably refuses to defend, even though the use of all procedure rights was ensured, the court shall take steps to appoint an ex officio counsel to replace them, by providing such replacement with a minimum term of 3 days to prepare the defense.

In terms of the ex officio lawyer he or she is under an obligation to appear whenever is called by the judicial body, ensuring a concrete and effective defense in the case. The mandate of an *ex officio* lawyer ceases when the selected counsel appears.

If during the trial the lawyer is absent and cannot be replaced under the terms of Article 91 (2), the case shall be adjourned.

As regards the relation between the lawyer and his or her client (defendant), Article 40 (1) and (2) of Law 51/1995 states that the lawyer shall be obligated to thoroughly study the causes entrusted to him, hired or ex officio, to appear for all hearings in the courts or at the criminal investigation bodies or other institutions, according to the mandate being entrusted, to manifest conscientiousness and professional probity, to plead with dignity in front of the judges and the parties in the trial, to submit written conclusions or minutes of the hearing whenever the nature or the difficulty of the case so requires or when the court orders to do so. Failure to observe these professional duties is a disciplinary conduct. The lawyer is obligated to take all due diligence to protect the rights, freedoms and legitimate interests of clients and to use the means provided by the law, which he or she considers to be favourable to them.

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?

As previously mentioned the convicted person who had appointed a chosen lawyer or a representative shall not be deemed tried in absentia if the latter appeared at any time during the court proceedings (Article 466 para 2 of the RO Criminal Procedure Code). The presumption operates in the sense that if the convicted person appointed a chosen lawyer he was aware of the proceedings and waived his right to attend it.

However if the convicted person is represented by an *ex officio* appointed lawyer he continues to be summoned unless the ex officio appointed lawyer made contact with him. To conclude, since he will continue to be summoned the proceedings will continue to be considered *in absentia*. However only if the conditions mentioned in article 466 (2) are met such proceeding will lead to a reopening of the trial at the request of the convicted person.

As mentioned above Article 364 of the RO Criminal Procedure Code states that the court proceedings may take place in the absence of the accused person, if the latter is missing, flees justice or changed his or her address without informing thereupon the judicial bodies (court) and, following the controls carried out, his or her new address remains unknown. The court proceedings may also take place in the absence of the defendant if, even though lawfully served the summons, the accused provides no justification for his or her absence from the trial of the case. Throughout the court proceedings, *the defendant*, including when deprived of liberty, *may request, in writing, to be tried in absentia and be represented by a chosen or ex officio lawyer*. When the court deems it necessary for the accused to be present, it may order the former's presence including by issuing a bench warrant.

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

From our perspective *defence* is a broader concept with several components and therefore it is not about being defended in absence during the court proceedings but about being *represented* before the court. Therefore, within the context of this question *our understanding* is that it is about given instructions to be represented within the court proceedings. As mentioned previously, Article 364 of the RO Criminal Code states that the defendant including the one in detention has the right to ask to be judged in his or her absence and thus to ask to be represented by the chosen or the ex officio lawyer.

If the defendant choose to exercise this right it should be expressly and in written. However irrespectively of his or her request of being judged in absentia, if the court considers his or her presence necessary, the judge can ask for his or her to be present and also can issue a bench warrant for being presented before the court.

According to the RO law, a lawyer is entitled to assist and represent a defendant, based on a contract concluded in a written form, which acquires a certified date after being recorded in the official register of evidence. The lawyer is obliged by law to advise his or her client promptly, in a conscientiously, correctly and diligently as well as *to inform him about the evolution of the case entrusted to him or her.*

- can the situation in which counsel is present and the accused absent be considered as "the defendant is present"?
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The only time the RO Criminal Procedure Code is expressly considering the defendant physically absent as being present is when he or she is participating to the court proceedings via videoconference. In all other cases if absent he or she is considered represented by his or her lawyer.

- 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?

Article 409 (2) of the RO Criminal Procedure Code states that appeal may be lodged not only by defendant but also by his or her lawyer as well as by his or her wife/husband.
Of course the defendant may withdraw the appeal no later than the closing of the debates in front of the appellate 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'?

In simple terms mandate means to give somebody the power to do something in his or her name and on his or her account. The mandate could be either general (in general terms) or special (specific actions). According to the Law 51/1995, and the Statue of the lawyer's profession, a lawyer has always to act within the framework of the contract between him/her and the defendant. The contract expressly provides the powers the client gives to the lawyer. Based on this, the lawyer is legitimating before the third parties, including courts, by means of lawyers' empowerment. Unless otherwise stipulated within the contract, the lawyer is empowered to perform any act specific to the profession which he or she considers necessary for the realization of the interests of the client. For activities expressly covered by the scope of the contract, it is a special mandate, based on which the lawyer may conclude acts of conservation administration or disposal in the name and on behalf of the client.

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).

In this respect Article 407 (1) of the RO Criminal Procedure Code states that after being pronounced, a copy of the minutes related to the criminal judgement shall be notified to the prosecutor, the parties, the victim and, when the defendant is detained, to the administration of the detention facility, in view of exercising the legal avenue of appeal. When the defendant does not understand Romanian, a copy of the minutes related to the criminal judgment shall be notified in a language he or she understands. The minutes must have the contents provided for the operational part of a criminal judgement. It means that among other references the minutes will include also the fact that the judgement is subject to appeal and the time frame in which it can be filed, the date when the judgement was pronounced and that it was made in a public session.

Once the criminal judgment is written the persons referred above are to be communicated with. According to Article 406 a criminal judgement is to be drafted no later than 30 days after being pronounced.

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

Indeed, according to Article 264 of the RO Criminal Procedure Code, communication of other procedural acts shall be performed as provided within the Chapter 1 Title VI. In the case of persons deprived of liberty, communication of other procedural acts shall be performed by fax or any means of electronic communication available at the detention facility.

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

A judgement of conviction of first instance is subject to appeal. After becoming final judgements of convictions are subject to an extraordinary legal remedy of annulment. The challenge for annulment may be filed against including the following cases: a) when the appeal court proceedings took place without lawfully summoning a party or when, even though lawfully summoned, the party could not appear in court and inform the court thereupon; e) when the appeal court proceedings took place without the participation of the prosecutor or the defendant, when it was mandatory for them to be present, according to the law; f) when the appeal court proceedings took place without the presence of the lawyer when the legal assistance of the defendant was mandatory, according to the law; h) when the appeal court did not hear the defendant present, in the case when the hearing was possible according to the law.
ART. 466
Reopening criminal proceedings in case of an in absentia trial of the convicted person
(1) The person with a final conviction, who was tried in absentia, may apply for the criminal proceedings to be reopened no later than one month since the day when informed, through any official notification, that criminal proceedings took place in court against them.
(2) The following shall be deemed as tried in absentia: the convicted person who was not summoned to appear in court and had not been informed thereof in any other official manner, respectively, the person who even though aware of the criminal proceedings in court, was lawfully absent from the trial of the case and unable to inform the court thereupon. The convicted person who had appointed a retained counsel or a representative shall not be deemed tried in absentia if the latter appeared at any time during the criminal proceedings in court and neither shall the person who, following the notification of the conviction verdict, according to the law, did not file an appeal, waived filing an appeal or withdrew their appeal.
(3) In the case of the person with a final conviction, tried in absentia, related to whom a foreign state ordered extradition or surrender based on the European arrest warrant, the time frame provided under par. (1) shall begin from the date when, following their bringing into country, they receive the conviction verdict.
(4) The criminal proceedings in court may not be reopened when the convicted person had applied to be tried in absentia.
(5) The provisions of the previous paragraphs shall apply accordingly to the person against whom a court ruling was returned to waive the service of the penalty or to postpone the service of the penalty.

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)?

Article 4 (1) FD 2002/584/JHA regulates several legal variants - a, b, c, d - which are not cumulative but alternative while each of them are having included either one hypothesis or two and when having two this have been considered either as cumulative or as alternative like 4 (1) c). Therefore depending on the legal system of each state, the issuing authorities shall indicate the one specific of the system to which it belongs. In this light, we have indicated that the time

frame to lodge an appeal is of 10 days once the minute is communicated (Article 410 (1) of the RO Criminal Procedure Code). The respective 10 days can also be considering as starting as of the day when the justified ground which prevented the defendant to exercise its right of appeal stops (Article 411 (1) Of the RO Criminal Procedure Code). Following the pronunciation of the judgement and until the expiry of the time frame to file the appeal, the parties, including the defendant may expressly waive this legal remedy. The waiving may be revisited, except for the appeal related to the civil component of the case, within the time frame to file the appeal. The waiving or its revisiting may be done in person or through a special intermediary (Article 414 of the RO Criminal Procedure Code). Apart from waiving the RO Criminal procedure law provides for the withdrawn of the appeal (Article 415). Thus, no later than the closing of the debates with the court of appeal, any of the parties, including the defendant, may withdraw the appeal he or she has declared. The withdrawal must be done in person by the party or through a special attorney, whereas if the party is detained, it shall be done through a certified statement or through a statement recorded in a report by the administration of the place of detention. The withdrawal statement may be submitted either before court of first instance whose judgement was appealed or before the court of appeal. The legal representatives may withdraw the appeal, in compliance with the requirements provided by the civil law, with respect to the civil component. The underage defendant may not withdraw the appeal filed in person or by his legal representative.

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.

See also the answer to question 8. The appeal is an *ordinary legal remedy* directed towards a judgement of conviction including an in absentia one. In terms of appeal the law does not provide specific grounds or reasons (as in the case of the extraordinary legal remedies), the case being examined by the court of appeal under all its aspects related to the facts and the law. When judging the appeal the court may administer again the evidence already administered before the court of first instance as well as may administer new evidence. The appeal court shall check the appealed judgement based on the reports and the material of the case file, as well as on any other items of evidence submitted within the appeal stage. To adjudicate the appeal, the court may appreciate the evidence differently, providing the reasons thereof. The court, adjudicating the appeal, shall issue one of the following solutions: 1. dismiss the appeal, maintaining the appealed ruling: a) if the appeal is late or inadmissible; b) if the appeal is not grounded; 2. sustain the appeal and: a) reverse the judgement of the court of first instance and issue a new judgement according to the rules referring to the settlement of the criminal action and civil action by the court of first instance; b) reverse the judgement of the court of first

instance and order that the case be retried by the court whose judgement was quashed as that court had tried that case while one of the parties had not been lawfully summoned and was absent or which, while lawfully summoned, could not attend and notify the court about this impossibility, raised by that party. The retrial by the court whose ruling was reversed shall also be ordered when there is any of the cases of absolute nullity, except for the case of lack of competence, when the competent court is ordered to retry the case.

The RO Criminal Procedure code provides also for extraordinary legal remedies within Chapter V Title III. Section 1 of Chapter V is dealing with the ***appeal for annulment*** (FR: *recours en annulation)* may be filed against the **final criminal court** judgements for a limited list of nine grounds (Article 426 a) to i)) including: a) when the appeal court proceedings took place without lawfully summoning a party or when, even though lawfully summoned, the party could not appear in court and inform the court thereupon; e) when the court proceedings took place without the participation of the prosecutor or the defendant, when it was mandatory for them to be present, according to the law; f) when the appeal court proceedings took place with the lawyer absent in the case when the legal assistance of the defendant was mandatory, according to the law h) when the appeal court did not hear the defendant present, in the case when the hearing was possible according to the law. The time frame to lodge an appeal for the above referred grounds is of 30 days since the decision of the court of appeal is communicated. Pending the adjudication of the appeal for annulment, the court, after taking the arguments of the prosecutor, may suspend the enforcement of the judgement whose annulment is requested. In terms of this legal remedy there are two steps to follow. The first one related to the admissibility of the challenge for annulment and the second one related to the trial proceedings. If the request for annulment is granted the court goes to the second stage. During the court hearing set to adjudicate the challenge for annulment, hearing the parties and the conclusions of the prosecutor, when finding the challenge grounded, the court shall quash the judgement whose annulment is requested and shall proceed either immediately, or by setting a court hearing, as the case may be, to adjudicate the appeal or to retry the case. The challenge for annulment shall be adjudicated only with the defendant present, when the latter is detained. The sentence issued in the case of the challenge for annulment shall be subject to appeal, whereas the decision in the appeal shall be final.

Section 2, Chapter V of the RO criminal Procedure Code covers ***appeal for cassation*** (FR ***recours en cassation).*** It is opened only to the judgements/decisions delivered by the courts of appeal and by the High Court of Cassation and Justice as an appeal court (except those by which the respective courts has decided the retrial). Such legal remedy can be filled in only for the following grounds: a). during the court proceedings, the provisions concerning the substantive competence or the quality of the person were not observed, when the court proceedings took place in a court that was inferior to that which is lawfully competent; b) the defendant was convicted for an offense which is not provided in the criminal law c) the end of the criminal court proceedings was ordered wrongfully; d) pardon was not established or it was wrongfully considered that the penalty applied to the defendant was pardoned; e) penalties were applied according to limits other than those provided in the law. Time frame is 30 days since the decision of the court of appeal was communicated. The third extraordinary legal remedy as provided by the RO Criminal Procedure Code is the *review* (Section 3, Chapter V of the RO criminal Procedure Code).

Section 4 of Chapter V provides ***reopening criminal proceedings in case of an in absentia trial of the convicted person.***

The person finally convicted, who was tried in absentia, may apply for the criminal proceedings to be reopened no later than one month since the day when informed, through any official notification, that criminal proceedings took place in court against him or her. In the case of the person with a final conviction, tried in absentia, related to whom a foreign state ordered extradition or surrender based on the European arrest warrant, the time frame provided by Article 466 (1) shall begin from the date when, following their bringing into country (Romania), he or she receives the judgement of conviction**.** According to Article 466 (2) the following shall be deemed as tried in absentia: the convicted person who was not summoned to appear in court and had not been informed thereof in any other official manner, respectively, the person who even though aware of the criminal proceedings in court, was lawfully absent from the trial of the case and unable to inform the court thereupon. The convicted person who had appointed a lawyer or a representative shall not be considered tried in absentia if the latter appeared at any time during the criminal proceedings in court and neither shall the person who, following the notification of the conviction verdict, according to the law, did not file an appeal, waived filing an appeal or withdrew their appeal. The criminal proceedings in court may not be reopened when the convicted person had applied to be tried in absentia.

The court shall hear the arguments of the prosecutor, the parties and the main subjects of the proceedings, and examine whether: a) the request was submitted within the deadline and **by one of persons provided under Article 466;** b) legal grounds were relied upon to reopen the criminal proceedings; c) the reasons based on which the request was submitted had not been shown in a prior motion to reopen criminal proceedings, that had been tried by the court of last resort. The request shall be examined as a matter of emergency and when the convicted person is serving the prison sentence applied in the case whose reopening is applied for, the court may wholly or partially suspend the enforcement of the court judgement and provide the reasons thereof and may order the convict to observe one of the obligations provided under Article 215 par. (1) and (2) of the RO Criminal procedure Code. When the service of the prison sentence has not begun, the court may order the convict to observe one of the obligations provided under Article 215 par. (1)and(2). If the court finds that the above mentioned requirements are fulfilled, it shall order in a court resolution that the request to reopen criminal proceedings is admitted. If the court finds that the requirements provided under Article 466 are not fulfilled, it shall order in a sentence that therequest to reopen criminal proceedings is denied. The court ruling that rejects the motion to reopen criminal proceedings shall be subject to the same legal remedies as the court ruling issued with the convict in absentia. The immediate *ex lege* effect of having the request to reopen the criminal proceedings admitted is the reversal of the judgement issued in the absence of the convicted person. The court shall reopen the criminal proceedings by extending it also to the parties that had not submitted any application. The court may also issue a ruling in their respect, without creating for them a more difficult situation.

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?

See the answer above

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?

See the answer above

According to Article 410 (1) of the RO Criminal procedure Code the time frame to file an appeal is 10 days, unless the law stipulates otherwise and starts counting since the notification of the copy of the minutes. If there are flaws related to the notification of the copy of the minutes, it is considered that the time frame for appeal has not started to flow.

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? No

- 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? No

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

Transposition of Directive 2016/343

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

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

The law transposing the Directive 2016/343 was already adopted by the Parliament and is currently pending before the President of Romania for being promulgated. After promulgation the law is to be published within the Official Journal and will come into force within 3 days after being published.

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] – already provided

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.

[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.]

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

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? The Law on transposing FD 2009/299/JHA has been published within the Official Journal on 11 December 2013 and entered into force within 15 days after publication (Law 300/2013 amending Law 302/2004).

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. From the perspective of a issuing state, article 2 FD 2009/299/JHA has been fully transposed within Article 92 of Law 302/2004

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? From the perspective of an executing state, article 2 FD 2009/299/JHA has been transposed as an optional ground.

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

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 the case

- 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? Yes – art.98 (2) i) of Law 302/2004

21. Which authority is/which authorities are responsible in your Member State for issuing and executing EAW's? The executing of the EAW is within the competence of courts of appeal (15) while the issuing within all courts within the RO judicial system (local courts, district courts, courts of appeal, High Court of Cassation and Justice).

B. Your Member State as issuing Member State

22.

a) Who exactly fills in EAW's within the issuing judicial authority? The judge delegated with the enforcement of final judgements within the court competent to issue

b) What are the formalities for issuing an EAW? Does your Member State have form sheets for that? The courts are using the format as provided within the FD.

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? Not the case ?

d) Which information does the issuing judicial authority usually provide under 4. in section (d) of the EAW-form? Proof of service of summon, or power of attorney

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? Information in this respect is mainly provided via the executing authority of the other member states (when asking for the in absentia judgement). Otherwise information is provided immediately after being surrendered.

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)? As indicated previously the court may suspend the enforcement of the custodial sentence.

ART. 469
Court proceedings related to the motion to reopen the trial
(1) The court shall hear the arguments by the prosecutor, the parties and the main subjects of the proceedings, and examine whether:
a) the motion was submitted within the deadline and by one of persons provided under Article 466;
b) legal grounds were relied upon to reopen the criminal proceedings;
c) the reasons based on which the motion was submitted had not been shown in a prior motion to reopen criminal proceedings, that had been tried by the court of last resort.
(2) The motion shall be examined as a matter of emergency and when the convicted person is serving the prison sentence applied in the case whose reopening is applied for, the court may wholly or partially stay the enforcement of the court ruling and provide the reasons thereof and may order the convict to observe one of the obligations provided under Article 215 par. (1) and (2). When the service of the prison sentence has not begun, the court may order the convict to observe one of the obligations provided under Article 215 par. (1) and (2).
(3) If the court finds that the requirements provided under par. (1) are fulfilled, it shall order in a court resolution that the motion to reopen criminal proceedings be admitted.
(4) If the court finds that the requirements provided under Article 466 are not fulfilled, it shall order in a sentence that the motion to reopen criminal proceedings be denied.
(5) The court report wherein the motion to reopen criminal proceedings is admitted may be challenged jointly with the merits.
(6) The court ruling that rejects the motion to reopen criminal proceedings shall be subject to the same legal remedies as the court ruling issued with the convict in absentia.
(7) Sustaining of the motion to reopen the criminal proceedings may result in the rightful reversal of the ruling issued in the absence of the convicted person.
(8) The court shall reopen the criminal proceedings by extending it also to the parties that had not submitted any application. The court may also issue a ruling in their respect, without creating for them a more difficult situation.
(9) Upon the sustaining the motion to reopen criminal proceedings, the court, ex officio or by request by the prosecutor, may order that one of the preventive measures provided under Art. 202 par. (4), letters b) to e) be taken. The provisions of the Title V of the general parties shall apply accordingly.

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)? The judgement is usually required by the prosecution office acting as receiving authority. Thus within article 99 of the Law 302/2004 it is mentioned that the prosecutor is to ask the issuing authority to provide a copy of the respective judgement. Failure by the issuing judicial authority to deliver the sentencing decision rendered in absentia shall bear no effect on the apprehension of the requested person and the notification of the court. Further on, Article 103 of law 302/2004 states that if the case be, upon the demand of the requested person, the judge shall postpone the case only once, for at least 5 days, and request the issuing authority to deliver, in copy and in a language which the requested person understands, the sentencing decision rendered in absentia. Failure by the issuing authority to deliver the sentencing decision rendered in absentia shall bear no effect on the continuation of the execution procedure of the European Arrest Warrant and on the surrender of the requested person.

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, the form is part of the national implanting law and therefore is mandatory to use it (Article 86 (1) of Law 302/2004)

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? We do not recall such practice.

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?

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

According with Article 86 (4) of Law 302/2004 the EAW submitted to Romania should be translated into Romanian, English of French. The declaration was submitted to the Council and it is also available on the EJN website.

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? There is no consequence in the sense that it is not considered as a ground of refusal. Ultimately if translation into EN, FR or RO is poor, as an executing state we could consider asking for additional information so that we have a full understanding what is about.

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? We did not identify such cases within the recurrent practice.

Require additional information under Article 15 FD - EAW
Article 4 (a) (1) is applicable as follows:

(i) where the requested person has been absent during the all trial phase both the first instance trial and the appellate court trial;
(ii) where the requested person who was present at the first instance court with a final acquittal or discontinuance of the criminal proceedings has been absent during the appeal proceedings, as a result of which he has been finally convicted to imprisonment or a custodial measure (confinement in an educational centre or in a detention centre, or to medical hospitalization);

(iii) where the requested person was present during the first instance trial and got convicted, but was absent during the appeal proceedings, and the appellate court ruled on the guilt of the person concerned.

Instead, the box corresponding to Article 4(a)(1) should not be ticked in the following situations:

- if the requested person was absent during the proceedings in front of the first instance court but was present in the appeal proceedings;
- if the requested person was present during the proceedings in front of the first instance court and absent during the appeal proceedings, but the appellate court did not rule on issues concerning guilt, the nature or extent of the custodial penalty but other aspects related, e.g., to the nature and duration of the additional or ancillary penalties, to the legality and opportunity of imposing another non-custodial penalty (such as a fine that accompanies the imprisonment), or the way of solving the civil action in the criminal proceedings.

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?

According to article 478 of the RO criminal procedure code, during the criminal investigation, after the formal filing of charges, the defendant and prosecutor can conclude an agreement as a result of the defendant pleading guilty. The effects of the *guilty plea* shall be subject to approval by the hierarchically superior prosecutor. The guilty plea can be initiated by both the prosecutor

and the defendant. The limits of the guilty plea shall be set by prior written agreement from the hierarchically superior prosecutor. A guilty plea can only be concluded in written concerning the offenses for which the law requires a penalty of a fine or no more than 15 years of imprisonment. A guilty plea can be concluded when the gathered evidence provides sufficient information that the offenses for which charges have been filed exists, and that the defendant is the author of that offense. On entering a guilty plea legal assistance is mandatory. In such case the custodial sentence is to be reduced with 1/3 or in case of a fine with ¼. Such an agreement has to be indeed confirmed by the court. The court shall rule on the guilty plea following a public session, by judgment, after only after the hearing the prosecutor, the defendant and of the latter's lawyer, as well as, if present, of other parties and of the victim. Therefore, according to our system it is unlikely to have a judgement on the guilty plea agreement rendered in absentia as the presence of the defended is mandatory as well as his or her hearing.

Apart from this, the RO Criminal procedure regulates the *plea bargaining procedure* meaning that when the criminal action does not concern a crime punishable by life imprisonment, the president of the panel shall inform the defendant that he may apply for the trial to take place only based on the evidence submitted during the prosecution and on the documentary evidence submitted by the parties when the defendant fully admits all the acts held against him or her , informing the defendant that the limits of the imprisonment are to be reduced with 1/3 or if a fine with ¼. When the defendant applies for the trial to take place in the conditions provided under article 374 (4) of the RO Criminal Procedure Code, the court shall hear him following which, after the arguments by the prosecutor and the other parties, shall take a decision upon the respective application. The defendant may admit the offences he or she is charged with by the prosecutor and ask for the trial to take place in the conditions provided under article 374 (4) also in written (authentic document). If it admits the application, the court shall ask the parties and the victim if they propose the submission of documentary evidence.

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?

From the perspective of an issuing state the hypothesis to which the question is referring to it is not possible.

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

- the imposition of a penalty without having held a trial;

- 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?

Within our system we have 3 categories of penalties: principle, accessory and complementary. Among the principles the RO Criminal Code distinguishes life imprisonment, imprisonment and fine. All of them are to be disposed only by a court.

G.2 Meaning of 'the trial <u>resulting</u> 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? It should first be clarified if within this context the concept of trial is referring to a specific court hearing or session or to the process itself.

the concept 'trial resulting in the decision' refers to the trial itself. It applies to proceedings which give rise to decisions on appeal which include a re-examination, in fact and in law, of the merits of the case (Tupikas) as well as to certain types of subsequent proceedings including those handing down a cumulative sentence inasmuch as the authority which adopted the latter decision enjoyed a certain discretion (Zdziaszek). It does not apply to subsequent proceedings whereby the suspension of a custodial sentence is revoked if the decision does not change the nature or the level of the sentence initially imposed (Ardic).

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?

No, if we are talking about several hearings, part of the same criminal proceedings. If we are referring to several stages of the same trial – first instance court proceeding, appellate proceedings – see the answer from point 34.

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? The presence in person of the defendant during even one of the court hearings/sessions does preclude the applicability of Art. 4a.

See above

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'?

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'? It generally means within reasonable time. In terms of defendants living outside Romania Article 259 (11) states that in setting the day for the court session for the defendant who is located abroad consideration shall be given to applicable international law in the relation with the state on whose territory the suspect or defendant is located (e.g. if located within a EU member state also member of the Council of Europe consideration is to be given to the declarations made by the states parties to 1959 MLA Convention, reference to this effect might be found also in the bilateral treaties), and in the absence of such rules consideration shall be given to the need that the summons be received 30 days before the date of reporting before the judicial body *at the latest*.

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?

Article 262 of the Romanian Criminal Procedure Code provides for proof of reception of the summons that must include the case number, name of the criminal investigation body or court of law that issued the summons, the surname, first name and capacity of the summoned person, as well as the date they are summoned for. It must also include the date the summons was served, the surname, first name, capacity and signature of the person serving the summons, certification of the identity and signature of the person served, and the latter's capacity. Every time a report is written concerning the serving, posting or transmitting a summons electronically, such report shall appropriately include the mentions refereed above. In the situation where the summons is performed using e-mail or any other electronic messaging system, appended to the report shall be, if possible, evidence of the sending.

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? The fact that he or she presents him/herself before the court, or that a representative, chosen or an ex officio lawyer if the latter has contacted the defendant is presenting before the court shall cover any irregularity related to the summoning procedure (Article 353 (1) of the RO Criminal Procedure Code)

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? The defendant have had actual knowledge of the date and the place of the trial

39. What does the expression 'the person had given a mandate to a legal counsellor' mean? The article refers to the relation defendant and his or her lawyer. As already mentioned, according to the Law 51/1995, and the statue of the lawyer's profession, a lawyer has always to act within the framework of the contract between him/her and the defendant. The contract expressly provides the powers the client gives to the lawyer. Based on this, the lawyer is legitimating before the third parties, including courts, by means of lawyers' empowerment.

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?

The legal assistance by an ex officio lawyer is only made as a result of a written communication from the court, addressed to the bar association and settled by the Office of the Legal Assistance, based on the appointment of the lawyer under the conditions provided by Law no. 51/1995 for organization and exercise lawyer profession, as subsequently amended and

supplemented, by the State of the Lawyer's profession and the Framework Regulation for the organization of the judicial assistance services of the bars. Within this case the legal assistance is provided solely on the basis of lawyers' empowerment issued by Office of the Legal Assistance. The ex officio lawyer is not refrained from contacting the defendant.

Art.466 al.2 C.p.p. The following shall be deemed as tried in absentia: the convicted person who was not summoned to appear in court and had not been informed thereof in any other official manner, respectively, the person who even though aware of the criminal proceedings in court, was lawfully absent from the trial of the case and unable to inform the court thereupon. The convicted person who **had appointed a retained counsel or a representative** shall not be deemed tried in absentia if the latter appeared at any time during the criminal proceedings in court and neither shall the person who, following the notification of the conviction verdict, according to the law, did not file an appeal, waived filing an appeal or withdrew their appeal. As previously mentioned if an ex offcio appointed lawyer makes contact with the convicted person during the trial , the latter will not be summoned anymore so the trial will not be considered *in absentia*.

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? It is a case by case decision. The information is required via a request for additional information based on Article 15 of the FD.

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? After having the judgement communicated in accordance with the corresponding procedural rules. In terms of the legal remedy available to the convicted person from the perspective of the Romanian law the reference to it is expressly made with the respective judgement (it is mandatory by law).

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? It is not considered as a ground of refusal. Additional information based on Article 15 of the FD might be required.

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? ? It is not considered as a ground of refusal. Within the practice of the RO executing courts issuing authorities have been ask to resent the EAW form. The practical issue debated within such cases is if resending the form it is considered that a new EAW was actually issued.

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 'right to a retrial, or an appeal' mean? May Member States make an actual retrial or an actual appeal dependent on any other 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)?

Legal remedies available to a person sought convicted in absentia according to the Romanian Criminal Procedure Code have been already presented.

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? The respective information if missing it is requested as an additional information. It is important to mention that within the RO practice as an executing state most of the EAW are issued for prosecution and rarely for the enforcement of custodial sentences. When requested for the enforcement of an imprisonment in most of the case the persons sought are Romanians who ultimately most of them choose to execute the sentence in Romania.

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? It is not considered as a ground of refusal.

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? The respective situation has not identified with the practice of the RO executing courts.

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? Such situations are subject to request for additional information. Decision to execute or not the respective EAW is delivered taken into consideration not only the EAW itself but all the other information provided by the issuing court as well as the person sought.

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? See the answer to 49

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? See the answer to 49

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?

From the perspective of Romanian law (meaning that such situations are likely to exist into the practice of the RO issuing judicial authorities) there are two procedural institutions that might follow within the hypothesis presented above. Thus the RO system provides for changes in the enforcement of court decisions. Thus, Article 583 provides for the revocation or cancellation of suspension of penalty enforcement under supervision. On a revocation or cancellation of a suspension of penalty enforcement under supervision set by Arts. 96 or 97 of the Criminal Code, the court deciding or having ruled on the offense that might cause such revocation or cancellation in first instance shall decide *ex officio* or based on a notification from the prosecutor or the probation officer. Article 584 provides for the replacement of a life detention sentence while Article 585 states that a penalty established by the court may be changed if, before the enforcement of the sentence or during the enforcement, the existence of any of the following situations is *established based on another final court decision*: a) multiple offenses; b) repeat offense; c) intermediate plurality; d) acts falling within the content of the same offense. The court may be seized *ex officio* or upon request by the prosecutor or by the convicted person. When receiving the application, the judicial panel's presiding judge shall order attachment of documents to the case files (the ones in which final decisions have been delivered) and the taking of all steps required for the case settlement. Article 586 provides for the replacement of a penalty by fine by a penalty by imprisonment procedure in the context of which the Criminal procedure code expressly provides that the convicted person shall be summoned and if he or she does not have a lawyer, the court shall appoint one *ex officio*. Cancellation and revocation of conditional release is also possible according to Article 588. The provisions contained in Title III of the special part regarding trial that do not contravene to the provisions of 4 Chapter of Title VI shall apply accordingly. The presence of the prosecutor is mandatory as well as the one of the detained person (appearance via video link is also admissible if there is agreement of the respective person within the presence of an ex officio or chosen lawyer). Further on, the RO system also knows the procedure of *Challenges against enforcement*. Thus Article 599 states that challenges against enforcement of criminal sentences may be filed in the following situations: a) when a sentence that was not final was enforced; b) when enforcement concerns a person other than the person mentioned in the conviction sentence; c) when ambiguities occur in respect of the sentence enforcement or when obstacles to enforcement occur; d) when amnesty, statute of limitations, pardon or any other cause for extinguishing or reducing the penalty is raised.

What is important to note is that the respective procedures are limited to the purpose for which they have been regulated meaning that they are only directed towards the penalty as such. Therefore to our opinion decisions amending the *quantum* of the original penalty do not fell within the ambit of Art. 4a.

In the light of all the foregoing, the answer to the first and third questions is that, in a situation such as that at issue in the main proceedings, the concept of a 'trial resulting in the decision', within the meaning of Article 4a(1) of Framework Decision 2002/584, must be interpreted as referring not only to the proceedings which gave rise to the decision on appeal, where that decision, after a fresh examination of the case on the merits, finally determined the guilt of the person concerned, but also to subsequent proceedings, such as those which led to the judgment handing down the cumulative sentence at issue here, at the end of which the decision that finally amended the level of the initial sentence was handed down, inasmuch as the authority which adopted the latter decision enjoyed a certain discretion in that regard.

Case C-271/17 PPU, Sławomir Andrzej Zdziaszek,

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? See answer to 52

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? See answer to 52

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? There is no such specific provision within the national

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 circumstances referred above might be considered as at least the second one is covered also by the Romanian legislation

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 – art. 92 from the perspective of the issuing state and art 98 (2) i) from the perspective of the executing authority

- an English translation thereof.[5] - already provided

[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.

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 most of the cases difficulties were related to the information included within the EAW format especially in those cases where the case was subject to several stages or were the respective persons sought were subject to several judgments of conviction.

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. No problems have been reported.

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. No problems have been reported.

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. No difficulties have been reported.

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. The executing authorities did not encounter any problem with regard to the European Arrest Warrant which contains multiple decisions from the point of view of the trial in the absence of the requested person. However, on August 29, 2018, the execution of a European arrest warrant issued by the Italian judicial authorities for the execution of a sentence resulting from the combination of three sentences imposed on the requested person by three sentenced trials was refused by the Court of Appeal of Targu Mures. The refusal to execute was based on the absence of double criminality in respect of escape from home arrest, the fulfillment of the prescription for the execution of the punishment applied for an attempted offense of robbery and the Romanian nationality.

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. Yes, there were such difficulties and those cases have required providing additional information including on the legal system. In most of the cases decisions have been positive.

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 such cases have been identified.

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. No such cases have been identified

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 such cases have been identified

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. No such cases have been identified.

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. No difficulties have been reported.

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.

In principle, the RO issuing did not encounter difficulties in their relations with the executing judicial authorities regarding the cases in which the trial consisted of more hearings and the defendant was present at one or more but not all hearings. However, there were some courts reporting a number of such difficulties in particular in relation to some executing authorities of some member states who have repeatedly requested additional information on the presence / personal information / legal assistance of the defendant, who was acquainted with the term or whose hearing was no longer required, in the same court, in appeal or re-trial proceedings.

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. No problems have been reported.

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 difficulties have 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. Not the case

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 Not the case

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. Not the case

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. Not the case

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. Not the case

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.

In principle, the RO issuing authorities did not encounter difficulties in their relations with the executing judicial authorities in respect of the European Arrest Warrant where point 3.4. of section (d) was ticked. However, some courts reported difficulties encountered in dealing with the executing authorities of some member states in the sense that the respective issuing authorities have repeatedly called for additional safeguards in the sense that: the requested

person will be expressly informed at the time of handing down the conviction that he or she has the right to an effective remedy or re-examination of the case. After communicating the required guarantees the respective persons have been surrendered.

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. Yes, in most of the cases the executing authorities have had difficulties in understanding the RO system. E.g. in those case were EAW was issued based on a judgement delivered as an effect of revocation or cancellation of suspension of penalty enforcement under supervision or as an effect of the judgement delivered in accordance with Article 585.

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. In principle no difficulties have been considered as being present within the practice of the issuing authorities. However there were courts reporting that they have been encountered difficulties in those situations in which the EAWs were issued for the execution of custodial sentences resulting from the accumulations of the sentences set out in several judgments. In such shortcomings, additional information was requested by the enforcement authorities in the respective states about the resulting penalty that was different in duration to the sentences imposed by the conviction decisions. Such difficulties have been overcome with the communication by the issuing court of the convictions related to the requested person

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. No problems have been reported.

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. No problems have been reported

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. Not the case

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? Among the additional information required the followings have been identified the purpose of having the EAWs

issued (when although mentioned that it was issued for prosecution or execution of a custodial sentence) information available indicated that the aim was only to have the person heard or to find out if the person is appealing or not the respective judgement; the enforceable nature of the penalty that has been the subject of EAWs, judged in the presence of the convicted person when requesting the surrender of the person concerned for the execution of a custodial sentence and point (d) of the EAW form was not completed with regard to each criminal procedure in which there were established sentences by multiple judgments, but only as to the procedure in which these punishments were merged.

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. Not the case

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?

- data regarding the circumstances of committing the offences by the requested person;
- the place of the offense; the contribution of the requested person to the offense; the damage caused in particular to the amended punishment;
- the presence of the requested person at the trial; its presence at all hearings; informing it of the time of the trial; informing him of the date and place of the hearing, or informing him that a decision may also be taken in absentia; if the requested person has fled the criminal proocedings or not;
- providing the legal assistance of the requested person; if the requested person was assisted by a lawyer elected or appointed ex officio, if his lawyer participated in the hearing or adjudication; if the conviction was served; the possibility of the requested person, convicted in absentia, to contest the decision and to obtain after the reopening of the criminal trial in Romania; how to communicate to the requested person the conviction handed down in absentia; how and if the requested person was informed about possible remedies against the decision and whether he or she appealed against the judgment within the time limit or declared that he would not contest the judgment given in his absence;
- clarifications regarding the lack or presence of the requested person both in the procedure of revoking the suspension under the supervision of the prison sentence and in the trial after which the punishment of the prison was applied with suspension under its supervision of its execution;
- the conditions of detention in prisons in Romania; granting assurances that the requested person will, once surrendered, be placed in a detention facility that complies with the European Convention for the Protection of Human Rights and Fundamental Freedoms and European Minimal Principles / Rules on the Treatment of Detainees of 12 February 1987

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. Not the case

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.

3.9. Methodology

89. On which type of research did you base your answers to the questions in Part 3? Contribution received from the executing and issuing judicial authorities within the jurisdiction of 3 courts of appeal – Targu Mures, Galati and Constanta.

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):

- 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 52 (Court of Appeal of Targu Mures)

- b. out of this total number of EAW cases referred to under a.:
- the total number of EAW's for the purpose of prosecution 32 Court of Appeal of Targu Mures)

- the total number of EAW's for the purpose of execution of a custodial sentence or detention order 20 (Court of Appeal of Targu Mures)
    -
- 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 0

- 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 21 of which 4 cases where EAW were issued for criminal prosecution and 17 cases where EAWs were issued for the execution of the penalty or the penalty of deprivation of liberty (Court of Appeal of Targu Mures)

- 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) 7

- 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) 0

- 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 0

- 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 0

- 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 0

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 3

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

- 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 0

- 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 0

- the total number of cases in which the execution of the EAW was refused on the basis of Art. 4a FD 2002/584/JHA. 0

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.

FD 2009/299 / JHA has largely achieved its objective of facilitating judicial cooperation and improving the rights of the defense. In doing so, with the implementation of the Framework Decision, Member States have had to take internal legislative measures to fully guarantee the

right to a fair trial, including from the point of view of ensuring that the defendant is present at trial, or in the event of conviction in absentia, to secure the right to a new trial in his or her presence. However, at the level of the laws and practices of the Member States of the European Union, the notion of " judgement in absentia" is not integrated in a unitary manner, and therefore cooperation in the matter of the European Arrest Warrant may, in certain situations, be either unsuccessful or might cause delays.

92. Did you notice a difference in the practice of *in absentia* EAW's before and after the implementation of the FD? The only difference noticed was the increase of the requests for additional information from the executing judicial authorities on the clarification of the matter if the requested person was or was not present and when.

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

94. Did you see surrenders granted in *in absentia* cases that should have led to a refusal?[7] No

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

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

- modality and means in which the requested person, who has not been personally summoned, has received official information on the date and venue of the hearing, what that information was and how it was transmitted;
- to what extent the lawyer chosen or appointed ex officio exercised the rights of the defense?
- when and where the requested person has been handed down the judgment rendered in absentia and in what manner he has been informed of the right to a retrial or of any other remedy in which he has the right to be present;
- effectiveness of the right of re-judgment of the case in the presence, according to the law of the issuing state;
- the existence of inadmissibility in the means of appeal or in the proceedings for the enforcement, which resulted in the conviction of the person concerned being finally pronounced and a decision to convict a custodial sentence or a measure involving deprivation of liberty or the nature or the duration of the custodial sentence or deprivation of liberty.

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

[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 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.

Certain information relating to the retrial in the presence of the requested person would no longer have been necessary as the requested data was already included in the EAWs. At the same time, it is considered that in some cases, and in particular authorities of one EU MS, requested too much additional information on the presence of the defendant in the trial during the same procedural cycle, even if he had been heard or when the solution was subsequently abolished and the conviction was ordered following re-judgment.

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? The Romanian judicial authorities did not identify stringent problems related to the judgments in absentia, other than those related to differences in the legal systems of the EU MS, by defining and interpreting the concept of trial in absentia. It is however considered that such problems have opened the way for requesting and providing additional information, but have not hampered the procedures for cooperation between the RO and other EU MS authorities.

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 respective Handbook is very useful and must be on the table of law practitioners not only when the issue of the in the absence is raised but in any situation when an EAW is to be issued or executed.

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 respective answer could also be considered in the context of other FDs.

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. Directive is to be transposed.