QUESTIONNAIRE *Improving Mutual Recognition of European Arrest Warrants for the purpose of executing in absentia judgments*: the Netherlands

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[1] As of 16 January 2018 (not counting withdrawn preliminary references).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

Answer

My name is Vincent Glerum LLM, LLD and I completed the – bulk of the –[4] questionnaire.

I work as a legal counsellor (a rough translation of the Dutch word *stafjurist*), specialising in European criminal law and EAW-matters, at the District Court of Amsterdam (*rechtbank Amsterdam*), the Dutch executing judicial authority. My tasks at the District Court of Amsterdam consist of, *inter alia*, advising the court in more complex EAW-cases, preparing these cases for a hearing, acting as court clerk at the hearing, participating in the deliberations of the court in an advisory capacity and drafting the court´s judgment.

In November 2018 I was appointed to the special chair of international and European criminal law at the university of Groningen.

I have over fourteen years of experience in dealing with EAW-matters. In 2003 I was asked to prepare a manual on the application of the Law on Surrender (*Overleveringswet*) for the Extradition Chamber (*Internationale Rechtshulpkamer*) of the District Court of Amsterdam. An amended version of this manual was later published as a book.[5]

In 2013 I received my doctoral degree from the *Vrije Universiteit* (Free University, Amsterdam) on the basis of a thesis on refusal grounds in extradition law and EAW law.[6]

I have published extensively on the subject of extradition law and EAW law, mostly in Dutch (articles, books, commentaries, case notes).

[4] Some questions explicitly refer to the perspective of *issuing* judicial authorities (questions 22, 23, 59, 62, 64, 67, 70, 72, 74, 76, 78, 80, 82, 86, 88 en 89). These questions were answered on the basis of information provided by Sjaak Pouw LLM, Public Prosecutor, and Maik Lammertink LLM, assistant Public Prosecutor, both of Fugitive Active Search Team of the National Office (*Landelijk Parket*) of the Public Prosecution Service (*Openbaar Ministerie*). The questions in Part 4 (statistical data on the actual application of the national legislation transposing the FD's) were answered on the basis of case-file research, carried out by a team of interns at the District Court of Amsterdam. Laurie Schreurs LLM analysed the statistical data and provided the graphs.

[5] *De Overleveringswet. Overlevering door Nederland*, Den Haag: Sdu Uitgevers 2005 (The Law on Surrender. Surrender by The Netherlands).

[6] *De weigeringsgronden bij uitlevering en overlevering. Een vergelijking en kritische evaluatie in het licht van het beginsel van wederzijdse erkenning*, Nijmegen: Wolf Legal Publishers 2013 (The grounds for refusal as regards extradition and surrender. A comparison and critical evaluation in the light of the principle of mutual recognition).

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.

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)?**

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?

Answer

a)

Introduction

Dutch criminal law distinguishes between crimes (*misdrijven*) and misdemeanours (*overtredingen*).

Dutch criminal procedural law provides for three-tier jurisdiction in criminal matters:

- first instance: District Courts (*rechtbanken*);[7]

- second instance (appeal): Courts of Appeal (*gerechtshoven*);[8]

- third instance (cassation): Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*).

The Magistrate's Division (*kantongerecht*) of a District Court is competent to try misdemeanours only (with some exceptions; see Art. 382 CPC). Competent to try crimes are the three-judge division (*meervoudige kamer*), the single judge-division (*politierechter*) and the juvenile judge-division (*kinderrechter*) of a District Court. The latter three divisions also try those misdemeanours which do not belong to the competence of the Magistrate's Division and may even try misdemeanours which do belong to the competence of the Magistrate's Division alongside one or more crimes (Art. 349(2) CPC).

[7] District Court of Amsterdam; District Court of Den Haag; District Court of Gelderland; District Court of Limburg; District Court of Midden-Nederland; District Court of Noord-Holland; District Court of Noord-Nederland; District Court of Oost-Brabant; District Court of Overijssel; District Court of Rotterdam; District Court of Zeeland-West-Brabant.

[8] Court of Appeal of Amsterdam; Court of Appeal of Arnhem-Leeuwarden; Court of Appeal of Den Haag; Court of Appeal of 's-Hertogenbosch.

This questionnaire will focus on proceedings before the three judge-division of the District Court for crimes.

A. Summons and notice to appear

Distinction between summons and notice to appear

As regards informing a defendant of the date and the place of a court hearing, the Code of Criminal Procedure (CPC, *Wetboek van Strafvordering*)[9] distinguishes between:

- a summons (*dagvaarding*) and

- an oral or a written notice to appear (*aanzegging* (oral) or *oproeping* (written)).

In proceedings before the three-judge division (*meervoudige kamer*) of the District Court, the defendant is informed of the **first** hearing by means of a summons (*dagvaarding*). If that hearing is adjourned, the defendant will be summoned to the **next** hearing by means of:

- a written notice to appear (*oproeping*), if the hearing was adjourned *sine die* or if the hearing was adjourned to a specific date but the defendant was not present at the time of the adjournment;

- an oral notice to appear (*aanzegging*), if the hearing was adjourned to a specific date and the defendant was present at the time of the adjournment (see also under C).

The summons

The summons (*dagvaarding*) contains:

- information about the date[10] and the place[11] of the first hearing;

- information about the rights of the defendant (Art. 260(4) CPC) and

- the charge against the defendant (Art. 261(1) CPC).

As regards information about the rights of the defendant, Art. 260(4) CPC only requires that the defendant is informed of the right to lodge an objection against the summons, of the right to hear witnesses and experts, of the possibility to apply for assistance by an interpreter and of

[9] I have used the non-official English translation of the CPC (text as valid on 8 October 2012) available at www.legislationonline.org.
[10] Supreme Court, judgment of 7 February 1984, ECLI:NL:HR:1984:AB9652.
[11] Supreme Court, judgment of 2 April 1991, ECLI:NL:HR:1991:ZC8774; Supreme Court, judgment of 14 October 2003, ECLI:NL:HR:2004:AG2651.

the possibility that the court may order that he be brought to the hearing, forcibly if need be. **In practice**, the summons also informs the defendant of his right to be present at the trial.

The summons does not mention as such that a judgment may rendered *in absentia* if the defendant does not appear at the hearing (compare Art. 4a(1)(ii) FD 2002/584/JHA). The only thing that comes even remotely near, is the statement that the defendant is not obliged to appear at the hearing, that he may have his legal counsellor defend him in his stead and that the court may force him to attend the hearing, if the court deems this necessary.[12]

As of 1 April 2018 – the date at which Directive 2016/343/EU should have been transposed –, it is doubtful whether the information contained in the summons meets the requirements of Art. 8(2)(a) Directive 2016/343/EU ('Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that: (a) the suspect or accused person has been informed, in due time, (…) of the consequences of non- appearance') and recital (36) of the preamble of Directive 2016/343/EU ('Informing the suspect or accused person of the consequences of non-appearance should, in particular, be understood to mean informing that person that a decision might be handed down if he or she does not appear at the trial'). Moreover, even if one were to hold that the information contained in the summons does comply with the directive, there is no national **legal** requirement to provide that information. According to the CoJ, Member States must, 'in order to secure the full implementation of directives **in law and not only in fact**, establish a specific **legal** framework in the area in question'.[13] Mere **practices** do not constitute valid transposition of a directive.[14]

A defendant who does not – or does not sufficiently – understand Dutch will be provided either with a written translation of the summons or with a written notification of the place, date and time of the hearing, a brief description of the offence he is charged with and of the information mentioned in Art. 260(4) CPC, in a language he does understand (Art. 260(5) CPC). With these provisions the Netherlands transposed Art. 3 of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings.[15] According to Art. 3(1) Directive 2010/64/EU the defendant who does not understand the language of the criminal proceedings shall be provided with a translation of essential documents; according to Art. 3(2) Directive 2010/64/EU essential documents shall include the charge or indictment.

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[12] See the model form of the summons available on the website of the Public Prosecution Service, https://www.om.nl/bijlagen-vraag/achterzijde/.
There is a ministerial circular – which does not have force of law – establishing model forms for the official record of service and for the summons (*Stcrt*. 2002/98). The model form for the summons deviates from the model form found on the Public Prosecution Service's website, but like the latter model form, the former does not mention as such that a judgment may rendered *in absentia* if the defendant does not appear at the hearing. The circular only concerns some types of criminal cases, mostly cases which are not dealt with by a three-judge divisions of a District Court.

[13] See, *e.g.*, CoJ, judgment of 28 April 2005, *Commission/Italy*, C-410/03, ECLI:EU:C:2005:258, para 32 (emphasis added).

[14] See, *e.g.*, CoJ, judgment of 14 April 2005, Commission/Netherlands, C-146/04, ECLI:EU:C:2005:236, para 6 (emphasis added).

[15] *OJ* 2010, L 280/1.

Notice to appear

The written notice to appear (*oproeping*) contains information about the date and the place of the next hearing.[16]

There is no national **legal** requirement to inform the defendant of his rights nor of the consequences of non-appearance (compare Art. 4a(1)(a)(ii) FD 2002/584/JHA). **In practice**, the written notice contains the same information as the summons. For the same reasons as stated above with regard to summonses, it is doubtful whether this complies with Art. 8(2)(a) Directive 2016/343/EU.

It is not required that a defendant who does not – or does not sufficiently – understand Dutch is provided with a translation of the written notice to appear *ex officio*. Such a defendant may, however, request a written translation in a language he understands (Art. 32a(1) CPC).

The oral notice to appear (*aanzegging*) pertains to the date and the place of the next hearing only. An oral notice to appear can only be given to a defendant who is present at the hearing. At the hearing, a defendant who does not – or does not sufficiently – understand Dutch will be assisted by an interpreter Art. 275(1) CPC). The oral notice to appear will, therefore, be translated in a language the defendant understands.

B. The giving of judicial notices

According to Art. 585(1) CPC 'judicial notices' shall be given to natural persons by means of:

a. service (*betekening*);

b. sending (*toezending*);

c. oral notice (*mondelinge mededeling*).

The notion of 'judicial notices' (*gerechtelijke mededelingen*) comprises summonses (*dagvaardingen*) and oral and written notices to appear (*aanzeggingen* and *oproepingen*).

C. Oral Notice

Oral notice to appear at the next hearing is given by the president of the three-judge division (Art. 319(1) CPC) and is recorded in the official report of the hearing (*proces-verbaal*). (See also under A.)

[16] In this regard the rules concerning summonses apply to written notices to appear also: opinion Advocate-General Vellinga, ECLI:NL:PHR:2003:AG2651, para 11.

D. Service

By ‘service’ is meant ‘delivery of a judicial letter in the manner prescribed by law’ (Art. 585(2) CPC).

According to Art. 586(1) CPC ‘[j]udicial notices shall only have to be given by means of service in the cases prescribed by law’, which is the case with ‘[s]ummonses and notices to appear, with which the Public Prosecution Service (…) is charged’.

The Public Prosecution Service is charged with the summons (*dagvaarding*) and the written notice to appear (*oproeping*). Both types of judicial notices must, therefore, be served on the defendant ‘in the manner prescribed by law’.

Delivery (*uitreiking*) of a judicial letter as meant in Art. 585(2) CPC ‘shall be made by post’ (Art. 587(1) CPC). Nowadays, however, the delivery is made by a governmental agency.

E. Service of summonses and written notices to appear on the defendant

The CPC distinguishes between a delivery in person and a delivery not in person. This distinction is relevant for determining:

- whether notice of a non-final judgment of conviction must be served on the defendant (see the answer to question 8a));

- the time frame for lodging an appeal or an appeal on points of law.

E. 1 Delivery in person in the Netherlands

Delivery of the summons or of the written notice to appear to the defendant in person consists of handing over that document to the defendant. It is not required that the defendant signs the official record of service (*akte van uitreiking*) for receipt of the summons or of the written notice to appear.[17]

In two cases the summons or written notice to appear **must** be delivered to the defendant **in person** (Art. 588(1)(a) CPC)**,** *viz.* if:

- the defendant ‘has been deprived of his liberty by law in the Netherlands **in connection with the criminal case to which the judicial notice to be delivered pertains**’ and

- the defendant ‘has been deprived of his liberty by law in the Netherlands in other cases designated by or pursuant to Governmental Decree’.

[17] Supreme Court, judgment of 11 January 2011, ECLI:NL:HR:2011:BO5251, para 2.

In essence, the Decree on the giving of judicial notice (*Besluit kennisgeving gerechtelijke mededelingen*) designates as 'other cases': deprivation of liberty in case of remand, the execution of a custodial sentence or a detention order, detention pending removal of an alien and coercive detention in bankruptcy proceedings, alimony proceedings and administrative sanction proceedings. Cases in which the defendant is prosecuted before the Magistrate's Division (*kantongerecht*) are excluded.

In view of Art. 588(1)(a) CPC, the Public Prosecutor must check the relevant computer systems to see whether the defendant is deprived of his liberty, before serving a summons or a written notice to appear.

E.2 Other cases of delivery in the Netherlands

In all other cases in which the summons or the written notice to appear is delivered in the Netherlands (Art. 588(1)(b) CPC) it must be delivered to:

> a) the address where the defendant is registered as a resident in the Dutch population register (*Basisregistratie personen*) or
>
> b) the place of residence or abode of the defendant in the Netherlands, if he is not registered as a resident in the Dutch population register or
>
> c) the clerk of the District Court, if the defendant is not registered as a resident in the Dutch population register and does not have an actual known place of residence or abode in the Netherlands.

From the system of Art. 588 CPC it follows that, in case of non-detained defendants, preference should be given to delivery of the summons or of the notice to appear at the address where the defendant is registered in the Dutch population register.[18] By law every resident is required to notify his community (*gemeente*) of his address, which is then entered in the population register.

In situation a) (registered address) or situation b) (actual known address):

- if the defendant is not present at that address, the delivery shall be made to 'the person present at that address and who declares that he is prepared to have the document promptly delivered to the addressee' (Art. 588(3)(a) CPC);

- if no one is present at that address, the delivery shall be made to 'the addressee or a person authorised by him at the location stated in a written message left behind at the address stated in the notice'.

[18] Supreme Court, judgment of 12 March 2002, ECLI:NL:HR:2002:AD5163, para 3.2.

Delivery to the defendant **constitutes** service **in person**. Delivery to a person authorised by the defendant **in writing** is **considered** as service **in person** (Art. 588(3)(b) CPC).

The summons or the written notice to appear will be kept at the location stated in the written message for a period of seven days, not counting the day on which delivery of the summons or of the written notice to appear was attempted (Art. 4(1) Decree on the giving of judicial notice).

- if delivery could not be made, the summons or the written notice to appear shall be sent back to the issuing authority. However, '[i]f it appears that on the date of delivery and at least five days thereafter the addressee was registered as resident in [the Dutch population register] at the address stated in the [summons or the written notice to appear], the [summons or the written notice to appear] shall then be delivered to the clerk of the District Court' and 'the Public Prosecution Service shall promptly send a copy of the [summons or the written notice to appear] to that address' (Art. 588(3)(c) CPC).

E.3 Delivery abroad

If the defendant is not registered as a resident in the Dutch population register and does not have an actual known place of residence in the Netherlands, but does have a **known place of residence abroad**, the Public Prosecution Service must deliver the summons or the written notice to appear by sending it 'either directly, or via the competent foreign authority or agency and, insofar as a treaty is applicable, with due observance of that treaty' (Art. 588(2) CPC).

Some treaties to which the Netherlands are a Party and which provide for mutual assistance with regard to the service of summonses: the *European Convention on Mutual Assistance in Criminal Matters*[19] and the *Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters*;[20] the *Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union*[21] and the *Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*.[22]

[19] Strasbourg, 20 April 1959.
[20] Strasbourg, 8 January 2001.
[21] *OJ* 2000 C 197, p. 3.
[22] *OJ* 2000 L 239, p. 19.

Sending the summons or the written notice to appear constitutes a valid service thereof.[23] The day of sending constitutes the day of service of the summons or of the written to notice to appear[24] (this is relevant for the time frame between service and the hearing; see under G). The relevant date must be recorded in the official record (*akte van uitreiking*).[25]

If a competent foreign authority or agency assisted in sending the summons or the written notice to appear and if that foreign authority or agency 'confirms that the [summons or the written notice to appear] has been delivered to the addressee,[26] this delivery shall be deemed to be a service **in person**, 'without said confirmation having to be evidenced by any separate record' (Art. 588(2) CPC). Absent such confirmation, service of the summons or of the written notice to appear will not be considered as service in person.

The summons (*dagvaarding*) 'shall be translated in the language or one of the languages of the country in which the addressee resides or, insofar as it is probable that he is only fluent in another language, in that language'. As regards the written notice to appear, 'a translation of the essential parts thereof shall suffice' (Art. 588(2) CPC).

F. Consequences of invalid service of a judicial notice

Although the applicable provision (Art. 590(1) CPC)[27] seems to suggest otherwise, as a rule the court **must** void service of the summons or of the written notice to appear, if service was not effected in accordance with the aforementioned rules, **unless**:

- the defendant is present at the hearing or

- the legal counsellor of the absent defendant is present at the hearing and does not challenge the validity of service. Absent any challenge to the validity of the summons or the written notice to appear, the court must assume that the defendant has voluntarily waived his right to be present.[28]

The fact that the legal counsellor was **mandated** by the absent defendant does not 'heal' any defects in the way the summons or the written notice to appear was served and does not absolve the court from examining any challenge to the validity thereof.[29]

Voiding service of a summons or of a written notice to appear has the following **consequences**:

[23] Supreme Court, judgment of 12 March 2002, ECLI:NL:HR:2002:AD5163, para 3.19.
[24] Supreme Court, judgment of 12 March 2002, ECLI:NL:HR:2002:AD5163, para 3.19.
[25] Supreme Court, judgment of 12 March 2002, ECLI:NL:HR:2002:AD5163, para 3.19.
[26] What is meant is a delivery to the addressee **in person in accordance with the foreign rules**: *Parliamentary Papers (Kamerstukken) II* 1979/80, 15842, 3, p. 18.
[27] Art. 590(1) CPC: 'The court **may**, if delivery was not made in accordance with the provisions of sections 588(1) and (3) and 589, declare the service null and void' (emphasis added).
[28] Supreme Court, judgment of 12 March 2002, ECLI:NL:HR:2002:AD5163, paras 3.26-3.27.
[29] Supreme Court, judgment of 11 February 2003, ECLI:NL:HR:2003:AE9649, paras 3.4-3.6.

- voiding service of the **summons** puts an end to the proceedings. Such a decision, however, does not trigger the protection offered by the principle of *ne bis in idem.* The Public Prosecutor may summon the defendant again on the same charge;

- voiding service of a **written notice to appear** does not put an end to the proceedings as such. These proceedings are still considered to be pending, but to proceed the Public Prosecutor must serve a written notice to appear at another hearing on the defendant.

G. Time frame between service and the hearing

Between the day on which the summons or the written notice to appear was served and the day of the court hearing a period of at least ten days must have expired, not counting the day of service and the day of the hearing (Art. 265(1) CPC; Art. 320(3) CPC).

This provision aims at ensuring that the defendant has enough time to prepare for the hearing.

If the summons or the written notice to appear is served on the defendant **in person**, he may **consent** to a shorter time frame (Art. 265(2) CPC).

If less than ten days have elapsed between the day of service and the day of the hearing (without the consent of the defendant) and:

- the defendant **is not** present at the hearing, the court **must adjourn** the hearing;

- the defendant **is** present at the hearing and asks for an adjournment in the interest of his defence, the court **must adjourn** the hearing, **unless** it concludes that 'in all reasonableness, continuation of the hearing cannot prejudice the defendant in his defence' (Art. 265(3) CPC).

H. Valid service and the right to be present

Presumption of a waiver and clear indications to the contrary (case-law)

Valid service of the summons or the written notice to appear at the registered or factual address of the defendant in the Netherlands or at his known address abroad, gives rise to the **presumption** that the absent defendant voluntarily waived his right to be tried in his presence, unless there are **clear indications to the contrary**.[30]

[30] Supreme Court, judgment of 12 March 2002, ECLI:NL:HR:2002:AD5163, para 3.33-3.34.

When such clear indications are present, *e.g.* when the defendant is **detained abroad,** the court must, as a rule, adjourn the hearing in order to enable the defendant to be present at a later hearing.[31]

Presumption of a waiver and clear indications to the contrary (legislation)

Apart from the duty to adjourn the hearing in case of clear indications that the defendant has not voluntarily waived his right to be tried in his presence, which is imposed by case-law, Dutch legislation imposes a further duty to guarantee this right in cases in which, notwithstanding valid service, the defendant cannot be deemed to have voluntarily waived that right.

Unless the summons or the written notice to appear was served **in person** on the defendant or on **a person authorised by the defendant (either orally or in writing)** [in which case in the view of the legislator it is sufficiently guaranteed that the defendant **actually** received the summons], Art. 588a(1) CPC imposes the **additional** requirement of sending a copy of the summons or of the written notice to appear by post to the **last address given by the defendant** in three situations:

> a. when the defendant at the time of his first interrogation by the police has given 'an address in the Netherlands to which notifications about the criminal case may be sent';
>
> b. when the defendant at the start of the first instance hearing 'has given an address in the Netherlands to which notifications about the criminal case may be sent';
>
> c. when exercising a legal remedy in the case concerned by or on behalf of the defendant 'he has given an address in the Netherlands to which notifications about the criminal case may be sent'.

There are two – obvious – exceptions to the rule of sending a copy of the summons or of the written notice to appear to the last address given by the defendant (Art. 588a(3) CPC):

- the address given is the same as the address at which the summons must be delivered according to Art. 588 CPC;
- the defendant, after having given on a previous occasion as referred to in Art. 588a(1) CPC an address, explicitly indicates that he wishes to change this address.

[31] Supreme Court, judgment of 12 March 2002, ECLI:NL:HR:2002:AD5163, para 3.34. See also ECtHR, judgment of 28 August 1991, *F.C.B. v. Italy*, ECLI:CE:ECHR:1991:0828JUD001215186; ECtHR, judgment of 31 March 2005, *Mariani v. France*, ECLI:CE:ECHR:2005:0331JUD004364098 and ECtHR, judgment of 14 February 2017, *Hokkeling v. the Netherlands*, ECLI:CE:ECHR:2017:0214JUD003074912.

Each of the aforementioned three situations (a-c) constitutes a clear indication that the defendant did not voluntarily waive his right to be tried in his presence.

The time frame which must elapse between the sending of a copy of the summons or of the written notice to appear and the hearing is the same as the time frame for service of the summons or the written notice to appear (ten days) (Art. 588a(4) CPC).

Consequences of non-compliance with relevant legislation

If the defendant is not present and it does not follow from the case-file that a copy of the summons or of the written notice to appear was sent to the last address given by the defendant in accordance with Art. 588a(1) CPC, while none of the exceptions of Art. 588a(3) CPC applies, the court must examine whether there are reasons to adjourn the hearing in order to give the defendant the opportunity to appear at the next hearing. No duty to adjourn the hearing exists, if the court finds that:

- a circumstance has occurred from which it follows that the date of the hearing or of the later hearing was known to the defendant beforehand, or

- b. a circumstance has otherwise occurred from which it follows that the defendant apparently does not wish to be tried in his presence (Art 590(3) CPC).

These same rules apply, *mutatis mutandis*, to non-compliance with the time frame for sending a copy of the summons or of the written notice to appear (Art. 590(3) CPC).

Presumption of a waiver and proceedings on appeal

Turning back to the presumption of a waiver in case of valid service at the address of the defendant, one must distinguish between first instance proceedings and **proceedings on appeal**.

When a first instance judgment was **appealed** by or on behalf of the defendant or by the Public Prosecutor, the Court of Appeal **must reckon** with the **probability** that the defendant **wishes to exercise his right to be present** at the hearing on appeal. Even so, a defendant who lodges an appeal and who wishes to exercise his right to be tried in his presence, may **reasonably be expected** to take the **usual measures** to prevent that the summons on appeal does not reach him, **such as keeping in touch with his legal counsellor in order to be informed of the date of the hearing on appeal**.[32] (The legal counsellor of the defendant will be aware of that date, because he will receive a copy of the summons on appeal (Art. 48 CPC.))

[32] Supreme Court, judgment of 12 March 2002, ECLI:NL:HR:2002:AD5163, paras 3.36-3.37. See the opinion of Advocate-General Harteveld, ECLI:NL:PHR:2013:69, para 6.7: at the hearing on appeal, the legal counsellor of the absent defendant stated that he no longer was in contact with his client; it must therefore be inferred that the defendant did not stay in touch with his legal counsellor.

The same reasonable expectation applies to a defendant who has not lodged an appeal, but who is **aware** that **the Public Prosecutor lodged an appeal**[33] and even to a defendant who did not lodge an appeal and who is **not** aware that the Public Prosecutor lodged an appeal, but who had **to reckon** with the **possibility** of **an appeal by the Public Prosecutor**, because the defendant was acquitted at first instance. In such circumstances, a failure to keep in touch with his legal counsellor may lead the Court of Appeal to conclude that the defendant does not wish to be tried in his presence and that, therefore, he waived his right to be present.[34,35]

Because the Court of Appeal must reckon with the probability that the defendant wishes to be present at the hearing on appeal, it may not on the basis of the defendant's absence at the hearing conclude that he waived the right to be present, if he lodged the appeal **while he was detained** (see the answer to question 9c)). The Court of Appeal must examine whether the absent defendant is still detained and, if so, it must adjourn the hearing in order that the defendant may exercise his right to be present.[36]

I. Delivery when lodging an appeal against a first instance judgment

A **written notice to appear** at a hearing on appeal – not: a summons on appeal – may be served on the defendant or on his authorised representative, when lodging an appeal against a first instance judgment (Art. 408a CPC).

Service on the defendant **constitutes** service **in person**.

Service on the authorised representative is **considered** to be service **in person** (Art. 450(5) CPC). A defendant who authorises his legal counsellor to lodge an appeal on his behalf, may reasonably be expected to acquaint himself with the date and the place of the hearing on appeal.[37] A copy of the written notice to appear shall be sent by ordinary post to the address given by or on behalf of the defendant for that purpose (Art. 450(5) CPC).

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[33] Supreme Court, judgment of 12 September 2006, ECLI:NL:HR:2006:AW2522, para 3.3.

[34] Supreme Court, judgment of 21 March 2017, ECLI:NL:HR:2017:476, paras 2.5-2.6 (in this case the defendant was not present at the hearing on appeal; his legal counsellor, who was present, stated that he had not been able to reach his client and that his client had not mandated him). See also Supreme Court, judgment of 13 February 2001, ECLI:NL:HR:2001:AA9957, para 4.3.4 (extradition case). In this extradition case, the Dutch Supreme Court held that the requested person who was acquitted at first instance could expect the Public Prosecutor to lodge an appeal and should enquire whether the Public Prosecutor actually lodged an appeal. As the requested person did not do so, the Supreme Court concluded that he had waived his right to be present at the hearing on appeal.

[35] According to Advocate-General Machielse, a legal counsellor who assisted a defendant who was acquitted at first instance is required to point out to his client that the Public Prosecutor might lodge an appeal: ECLI:NL:PHR:2016:1502, para 3.5. He refers to ECtHR (Grand Chamber), judgment of 18 October 2006, *Hermi v. Italy*, ECLI:CE:ECHR:2006:1018JUD001811402, § 92 ('(…) However, the State cannot be made responsible for spelling out in detail, at each step in the procedure, the defendant's rights and entitlements. It is for the accused's legal counsel to inform his client as to the progress of the proceedings against him and the steps to be taken in order to assert his rights').

[36] Supreme Court, judgment of 12 March 2002, ECLI:NL:HR:2002:AD5163, para 3.39.

[37] *Parliamentary Papers* (*Kamerstukken*) *II*, 1995/1996, 24510, 3, p. 5-6.

These provisions do **not** refer to a **summons** on appeal. Unlike a summons on appeal, a written notice to appear on appeal does not need to contain information about the charge against the defendant (see also the answer to question 9a)). According to the legislator, in the circumstances envisaged in these provisions the defendant is aware of the charges either because he was served the first instance summons in person or because he was informed of the first instance judgment. The legislator, therefore, felt justified in dispensing with the requirement of providing information about the charge.[38]

J. Evidence of service

A record (*akte van uitreiking*) shall be kept of every delivery of a summons or of a written notice to appear (Art. 589(1) CPC). The record shall state:

1°. the authority which issued the judicial notice;
2°. the number of the letter;
3°. the person for whom the letter is intended;
4°. the person to whom the letter has been delivered;
5°. the place of delivery;
6°. the date and the hour of delivery.

If the summons or the written notice to appear could not be delivered at the registered address or at the actual known residence or abode of the defendant (see Art. 588(3)(c) CPC), the record shall also state the date on which the attempt to deliver it at that address was made (Art. 589(2) CPC).

If the Public Prosecution Service sends a copy of the summons or of the written notice to appear to the address at which delivery thereof could not be made (see Art. 588(3)(c) CPC), this shall be noted in the record (Art. 589(2) CPC).

H. Legal counsellor and summonses/notices to appear

The legal counsellor of the defendant will promptly receive a copy of every document which must be brought to the attention of the defendant, such as a summons or a written notice to appear (Art. 48 CPC).

This rule also applies to proceedings on appeal and to proceedings on appeal on points of law.

b)

[38] *Parliamentary Papers* (*Kamerstukken*) *II*, 1995/1996, 24510, 3, p. 5.

First of all, let me state that the Dutch Supreme Court is of the opinion that the case-law of the CoJ on Art. 4a FD 2002/584/JHA does not concern and, therefore, is not relevant to the interpretation of national rules on the service of summons in criminal proceedings.[39]

Delivery of the summons or of the written notice to appear to the defendant **in person** undoubtedly constitutes a 'personal summons' in the sense of Art. 4a(1)(a)(i) FD 2002/584/JHA, because in such cases it is 'ensured that the person concerned has himself received the summons and, accordingly, has been informed of the date and place of his trial'.[40]

Delivery of the summons or of the written notice to appear to a person **authorised by the defendant** does not constitute a 'personal summons' in the sense of Art. 4a(1)(a)(i) FD 2002/584/JHA. It is not excluded that such a delivery of the summons constitutes 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' in the sense of Art. 4a(1)(a)(i) FD 2002/584/JHA, but in order to qualify as such a service it must be **unequivocally established** that the person authorised by the defendant **actually** passed the summons on to the person concerned and when he did so.[41] The record of delivery as referred to in Art. 589 CPC will not indicate if and when this condition was met (see the answer to question 2a) under J). One could argue that, if a defendant expressly authorises a third person in writing to collect a summons for him, it is not an unreasonable inference that this third party will pass the summons on to the defendant. However, it is questionable whether a reasonable inference is sufficient to unequivocally establish that the defendant actually received the summons. At any rate, a reasonable inference does not answer the question *when* the defendant actually received the summons. The answer to that question is relevant for determining whether the defendant was informed in due time of the date and the place of the trial (Art. 4a(1)(a)(ii) FD 2002/584/JHA). In conclusion, delivery of the summons to a person authorised in writing by the defendant does not *in and of itself* equate to service 'by other means' as referred to in Art. 4a(1)(a)(i) FD 2002/584/JHA. However, the case-file may contain evidence that the person authorised by the defendant did indeed pass the summons on to the defendant and when he did so, *e.g.*, if the defendant requests in writing an adjournment of the hearing, stating that he has received the summons but is unable to attend the hearing.

All other methods of delivery of the summons or of the written notice to appear do not constitute a 'personal summons' as referred to in Art. 4a(1)(a)(i) FD 2002/584/JHA, neither do they constitute, in and of itself, service 'by other means'.[42] Again, the case-file may

[39] Supreme Court, judgment of 30 May 2017, ECLI:NL:HR:2017:976.
[40] CoJ, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, para 45.
[41] CoJ, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, paras 47-48.
[42] Concerning delivery to 'the person present at [the address of the defendant] and who declares that he is prepared to have the document promptly delivered to the addressee', see the Opinion of Advocate-General Hofstee, ECLI:NL:PHR:2017:1275, footnote 18.

contain evidence that the defendant actually received the summons or the written notice to appear and when he did so.

c)

The rules on service of judicial notices – see the answer to sub question a) – contain a number of presumptions or legal fictions.

Service on an authorised representative of the defendant – see Art. 588(3)(b) CPC with regard to a person who is **authorised in writing** by the defendant to collect the summons or the written notice to appear and Art. 450(5) CPC with regard to a person who is **authorised** by the defendant **to lodge an appeal** – is **considered** service **in person**. In both cases, it isn't necessarily so that the authorised representative **actually** handed over the summons or the written notice to appear to the defendant.

As to the example given in sub question c): if a summons or a written notice to appear is delivered in accordance with Art. 588(3)(a) or (b) CPC either at the registered address or at the actual known address or abode of the defendant to a third party who declares that he is prepared to have the document promptly delivered to the defendant, service of that summons or that notice to appear is considered to be **valid**. Confirmation that the defendant **actually** received the summons is not required. Such service, however, is **not** equivalent to service **in person**.

There is, however, a – rebuttable – presumption that the defendant voluntarily waived his right to be tried in his presence. Barring clear indications to the contrary (see the answer to question 2a) under H), the court is justified in proceeding with the case *in absentia*.[43]

On the other hand, there is **no presumption** that the defendant was **actually** aware of the date and the place of the hearing beforehand and that he, therefore, was actually aware or could have been aware of the date of the pronouncement of the judgment.[44] As a result, in case of a conviction of an absent defendant the time limit for lodging an appeal only starts running when the defendant becomes aware of that judgment. Consequently, notice of that judgment must be served on the defendant (see the answers to question 8a) and 9b)).

This compromise represents the outcome of balancing on the one hand the interests of society in pressing on with the proceedings even in the absence of the defendant – *e.g.* preventing impunity – against on the other hand the right of the defendant to be tried in his presence (on appeal).

[43] Supreme Court, judgment of 12 March 2002, ECLI:NL:HR:2002:AD5163, para 3.33.
[44] Compare Supreme Court, judgment of 10 October 2017, ECLI:NL:HR:2017:2586: notice of the judgment of conviction (see Art. 366 CPC and the answer to question 8) was served on 'the person present at [the registered address of the defendant] and who declares that he is prepared to have the document promptly delivered to the addressee'; this does not constitute a circumstance from which it follows that the judgment is known to the defendant (as referred to in Art. 408(2) CPC).

Essentially, the rules on commencement of the time limits for appeal and on notice of a judgment of conviction soften the effect of the presumption of a voluntary waiver.

***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?**

Answer

Contradictory and *in absentia* proceedings according to Dutch criminal procedural law; conditions under which *in absentia* proceedings are possible

Introduction

Dutch criminal procedural law distinguishes between contradictory proceedings (*procedure op tegenspraak*) and *in absentia* proceedings (*procedure bij verstek*).

Under Dutch criminal procedural law the defendant has a right to be present at the trial. He is under no duty to appear, but the court may order him to appear and may also order that he be brought to court, forcibly if need be (Art. 278(2) CPC).

The defendant appeared at one hearing at least

If the defendant appears at the hearing of the District Court, the proceedings are contradictory proceedings in which the defendant may exercise all the rights of defence. The legal counsellor of a defendant who is present at the hearing may exercise the same rights (Art. 331(1) CPC).

If the defendant is present at a hearing, but, after an adjournment, fails to appear at the next hearing, the proceedings are still considered to be contradictory, according to the adage 'contradictory proceedings remain contradictory proceedings' (*tegenspraak blijft tegenspraak*).[45] During contradictory proceedings, the legal counsellor of an absent defendant

[45] Supreme Court, judgment of 9 December 2003, ECLI:NL:HR:2003:AG3022, para 3.4.

may only conduct the defence, if he declares that the defendant has explicitly authorised him to do so in accordance with Art. 279(1) CPC (see also the answer to question 6).[46]

The defendant did not appear at all

If the defendant fails to appear, the court shall order that the defendant be tried *in absentia* (*bij verstek*) and that the trial be continued in his absence (Art. 280(1) CPC), unless:

- the summons was not delivered validly to the defendant and the court declares the summons null and void;

- the court orders that the defendant be brought to court, forcibly if need be, or

- a legal counsellor declares that the absent defendant has explicitly authorised him to defend him.

As a consequence of the order that the defendant be tried *in absentia*, the absent defendant cannot exercise any of the rights of defence. The defendant's legal counsellor who is present at the hearing and who is not explicitly authorised to defend his client – otherwise the court could not have ordered that the defendant be tried *in absentia* – is not entitled to exercise any of those rights on behalf of the defendant. As a rule, a non-mandated legal counsellor is only entitled to:

- explain the defendant's absence and

- to request an adjournment of the hearing in order either to give the defendant the opportunity to exercise his right to be tried in his presence or to give the legal counsellor the opportunity to obtain the defendant's explicit authorisation to defend him.[47]

If, after having ordered that the defendant be tried *in absentia*:

- the defendant appears after all or, in case of an adjournment, appears at a next hearing or

- has himself defended in his absence by an explicitly authorised legal counsellor after all,

the District Court **must revoke** the order to try the defendant *in absentia*. In that case, the examination of the merits of the case will start afresh and the proceedings will thenceforth be

[46] Supreme Court, judgment of 9 December 2003, ECLI:NL:HR:2003:AG3022, para 3.6.1.
[47] Supreme Court, judgment of 23 October 2001, ECLI:NL:HR:2001:AD4727, paras 4.8-4.9. The Supreme Court does not exclude that, in exceptional circumstances, the right to a fair trial might require deviating from that rule.

conducted as contradictory proceedings, although the District Court may order that specific investigative acts will not be conducted again (Art. 280(3) CPC).

Relevance of the 'labels' contradictory and *in absentia*

The 'labels' contradictory and *in absentia*, in itself, have no relevance whatsoever for determining whether the defendant may exercise a legal remedy against a judgment of conviction (see the answer to questions 9a) and 10) nor for the time frame within which to exercise a legal remedy (see the answer to question 9c)).

The national law meaning of *in absentia* proceedings compared to the EU law meaning of *in absentia* proceedings

Framework Decision 2009/299/JHA does not refer to the concept of *in absentia* proceedings, probably to avoid any possible confusion over the meaning of that concept. After all, the definition of that concept varies greatly between Member States. Instead, Framework Decision 2009/299/JHA uses the concept of a trial at which the defendant did not appear in person. The CoJ, however, does use the concept of *in absentia* proceedings as a synonym of a trial at which the defendant did not appear in person.[48]

Likewise, Directive 2016/343/EU does not refer to the concept of *in absentia* proceedings. However, from Art. 8(1) and (2), read in conjunction with recitals 36 and 37, it necessarily follows that this directive is applicable only to trials at which the defendant was not **personally** present.

In conclusion, I would suggest that as a matter of Union law the concept of *in absentia* proceedings refers to a trial at which the defendant was not personally present.

The national law meaning of *in absentia* proceedings to some extent coincides with the Union law meaning of the concept, but the Union law meaning is *broader* than the national law meaning.

Where the court orders that an **absent** defendant who is **not** represented by an **authorised** legal counsellor be tried *in absentia* in accordance with Art. 280 Dutch CPC, the defendant is **not personally present** at the trial resulting in the decision. In such cases the Union law meaning coincides with the national law meaning of the concept of *in absentia* proceedings.

The following situations, however, fall within the Union law meaning of the concept, but not within the national law meaning of the concept:

- when an **absent** defendant is **defended** by his **mandated** legal counsellor in accordance with Art. 4a(1)(b) FD 2002/584/JHA, as a matter of Union law the

[48] See, *e.g.*, CoJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, paras 55-56.

proceedings are *in absentia* proceedings (to which however an exception to the option of refusal applies), whereas according to national law these proceedings are regarded as contradictory proceedings;

- when a defendant is **present** at one or more hearings, but **not** at the hearing(s) at which the court deals with the **merits of the case**, as a matter of Union law it is suggested that the proceedings are *in absentia* proceedings to which Art. 4a applies (see the answer to question 35), whereas according to national law the proceedings are regarded as contradictory proceedings.

In these cases the Union law meaning of the concept of *in absentia* proceedings is broader or, viewed from the other side, the national law meaning of *in absentia* proceedings is narrower than the Union law meaning.

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)?

Answer

If the defendant was not present at the trial – and if he was not represented at that trial by his authorised legal counsellor –, the proceedings are considered to be *in absentia* proceedings. The mere fact that the defendant was present at the pronouncement of the judgment, is irrelevant in this respect.

5. If in the 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?

Answer

Trial consisting of several hearings

Once the defendant is present at one of the hearings, from then on the proceedings are considered to be contradictory proceedings (*procedure op tegenspraak*). If the defendant is absent at the next hearing(s), the proceedings are still considered to be contradictory proceedings according to the adage 'contradictory proceedings remain contradictory proceedings' (*tegenspraak blijft tegenspraak*) (see the answer to question 3).[49]

Therefore it follows that it is irrelevant what transpired at the hearings at which the defendant was present.

[49] Supreme Court, judgment of 9 December 2003, ECLI:NL:HR:2003:AG3022, paras 3.4-3.5.

Appearing at a hearing by way of videoconferencing?

If the defendant is present at the hearing, the court will *question* him (Art. 286(1) CPC)). *Questioning* an absent defendant can also take place by way of video conferencing (Art. 131a CPC).

The relevant provision only refers to questioning the defendant, not to his presence at the hearing. However, on the basis of the relevant legislative history it is clear that it was intended that an absent defendant could be present at the hearing by way of videoconferencing. Nevertheless, according to Art. 2(2)(b) Decree on videoconferencing (*Besluit videconferentie*), videoconferencing will not be used at the hearing at which the merits of the case are dealt with (*bij de inhoudelijke behandeling van de zaak*),[50] unless the defendant and his legal counsellor give their consent.

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

- **does the defendant have to have any knowledge of the proceedings against him or the scheduled trial;**
- **what are the conditions under which a trial may take place without the defendant being there?**
- **does the defendant have to have instructed his legal counsellor to defend him in his absence, either expressly or implicitly?**
- **can the situation in which counsel is present and the accused absent be considered as "the defendant is present"?**
- **does a legal counsellor have the right to appeal or to ask for a retrial independently or does he need the consent of the defendant?**

Answer

Yes. Art. 279 CPC law allows 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.[51] See also the answer to question 3.

The authorisation as required by Art. 279 CPC is an authorisation to conduct the defence at the trial in the absence of the defendant. The provision does not require that the defendant, at the time of authorising his legal counsellor, was aware of **the date and the place of the trial**. There is a presumption that the defendant was aware of the date and the place of the trial (see below).

[50] In contrast to so-called *pro forma* hearings. Such hearings are held for determining, *inter alia*, whether the defendant will remain in remand.

[51] This provision was introduced as a result of ECtHR, judgment of 22 September 1994, *Lala v. the Netherlands*, ECLI:CE:ECHR:1994:0922JUD001486189 and ECtHR, judgment of 22 September 1994, *Pelladoah v. the Netherlands*, ECLI:CE:ECHR:1994:0922JUD001673790.

The conditions under which a trial may be conducted in the absence of the defendant but in the presence of an authorised legal counsellor were discussed in the answer to question 3.

Under Art. 279 CPC what is needed is an **explicit** authorisation by the defendant to defend him at the trial in his absence. When invoking an authorisation by the defendant, the legal counsellor must declare that the defendant has given him an explicit authorisation to that effect (*daartoe uitdrukkelijk te zijn gemachtigd*) (Art. 279(1) CPC). Once the legal counsellor has made this declaration, the court is barred from enquiring whether the defendant has **actually** explicitly authorised his legal counsellor.[52]

Proceedings in which the legal counsellor is present and the defendant is absent, can only be considered as contradictory proceedings, if:

- the defendant **was at least present at one previous hearing**. In such proceedings the adage 'contradictory proceedings stay contradictory proceedings' apply (see the answer to question 3) or

- the legal counsellor **was explicitly authorised by the defendant to conduct the defence in the defendant's absence** and the District Court **consented** to a defence by an authorised legal counsellor (see the answer to question 3).

According to Art. 450(1)(a) CPC a legal counsellor may lodge an appeal on behalf of a defendant, if he declares that the defendant has **particularly authorised** him to do so.

As with the declaration mentioned in Art. 279(1) CPC, it is not up to the courts to enquire whether the defendant has indeed authorised the legal counsellor to lodge an appeal.

The circumstance that an absent defendant was defended by his authorised legal counsellor has no relevance whatsoever for determining whether the defendant may exercise a legal remedy against the judgment (see the answer to questions 9a) and 10). However, this circumstance is relevant for determining the time frame within which to exercise a legal remedy. Having authorised his legal counsellor, the defendant is deemed to have been aware of the date and the place of the hearing beforehand. In such circumstances, it is the defendant's responsibility to acquaint himself with the date of the pronouncement of the judgment (see the answers to question 9c), point I).

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'?

Answer

The concept of 'mandate' means an authorisation to conduct the defence at the trial in accordance with the wishes of the defendant.

Once the District Court consents to a defence by a legal counsellor (see the answer to question 3), that legal counsellor may exercise all the rights that the CPC affords a defendant who is

[52] Supreme Court, judgment of 8 april 2003, ECLI:NL:HR:2003:AF4323.

present and he may conduct the defence to the fullest extent and in the manner he deems necessary, in accordance with the wishes of his client.[53]

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).

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

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

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)?

Answer

a)

After the District Court closes the examination of the merits of the case, the judgment shall be pronounced straight away or at a later, specific date, but no later than 14 days after closing the examination of the merits of the case (Art. 345(1) CPC). If the defendant is present at the closing of the examination of the merits of the case, he, therefore, knows when the judgment will be pronounced.

The judgment is pronounced at a public court session (Art. 362(1) CPC).[54] The defendant has a right to be present at the pronouncement of the judgment. If he is remanded in pre-trial detention in regard of the offence of which he was tried, the defendant 'shall be present at the pronouncement of judgment' – these words are not meant to denote that defendant is obliged to be present, but impose a duty on the judicial authorities to ensure that he can exercise his right to be present –, unless he is unable to be present or he has given written or oral notice that he does not wish to be present (Art. 363(1) CPC).[55]

If the defendant was assisted by an interpreter at the hearing(s), the judgment shall be interpreted for the defendant at the public court session (Art. 362(3) CPC).

<u>The defendant is present at the pronouncement of the judgment</u>

If the defendant is present at the pronouncement of the judgment, the judge who reads out the judgment will inform him orally of the legal remedy which may be exercised against the

[53] Supreme Court, judgment of 8 april 2003, ECLI:NL:HR:2003:AF4323.

[54] I use the expression 'session', instead of 'hearing', because when pronouncing a judgment, the court does not hear any of the parties.

[55] If the defendant was unable to be present, the court clerk will read out the judgment to the defendant 'as soon as possible' at the place where the defendant is held in detention (Art. 363(2-3) CPC).

judgment and of the time limit within which that legal remedy may be exercised (Art. 364(1) CPC).[56]

There is no national legal requirement to provide the defendant with a copy of the judgment *proprio motu* (compare Art. 4a(1)(c and d) FD 2002/584/JHA). **At his request**, the defendant will receive **a copy** of the judgment (Art. 365(3) CPC). If he does not – or does not sufficiently – speak or understand Dutch, he will at the same time be provided with a written notification in a language he understands. The written notification contains, *inter alia*,

- the decision to convict him and

- if a sanction was imposed, the penalty or measure and the legal provisions on which the penalty or measure is based (Art. 365(4) CPC).

However, no such written notification will be provided for (Art. 365(4) CPC), if:

- the defendant was present at the pronouncement of the judgment and the judgment was interpreted for him or

- the defendant already received a written notification of the judgment in a language he understands (see below).

There is no national legal requirement to provide information about the legal remedy against the judgment, when providing the defendant with a copy of the judgment or with a written notification in a language he understands (compare Art. 4a(1)(c-d) FD 2002/584/JHA).

As of 1 April 2018, this state of affairs may be considered not to be in compliance with Directive 2016/343/EU. According to Art. 8(4) Directive 2016/343/EU Member States must ensure 'that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy (…)'. (See also the answer to question 2a) under A and to question 42).

<u>The defendant is not present at the pronouncement of the judgment</u>

If the defendant was not present at the pronouncement of the hearing, the Public Prosecutor shall serve a **notification of the judgment** of conviction on the defendant as soon as possible (366(1) CPC), **unless:**

- the summons to appear at the hearing was served on the defendant **in person** or the written notice to appear at the later hearing after the hearing was adjourned *sine die*, was served on the defendant **in person**;

- the defendant **appeared** at the hearing or at the later hearing,[57] or

[56] According to Advocate-General Vellinga, the judge should also provide the defendant with information on the manner in which to exercise the legal remedy: ECLI:NL:PHR:2005:AR3700, para 13.
[57] Presumably, this exception also applies when an absent defendant is defended by his mandated legal counsellor. See the answer to question 9c) sub I.

- a circumstance has otherwise occurred from which it follows that the date of the hearing or of the later hearing was **known** to the defendant **beforehand** (Art. 366(2) CPC).

In case of more than two hearings the term '**later** hearing' denotes the **last** hearing before the District Court closes the examination of the merits of the case.[58]

These three exceptions to the rule of notifying the judgment represent cases in which it is established or in which it is likely that the defendant **was aware of the date of the pronouncement of the judgment**. In such cases, the defendant may reasonably be expected to enquire after and to acquaint himself with the judgment.[59]

The notification of the judgment shall contain:

- the name of the judges who rendered the judgment;
- the date of the judgment;
- the legal designation of the criminal offence; stating the place and time at which it was allegedly committed and
- insofar as is stated in the judgment: surnames and forenames, date and place of birth, and the place of residence or abode of the defendant (Art. 366(3) CPC).

If the defendant does not – or does not sufficiently – speak or understand Dutch,[60] he will be provided with a translation of the notification in his native language or in any other language that he speaks or understands (Art. 366(4) CPC).[61]

Notification of a judgment of conviction is intended to inform the defendant of the content of the judgment and to enable him to decide whether he will appeal the judgment or not. If the notification is served on the defendant **in person**, this is directly relevant for the time limit within which he can appeal the judgment (see Art. 408(2)(c) CPC; see the answer to question 9c)).[62]

It should be stressed that it is not required to serve a **copy** of the judgment on the defendant, but rather a notification of that judgment (compare Art. 4a(1)(c and d) FD 2002/584/JHA).

Neither is it required that the notification of the judgment contains **information about possible recourses against the judgment and about the time limits within which to**

[58] *Parliamentary Papers (Kamerstukken) II* 1988/89, 21241, 3, p. 30.
[59] *Parliamentary Papers (Kamerstukken) II* 1995/96, 24834, 3, p. 10.
[60] The extent to which the defendant has a command of the Dutch language at the time of his first interrogation by the police is a relevant factor when deciding whether to apply Art. 366(4) CPC: Supreme Court, judgment of 9 October 2018, ECLI:NL:HR:2018:1888, para 2.4.
[61] Art. 366(4) CPC is part of the transposition of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right and translation in criminal proceedings (*OJ* 2010 L 280, p. 1). Failure to comply with the obligation to provide the defendant with a translation of the notification may excuse non-compliance with the time limits for lodging an appeal (on points of law) by the defendant: Supreme Court, judgment of 30 October 2018, ECLI:NL:HR:2018:2008, para. 2.5.
[62] However, if the defendant does not – or does not sufficiently – understand Dutch and was notified in person in Dutch only, this notification must not be held against him: opinion Advocate-General Bleichrodt, ECLI:NL:PHR:2018:771.

exercise these recourses (compare Art. 4a(1)(c and d) FD 2002/584/JHA), although **in practice** a leaflet is attached to the notification of the judgment, explaining whether the defendant may appeal the judgment and, if so, within which time frame and in which manner.

Because informing the defendant of the possible recourses and the relevant time limits is not a national **legal** requirement, as of 1 April 2018, this state of affairs may not be considered to be in compliance with Directive 2016/343/EU. According to Art. 8(4) Directive 2016/343/EU Member States must ensure 'that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy (…)'. (See also the answer to question 2a) under A and to question 42).

Even apart from the Directive, the right of access to a tribunal (Art. 6 ECHR/Art. 47 Charter) requires that, 'when serving a judgment of conviction on the defendant, particularly when at the moment of service he is detained or he is not represented by a legal counsellor, he must be informed in an reliable and official manner of the possible recourses against that judgment and the time frame within which to exercise those recourses'.[63] (See also the answer to question 42).

> Art. 366a CPC contains additional regulations concerning judgments in which, *inter alia*, a **suspended** custodial sentence is imposed, in order to ensure that the defendant becomes aware of the commencement of the **probation period**.
>
> This provision distinguishes between cases in which the defendant was present at the pronouncement of the judgment and cases in which he was not.
>
> If the defendant is **present** at the pronouncement of the judgment – **in which case Art. 366 CPC does not impose an obligation to serve a notification of the judgment to the defendant –**, the Public Prosecutor may **hand over** a **notification** to the defendant **immediately after pronouncement** of the judgment (Art. 366a(1) CPC). The notification shall contain, *inter alia*, the suspend custodial sentence imposed on the defendant, the conditions attached to the suspended custodial sentence or detention order and **the date of commencement of the probation period**, if the defendant waives his right to exercise a legal remedy (Art. 366a(1) CPC).
>
> If the defendant is **not present** at the pronouncement of the judgment and if according to Art. 366(2) CPC there is **no need to serve a notification** of the judgment on the defendant – *viz.* if it is established or if it is likely that the defendant **was aware of the date of the pronouncement of the judgment** – the notification of the suspended custodial sentence can be sent to the defendant via ordinary letter post (Art. 366a(2) CPC). The same goes, if the Public Prosecutor did not hand over the notification of the suspended custodial sentence to the defendant in person (as referred to in Art. 366a(1) CPC).
>
> If the defendant is **not present** at the pronouncement of the judgment and if according to 366(2) CPC a **notification** of the judgment **must be served** on the defendant – *viz.* if it is **not** established or likely that the defendant **was aware of the date of the**

[63] ECtHR, judgment of 1 March 2011, *Faniel v. Belgium*, ECLI:CE:ECHR:2011:0301JUD001189208, § 30. A propos the time frame see ECtHR, judgment of 29 June 2010, *Hakimi v. Belgium*, ECLI:CE:ECHR:2010:0629JUD000066508, § 36.

pronouncement of the judgment – a notification of the suspended custodial sentence must be served on the defendant. In such a case the notification of the suspended custodial shall contain not only the information referred to in Art. 366a(1) CPC, but also the information referred to in Art. 366 CPC.

b) Yes, the same rules apply.

c) See the answer to question 9a).

d)

Formalities for contesting the judgment
In the context of Dutch criminal procedural law 'contesting the judgment' must be understood as 'appealing against the judgment'.

An appeal must be filed by a statement made by the person who exercises the legal remedy at the registry of the court which rendered the judgment (Art. 449(1) CPC).

An appeal can be filed **on behalf of the defendant** by:

a. a legal counsellor, provided that he declares that he has been given specific authorisation for that purpose by the person who exercises the legal remedy;

b. an authorised representative who has been given a special written power of attorney for that purpose by the person who exercises the legal remedy (Art. 450(2) CPC).

A record of lodging an appeal will be kept by the clerk of the court (Art. 451 CPC).

If the defendant is **detained**, he may file an appeal by means of a written statement which he must send to the head of the institution where he is detained (Art. 451a(1) CPC). The head of the institution shall enter the statement in a register without delay – the date of entry in the register shall be considered as the date on which the appeal was lodged – and shall thereupon send the statement to the registry of the court which rendered the judgment (Art. 451a(2) CPC).

Not 'contesting' the judgment

The defendant may:

- **waive** his right to lodge an appeal against a certain judgment (Art. 453(3) CPC) or

- once he has lodged an appeal, **withdraw** it up to the start of the hearing on appeal (Art. 453(1 CPC).

A waiver or a withdrawal must be done by making a statement at the registry of the court which rendered the judgment (Art. 454(1) CPC). Art. 450(2) CPC and Art. 451 CPC shall apply *mutatis mutandis*. (See the answer to question 8d).)

If the defendant is **detained**, he may withdraw or waive an appeal by means of a written statement which he or she must send to the head of the institution where he is detained. Art. 451a(2) CPC shall apply *mutatis mutandis*.

A waiver or a withdrawal undoubtedly constitutes an express statement that he or she does not contest the decision, as referred to in Art. 4a(1)(c)(i) FD 2002/584/JHA.

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.**

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?**

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?**

Answer

a)

<u>Appeal against a first instance judgment</u>

The Public Prosecutor and the defendant who was not acquitted of the entire indictment may lodge an appeal (*hoger beroep*) with the territorially competent Court of Appeal (*gerechtshof*) against a **first instance** judgment concerning a **crime** (*misdrijf*), whether the judgment was rendered *in absentia* or not (Art. 404(1) CPC).

The Public Prosecutor and the defendant who was not acquitted of the entire indictment may appeal against a first instance judgment concerning a **misdemeanour** (*overtreding*), whether the judgment was rendered *in absentia* or not, **unless**:

a. the defendant was declared guilty of the misdemeanour without imposing a penalty or a measure or

b. no other penalty or measure was imposed than a fine or fines up to a (joint) maximum of € 50 (art. 404(2) CPC).

However, the defendant may appeal a judgment *in absentia* referred to in sections a) and b), if the summons to appear at the first instance court hearing or the notice to appear at a later hearing was **not** served on the defendant **in person** and no other circumstance has occurred from which it follows that the date of the court hearing or later court hearing **was known to the defendant beforehand** (Art. 404(3) CPC). In these circumstances, the defendant was not aware of the first instance hearings. Were it not for this exception to the rule, he would lose his only opportunity of obtaining a full determination of the merits of the charge, in respect of both the law and the facts.

In case of a **first instance** judgment concerning **minor offences** – *i.e.* a judgment concerning one or more misdemeanours or crimes which carry a statutory term of imprisonment not exceeding four years, and no other punishment or measure was imposed than a fine or fines up to a (joint) maximum of € 500, a **leave to appeal** procedure applies.

The defendant is required to submit grounds for appeal in writing (Art. 410(4) CPC). The case will only be heard on appeal, if the president of the Court of Appeal decides that hearing the case on appeal is required by the interest of a proper administration of justice (art. 410a(1) CPC). The interest of the proper administration of justice requires an appeal lodged against an *in absentia* judgment of a District Court – not being the Magistrates' Division – to be heard, **in any case**, if:

- the first instance summons or the first instance notice to appear was **not served** on the defendant **in person** and

- no other circumstance has occurred from which it follows that the **date** of the first instance **hearing** or of the **later** first instance **hearing was known** to the defendant **beforehand** (Art. 410a(2) CPC).

After all, in such circumstances the defendant was not aware of the first instance hearing(s). For the same reasons, in such circumstances the defendant is not required to submit grounds for appeal in writing (Art. 410(4) CPC).
If the president of the Court of Appeal finds that the interest of a proper administration of justice requires that the appeal be heard, he shall order the case to be brought before the Court of Appeal (Art. 410a(3) CPC). If not, he shall decline to hear the appeal in a

reasoned decision (Art. 410a(4) CPC).[64] Either decision is taken in written proceedings, on the basis of the written grounds for appeal and the case-file. Both decisions must be served on the defendant (Art. 410a(6) CPC). No appeal on points of law lies against either decision (Art. 410a(7) CPC). The decision declining to hold a hearing on appeal shall be considered as a decision determining the appeal, in the sense of Art. 557(1) CPC (see 'Enforceability and irrevocability of judgments of conviction', after the answer to question 10).

Summons on appeal/written notice to appear on appeal

On appeal, the defendant will be informed of the (first) hearing[65] either by a summons on appeal or by a written notice to appear on appeal (Art. 412(2) CPC). The written notice to appear pertains only to the possibility of serving a notice to appear on the defendant when lodging an appeal (Art. 408a CPC; see the answer to question 2a) under I).[66]

Summons on appeal

The summons on appeal contains information about:

- the date and place of the hearing;
- the rights of the defendant (Art. 412(3) CPC) and
- the charge on appeal.

It is not required that the summons on appeal contains the text of the charge against the defendant (Art. 412(3) CPC does not declare Art. 261 CPC to be applicable). However, the summons on appeal aims at preventing that the defendant is left uncertain as to the charge with regard to which he is to be tried on appeal. To that effect, the summons on appeal must clearly and unequivocally state the offence or offences of the charge on appeal.[67] In practice, referring to the charge contained in the first instance summons suffices.

Like the first instance summons, **the summons on appeal does not have to inform the defendant of the consequences of non-appearance**. **In practice**, the summons on appeal contains the same information about the consequences of non-appearance as the first instance summons. It is doubtful whether this situation conforms to Art. 8(2)(a) of Directive 2016/343/EU (see the answer to question 2a) under A).

Written notice to appear on appeal

Unlike the summons on appeal, **a written notice to appear on appeal does not have to contain information about the charge** (see also the answer to question 2a) under I) **or about**

[64] See for the application of Art. 410a CPC: ECtHR, judgment of 22 February 2011, *Lalmahomed v. the Netherlands*, ECLI:CE:ECHR:2011:0222JUD002603608 and ECtHR, decision of 17 May 2016, *Van Velzen v. the Netherlands*, ECLI:CE:ECHR:2016:0517DEC002149610.

[65] If the first hearing is adjourned, the defendant will be informed of the next hearing by an oral or a written notice to appear (see the answer to question 2a) under A).

[66] Supreme Court, judgment of 5 October 2010, ECLI:NL:HR:2010:BN4309, para 2.3.

[67] Supreme Court, judgment of 11 November 2003, ECLI:NL:HR:2003:AL9349, para 3.4.2.

the rights of the defendant (Art. 412(3) CPC declares Art. 260 CPC to be applicable only to the **summons on appeal**).

In practice, the written notice to appear on appeal contains the same information about the rights of the defendant and **the consequences of non-appearance** as the summons on appeal. The remarks made when discussing the summons on appeal concerning non-compliance with Directive 2016/343/EU apply *mutatis mutandis* to the written notice to appear on appeal.

The rules on translation of the first instance summons for a defendant who does not – or who does not sufficiently – understand Dutch are also applicable to the summons on appeal (Art. 412(3) CPC).

Proceedings on appeal

Factually, the proceedings on appeal do not differ much from first instance proceedings. The Court of Appeal will hear the defendant, if he is present. The rules regarding first instance *in absentia* proceedings and on defence by a mandated legal counsellor are applicable in appeal (Art. 415(1) CPC). The Court of Appeal will discuss the evidence in the case-file and may hear witnesses and experts.

If the defendant lodged the appeal and if he is present, he will be given the opportunity to state his objections against the first instance judgment (art. 416(1) CPC). If he hasn't submitted written grounds for appeal – in general, the defendant is not obliged to submit written grounds for appeal (Art. 410(1) CPC) – and if he does not avail himself of the opportunity to present oral objections against the judgment, the Court of Appeal may declare the appeal inadmissible, without any examination of the merits of the charge (Art. 416(2) CPC).

Scope of appellate review

In cases in which appeal lies against a first instance judgment, the defendant has a right to **full** determination of the merits of the charge – *i.e.* a determination in respect of both law ***and fact*** –, **both** in the first instance proceedings **and** in the proceedings on appeal.[68]

An appeal entails an *ex officio* fresh determination of the merits of the charge, in respect of both the law and the facts, by the Court of Appeal on the basis of the hearing(s) on appeal and the hearing(s) at first instance[69] (Art. 422(2) CPC).

In examining the merits of the case, the Court of Appeal will focus on the written grounds for appeal and on any oral objections against the judgment by the defendant or the Public Prosecutor (Art. 415(2) CPC). But even if, *e.g.*, the defendant does not contest the finding of guilt, but only the penalty imposed, the Court of Appeal is still required to examine *ex officio* whether the defendant is guilty of the offence with which he is charged.

The Court of Appeal can either (wholly or partially) uphold or (wholly or partially) quash the first instance judgment. In the event that the judgment is wholly or partially quashed, the Court of Appeal will do itself what the District Court ought to have done (Art. 423(1) CPC).

[68] Supreme Court, judgment of 7 May 1996, ECLI:NL:HR:1996:ZD0442, para 5.8.

[69] As far as the hearings at first instance are concerned, the Court of Appeal will have regard to the official record of those hearings (*proces-verbaal*).

An example. On appeal, the Court of Appeal must examine the validity of both the first instance summons and the summons on appeal. If the Court of Appeal finds that the first instance summons was not validly served and the defendant nor his legal counsellor was present at the first instance hearing, it must **annul** the first instance judgment and, doing what the first instance court ought to have done, it must **void** the first instance summons, **unless** the summons **on appeal** was served **in person** on the defendant and the defendant nor his legal counsellor is **present** at the hearing on appeal or the defendant nor his legal counsellor challenge the validity of the first instance summons. (In such a case the defendant was aware of the date of the hearing on appeal beforehand and had an opportunity to challenge the validity of the first instance summons, but chose not to do so. The Court of Appeal, therefore, must assume that the defendant yet voluntarily waived his right to be present at the first instance hearing.[70])

Remitting the case to the District Court

There are two **exceptions** to the rule that, having quashed a first instance judgment, the Court of Appeal must itself do what the District Court ought to have done. Both exceptions express the defendant's right to a **full determination** of the merits of the charge in **two** instances.

If the Court of Appeal finds that the District Court **did not decide on the merits of the case, where it should have done so** – *e.g.* if the District Court declared the summons void, but the Court of Appeal is of the opinion that the first instance summons is not void – the Court of Appeal will **remit the case** to the District Court **at the request** of the Advocate-General (the representative of the Public Prosecution Service at the Court of Appeal) or the defendant (Art. 423(2) CPC). In this way, the defendant can ensure that the merits of the charge are **fully** determined in **two** instances.

If the defendant:

- is not present at the hearing in appeal;

- the summons on appeal or the written notice to appear at the later hearing on appeal was not served in person on the defendant and

- no other circumstance has occurred from which it follows that the date of the hearing on appeal or of the later hearing on appeal was known to the defendant beforehand,

the Court of Appeal **shall remit** the case to the District Court ***ex officio*** (Art. 423(3) CPC). It is thereby prevented that a defendant who is not aware of the hearing on appeal loses, through no fault of his own, an instance in which the merits of the case could have been determined fully.

The Court of Appeal must also **remit the case** to the District Court, if the District Court **decided on the merits of the case, where it should not have done so**: the defendant or his legal counsellor did not appear at the first instance hearing, while the defendant or his legal counsellor was not informed of the date of that hearing in the manner prescribed by law and

[70] Supreme Court, judgment of 12 March 2002, ECLI:NL:HR:2002:AD5163, para 3.29.

no circumstance has occurred from which it follows that the date of the first instance hearing was known to the defendant or his legal counsellor beforehand.[71]

Legal recourse against judgments on appeal

It should be stressed that no appeal lies against a **second instance** judgment – *i.e.* a judgment on appeal – whether it is rendered *in absentia* or not.

The only legal remedy open to the defendant and the Public Prosecutor against judgments on appeal concerning **crimes** (*misdrijven*) is an appeal on points of law (*beroep in cassatie*) with the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*) (Art. 427(1) CPC).

> The defendant and the Public Prosecutor may lodge an appeal on points of law against a judgment on appeal concerning a **misdemeanour** (*overtreding*), whether the judgment was rendered *in absentia* or not, unless:
>
> a. the defendant was declared guilty of the misdemeanour without imposing a penalty or a measure or
>
> b. no other penalty or measure was imposed than a fine or fines up to a (joint) maximum of € 250 (art. 427(2) CPC).
>
> However, an appeal on points of law may be lodged against a judgment on appeal concerning a misdemeanour without restrictions, if the judgment concerns a misdemeanour established by a regulation of certain public bodies (counties, communities *et cetera*) (Art. 427(3) CPC).[72]

An appeal on points of law is **not** a **full** appeal, because it does not entail a fresh determination of the merits of the charge, in respect of both law ***and fact*** (see also the answers to question 10).[73] In case of an *in absentia* conviction on appeal, it is, therefore, not possible to state that the defendant had the right to a retrial or an appeal as referred to in Art. 4a(1)(c) FD 2002/584/JHA nor to guarantee that the defendant still has the right to a retrial or an appeal as referred to in Art. 4a(1)(d)(i) FD 2002/584/JHA ('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'). Nor does a defendant who was convicted *in absentia* on appeal have the right to a new trial, or another legal remedy, as referred to in Art. 8(4) and Art. 9 Directive 2016/343 ('the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed. In that regard, Member States shall ensure that those suspects and accused persons have the right to be present, to participate effectively, in accordance with procedures under national law, and to exercise the rights of the defence').

b) No, not the right to appeal as such.

Whether:

[71] Supreme Court, judgment of 7 May 1996, ECLI:NL:HR:1996:ZD0442, para 5.9.
[72] This exception enables the Supreme Court to supervise subordinate 'legislation'.
[73] See ECHR, report of 4 May 1993, *Lala v. the Netherlands*, ECLI:CE:ECHR:1993:0504REP001486189, § 50; ECHR, report of 4 May 1993, *S.P. v. the Netherlands*, ECLI:CE:ECHR:1993:0504REP001673790, § 58.

- the summons for the first instance hearing was served on the defendant in person or not;

- the defendant was defended by his mandated legal counsellor in his absence or not or

- the *in absentia* judgment of conviction was served on the defendant in person or not,

the Public Prosecutor and the defendant have a right to lodge an appeal against a first instance judgment concerning a crime (as regards the defendant: unless he was acquitted of all of the charges (see the answer to sub question a)).

However, the three factors mentioned in sub question b) are relevant for the *terminus a quo* of the time limit for lodging an appeal (see the answer to question c)).

c) The applicable time frame for the Public Prosecutor and for the defendant is **14 days** (Art. 408(1) CPC).

The Public Prosecutor

For the Public Prosecutor, the period for lodging an appeal starts running **the day after the pronouncement of the judgment.**

The defendant

As for the defendant, the CPC distinguishes between a number of situations.

I. The rule is that the defendant must appeal **within 14 days from the pronouncement of the first instance judgment** if:

- the summons to appear at the hearing or the written notice to appear at the later hearing was was served on the defendant **in person**;

- the defendant **appeared** at the hearing or at the later hearing[74] (the second part of the sentence refers to cases in which the hearing was adjourned to a specific date; see point III for adjournments *sine die*);

  If the absent defendant was represented by his authorised legal counsellor (Art. 279 CPC), the same time limit applies.[75]

- a circumstance otherwise occurred from which it follows that the date of the hearing or of the later hearing was **known** to the defendant **beforehand**[76] (the

[74] Unless the official record of the hearing (*proces-verbaal*) does not show that the court announced the date at which the judgment would be pronounced at that hearing: Supreme Court, judgment of 7 January 2014, ECLI:NL:HR:2014:37, para 2.4.
[75] Supreme Court, judgment of 11 February 2003, ECLI:NL:HR:2003:AE9649, para 3.3.
[76] If the defendant became aware of the date of the hearing only *after* the hearing was held, the condition of Art. 408(1)(c) CPC is not met: Opinion Advocate-General Vellinga, ECLI:NL:PHR:2010:BL7689, para 6.

second part of the sentence refers to cases in which the hearing was adjourned to a specific date; however, see point III for adjournments *sine die*) (Art. 408(1) CPC).

Serving the **notification of the judgment** on the defendant **in person**, *e.g.*, constitutes such a circumstance (see also the answer to question 8).

If the court adjourned the hearing to a **specific** date **in the presence of the defendant** and gave **oral** notice of that date to the defendant (Art. 319(1) CPC) (see the answer to question 2a) under C), this will constitute such a circumstance.[77]

The mere fact that the legal counsellor of the defendant wrote a letter to the court, announcing his intention to act on behalf of the defendant at a specific hearing does not, in itself, constitute a circumstance from which it follows that the date of that hearing was known *to the defendant* beforehand;[78]

- the summons to appear at the hearing was served on the defendant and Art. 588a CPC was applied – this provision requires sending a copy of the summons to the **last address given by the defendant** – within six weeks after the defendant filed an objection to a punishment order as referred to in Art. 257e CPC (see the answer to question 33) and the court did not impose an unconditional custodial sentence or detention order for more than six months (Art. 408(1) CPC).

  This provisions concerns situations in which a punishment order was issued, the defendant filed an objection against that order, the defendant did not appear at the hearing(s) of the District Court, the District Court quashed the punishment order and convicted the defendant and the defendant lodged an appeal against that judgment.

  When filing an objection against a punishment order, the defendant may give an address in the Netherlands to which notification about the criminal case may be sent (Art. 257e(4) CPC).

In case of more than two hearings the term 'later hearing' denotes the **last** hearing before the courts closes the examination of the merits of the case.[79]

All these situations represent cases in which the defendant was aware – or is considered to have been aware – beforehand of the date at which the judgment was pronounced. In these situations – in which the defendant was either aware of the date of one of the hearings, was present at one of the hearings or was represented by his mandated legal counsellor at one of the hearings –, it is the legislator's view that the defendant is responsible for acquainting himself with the date of the pronouncement of the judgment.

The rationale of the provision concerning judgments which were preceded by a punishment order is that, when a defendant lodges an appeal against a judgment of a court, he may reasonably be expected to be contactable for a limited period of time – six weeks – at the address he himself provided. After all, the defendant is aware of the judgment and he took the

[77] *Parliamentary Papers (Kamerstukken) II* 1988/89, 21241, 3, p. 30.
[78] Supreme Court, judgment of 22 June 2010, ECLI:NL:HR:2010:BM3628.
[79] *Parliamentary Papers (Kamerstukken) II* 1988/89, 21241, 3, p. 30.

initiative to lodge an appeal.[80] The result of this provision is that the time limit for lodging an appeal starts running the day after the pronouncement of the judgment, just as if the defendant was summoned in person. Because of Art. 6 ECHR, the legislator thought it prudent to limit the scope of this legal fiction to relatively minor cases, *i.e.* cases in which no unconditional custodial sentence or detention order for more than six months was imposed.[81]

II. In all other cases, the defendant must lodge an appeal **within 14 days after a circumstance has occurred from which it follows that the judgment is known to the defendant** (Art. 408(2) CPC).

It can only be held that 'a circumstance occurred from which it follows that the judgment is known to the defendant' if the defendant was informed of what is necessary for him to decide whether to appeal – in other words if he was informed of the *essence* of the judgment – such as the nature or *quantum* of the penalty.[82]

The mere fact that the defendant requested in writing to be provided with a copy of the judgment, therefore, does not suffice.[83]

Neither does the mere fact that the defendant became aware of the summons **after** the hearing was held.[84] What is needed is that the judgment **is known** to the defendant, not that the defendant **could have known** of the judgment.

The fact that the defendant was provided with a copy of the judgment in accordance with Art. 4(2) FD 2002/584/JHA shall not count as a circumstance from which it follows that the judgment is known to the defendant (Art. 408(3) CPC; Art. 45b *in fine* Law on Surrender).

Service of a notification of the judgment (see Art. 366(1) CPC) on the defendant **in person**, undoubtedly constitutes a circumstance from which it follows that the judgment is known to the defendant. Neither the provision itself nor case-law requires that the defendant is informed of the **legal recourse** against the judgment nor of the **manner in which** and the **time frame within which** to **exercise** that legal recourse.[85] As said before (see also the answer to question 8a)), this situation cannot be deemed to be in compliance with Directive 2016/343/EU.

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[80] *Parliamentary Papers (Kamerstukken) II* 2004/05, 29805, 3, p. 14-15.

[81] *Parliamentary Papers (Kamerstukken) II* 2004/05, 29805, 3, p. 5.

[82] Supreme Court, judgment of 12 February 2013, ECLI:NL:HR:2013:BZ1940.

[83] Supreme Court, judgment of 24 November 2015, ECLI:NL:HR:2015:3353.

[84] Supreme Court, judgment of 20 April 2010, ECLI:NL:HR:2010:BL7689; Supreme Court, judgment of 5 July 2011, ECLI:NL:HR:2011:BQ6010.

[85] In this sense: opinion Advocate-General Keulen, ECLI:NL:PHR:2018:759.
According to Advocate-General Keulen, it does not follow from the *Da Luz Domingues Ferreira* and *Hakimi* judgments that the defendant should be informed of the legal recourse against the judgment in **all cases**: both judgments are not Grand Chamber judgments; neither judgment concerned a violation by the Netherlands; in both judgments the circumstances of the case, especially the fact that both applicants were in custody when informed of the judgment, may have played a role (ECLI:NL:PHR:2018:759, para 26).
These arguments are not entirely satisfactory.
Most judgments of the ECtHR are not Grand Chamber judgments; to discount judgments because they were not rendered by the Grand Chamber is to discount the overwhelming majority of the ECtHR's case-law.
Moreover, the ECtHR reiterated its *Da Luz Domingues Ferreira* judgment in its judgment in *Faniel v. Belgium* (ECtHR, judgment of 1 March 2011, *Faniel v. Belgium*, ECLI:CE:ECHR:2011:0301JUD001189208) and referred to *Faniel v. Belgium* in *Assunção Chaves v. Portugal* (ECtHR, judgment of 31 January 2012, Assunção Chaves v. Portugal, ECLI:CE:ECHR:2012:0131JUD006122608).

III. Equally, the time limit is **14 days after a circumstance has occurred from which it follows that the judgment is known to the defendant**, if the hearing was **adjourned *sine die*** and the notice to appear at the later hearing was **not** served **in person**, **unless**

a. the defendant has **appeared** at the later hearing or

b. a circumstance has otherwise occurred from which it follows that the date of the later hearing was **known** to the defendant **beforehand**.

The '**later** hearing' means 'the **last** hearing before the District Court closes the examination of the merits of the case'.

The rationale of Art. 408(4) CPC is that a defendant may lose sight of the progress of the proceedings if the hearing is adjourned *sine die*. In such cases, it would not be reasonable to apply the rule that the time limit starts running the day after pronouncement of the judgment. If one of these two exceptions applies, the time limit is 14 days **from the pronouncement of the first instance judgment** (Art. 408(4) CPC).

Both **exceptions** represent cases in which the defendant was aware – or is considered to have been aware – beforehand of the date at which the judgment was pronounced. In the view of the legislator, in these circumstances it is his responsibility to acquaint himself with the date of the pronouncement of the judgment. Therefore, in those cases the time limit does start running from the day after the pronouncement of the judgment.

Appeals lodged by the Public Prosecutor

If the Public Prosecutor lodges an appeal against a first instance judgment, it must be ensured that:

- the defendant becomes aware of the appeal in due time in order that he may prepare his defence and

- the appeal is not heard before the time frame for lodging an appeal by the defendant expires.

That is why, if only the Public Prosecutor lodges an appeal against an first instance judgment, the clerk of the District Court will only send the case-file to the Court of Appeal **after** a notice of the appeal has been served on the defendant (Art. 409(2) CPC).

It is true that the applicants in the *Da Luz Domingues Ferreira* and *Hakimi* cases were in custody when they were informed of the judgment – the same goes for the applicant in *Faniel v. Belgium*, a case not mentioned by the Advocate-General –, but apparently this is not decisive. After all, the ECtHR did not limit itself to situations in which the applicant was in custody: "Il en est particulièrement ainsi lorsqu'une personne qui a été condamnée par défaut est détenue **ou n'est pas représentée par un avocat** lorsqu'elle reçoit notification d'un jugement de condamnation (…)' (*Faniel v. Belgium*, § 30). In *Assunção Chaves v. Portugal* – a case concerning the civil limb of Art. 6(1) ECHR – the ECtHR referred to *Faniel v. Belgium*; the applicant was not in custody when he was informed of the judgment.
Lastly, the Advocate-General does not refer to Directive 2016/343/EU at all.

If the notice of appeal was **not** served on the defendant **in person**, the case-file will not be sent to the Court of Appeal as long as the time limit for the defendant to lodge an appeal has not expired or, if the defendant has since lodged an appeal, as long as the time limit for submitting his written grounds for appeal (see Art. 410 CPC) has not expired (Art. 409(3) CPC).

If the defendant was **acquitted** of the entire indictment at first instance, the summons or the written notice to appear was **not** served on the defendant **in person** and no other circumstance has occurred from which it follows that the date of the hearing or of the later hearing was known to the defendant beforehand – in short: if the defendant was not aware of the first instance hearing(s) –, the case-file will not be sent to the Court of Appeal until the notice of appeal has been served on the defendant **in person** (Art. 409(4) CPC).

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

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

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

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

Answer

Yes. The defendant and the Public Prosecutor may lodge an appeal on points of law with the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*) against judgments of a Court of Appeal concerning **crimes** (*misdrijven*) (art. 427(1) CPC). (As regards judgments of a Court of Appeal concerning misdemeanours (*overtredingen*) see the answer to question 9a)).

As said before (see the answer to question 9a)), an appeal on points of law is not a **full** appeal: it does not entail a fresh determination of the merits of the charge, in respect of both law **and fact**. The Supreme Court will only examine whether there was:

- any non-compliance with procedural requirements prescribed under penalty of nullity, committed in the judgment *a quo* and in the proceedings leading to that judgment and/or

- any violation of substantive law in the judgment *a quo*.

Although the Supreme Court holds public hearings, in principle the proceedings before the Supreme Court are **written** proceedings (Art. 438 and 439 CPC), in which the defendant is represented by his legal counsellor. Only exceptionally, does a legal counsellor request to be permitted to provide an **oral** explanation of the appeal on points of law.

After having (partially) quashed the judgment below, usually the Supreme Court will either remit the case to the court that rendered the quashed judgment or refer the case to another court, in order to retry the case or to further try the case (Art. 440(2) CPC).

However, the Supreme Court has the power to deal with the case itself, if no re-examination of the facts is necessary (art. 440(2) CPC). In theory, this means that the Supreme Court could **on the basis of the case-file** convict the defendant and sentence him to a penalty. In practice, this is hardly ever done. The personal situation of a defendant plays an important part in the sentencing process and it is very difficult to form an opinion as to the right sentence solely on the basis of the case-file.

Even if the Supreme Court does not in practice exercise its power to convict and sentence a defendant, it does regularly modify the penalty imposed by the judgment *a quo*. If the Supreme Court finds a violation of the reasonable time requirement of Art. 6(1) ECHR in the cassation-phase of the proceedings, *i.e.* the phase which starts at lodging the appeal on points of law against the judgment of the Court of Appeal, as a rule it will compensate for that violation by decreasing the *quantum* of the penalty imposed in the judgment *a quo*.[86] The extent to which the *quantum* of the penalty is decreased depends exclusively on the extent to which the cassation-phase of the proceedings exceeded the reasonable time requirement and is determined in accordance with a number of benchmarks.[87] The personality of the person concerned or aggravating and mitigating factors do not play a role in determining the decrease of the *quantum* of the penalty, which is, after all, not a sentencing exercise, but a means to redress a violation of the right to be tried within a reasonable time. In these circumstances, it is doubtful whether Art. 6(1) ECHR entails the right of the person concerned to be heard in person by the Supreme Court.[88]

In view of the answers to the first and second sub questions, it does not seem necessary to answer the third sub question.

Enforceability and irrevocability of judgments of conviction

Having now dealt with appeals and appeals on points of law, we must devote some attention to the issue of enforceability and irrevocability of judgments of conviction.

The CPC distinguishes between enforceability (*uitvoerbaarheid*) and irrevocability (*onherroepelijkheid*) of judgments. In some cases a judgment may be enforceable and yet not irrevocable. In other cases a judgment may be irrevocable, but not yet enforceable.

A. As a rule, a judgment of conviction is **not enforceable** as long as it is **not irrevocable**. Art. 557(1) CPC expresses this rule in the following way: a judgment of conviction is **not** enforceable

- as long as exercising an ordinary legal remedy[89] against that judgment is still possible or

[86] Supreme Court, judgment of 17 June 2008, ECLI:NL:HR:2008:BD2578, paras 3.2-3.5.2.
[87] Supreme Court, judgment of 17 June 2008, ECLI:NL:HR:2008:BD2578, para 3.6.2.
[88] Compare CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 87-88.
[89] The CPC distinguishes between ordinary legal recourses, such as appeal (*hoger beroep*) and appeal on points of law (*beroep in cassatie*), and extraordinary legal recourses, *viz*. appeal on points of law in the interest of

- if an ordinary legal recourse was exercised, until it is withdrawn or until a court has decided on the legal recourse.

B. However, if notification of the judgment is required in accordance with Art. 366 (see the answer to question 8a)), enforcement of the judgment may start **right after service of that notification**. In case of an *in absentia* judgment which does not need to be notified, **enforcement** may start **right from the pronouncement of that judgment**. In both cases, however, **lodging an appeal or an appeal on points of law** will **suspend enforcement** (Art. 557(2) CPC), unless the Public Prosecutor is of the opinion that the appeal or appeal on points of law was lodged out of time (Art. 557(3) CPC).[90]

C. If the judgment is **final** and **enforcement** has **not commenced**, an application for remission or commutation of sentence (*verzoekschrift om gratie*) will **defer enforcement** of a custodial sentence of six months or less (Art. 558a(1) CPC).

Similarly, such an application will **suspend enforcement** in cases in which one year after the judgment has become irrevocable, the enforcement has not yet commenced.

Art. 559 CPC provides for a number of **exceptions** to the rule of deferment or suspension of enforcement, *inter alia*, when the application for remission or commutation of sentence is submitted at a time when the person concerned is in the territory of a foreign state, which is in the process of handling a request from the Netherlands for his **extradition** and for the purpose of said extradition has ordered his provisional arrest. Otherwise, the person concerned would be able to frustrate extradition proceedings by applying for remission or commutation of sentence.[91] For the same reasons,[92] a reasonable interpretation of this provision seems to require that surrender on the basis of an EAW is equated with extradition.

Conclusion drawn from the answers 1-10

The rules on giving judicial notice are aimed at ensuring that the defendant, if at all possible, becomes aware of the content of the judicial notice, *i.e.* in the case of a summons or of a written notice to appear the date and the place of the hearing. These rules, therefore, intend to promote the exercise of the defendant's right to be tried in his presence.[93]

These rules are reinforced by the obligation to send a copy of the summons or the written notice to appear by post to the last address given by the defendant, even though the summons or the written notice to appear was served validly at another address.

In combination with, *inter alia*:

justice (*beroep in cassatie in het belang der wet*) and revision (*herziening*). Both extraordinary legal recourses are only open against irrevocable judgments.

[90] The person concerned may ask a court to review this opinion (Art. 557(2) CPC).

[91] In case of extradition for the purpose of enforcing a sentence, that sentence must be 'immediately enforceable' (see, *e.g.*, Art. 12(2)(a) European Convention on Extradition).

[92] In case of an EAW issued for the purpose of executing a custodial sentence or detention order, the EAW must contain evidence of the existence evidence of 'an enforceable judgment (…) or any other enforceable judicial decision having the same effect' (Art. 8(1)(c) FD 2002/584/JHA).

[93] Supreme Court, judgment of 12 March 2002, ECLI:NL:HR:2002:AD5163, para 3.1.

- the duty to adjourn the hearing in case of clear indications that the defendant did not waive his right to be present, even though the summons or the written notice to appear was duly served;

- the obligation to serve a notice of a judgment of conviction on a defendant who was not aware of that judgment;

- the fact that a defendant who was not aware of a judgment of conviction may appeal against that judgment when he becomes aware of that judgment and

- the fact that a notice of an appeal by the Public Prosecutor must be served on the defendant,

the Dutch system tries to prevent as much as possible that a defendant is convicted *in absentia* without having had knowledge of that conviction or without having had an opportunity to obtain a fresh and full determination of the merits of the charge.

Still, it cannot be ruled out entirely that a defendant who had no actual knowledge of the date and the place of the hearing beforehand and who had no actual knowledge of the *in absentia* judgment of conviction, is unable to obtain a fresh and full determination of the merits of the charge. After all, inherent in the Dutch system are a number of presumptions which do not necessarily correspond to reality.

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

Answer

The Netherlands have not transposed Directive 2016/343 yet and will not transpose this directive in the future.

The Dutch Government are of the opinion that existing legislation already conforms to the directive.[94]

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

Answer

Not applicable. See the answer to question 11.

[94] Notification of the transposition of Directive (EU) 2016/343 of the European Parliament and 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 (OJ 2016, L 65, p. 1), *Stcrt*. 2018, 18991 (*Mededeling van de implementatie van richtlijn (EU) 2016/343 van het Europees parlement en de Raad van 9 maart 2016 betreffende de versterking van bepaalde aspecten van het vermoeden van onschuld en van het recht om in strafprocedures bij de terechtzitting aanwezig te zijn (PbEU 2016, L 65/1)*).

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 and**

- **an English translation thereof.**

Answer

See Annex 1 and Annex 2.

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 judgment 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.]

Introductory remarks

In answering the questions of Part 2.2, some expressions had to be defined which the CoJ has not yet had the opportunity to interpret. In doing so, I tried to draw general principles from case-law of the CoJ, where available, and apply them to the expression at hand. Furthermore, I referred to case-law of the ECtHR on Art. 6 ECHR. After all, as the CoJ says itself, Art. 4a FD 2002/584/JHA aims at strengthening the procedural rights of defendants, 'guaranteeing them a high level of protection by ensuring full observance of their rights of defence, flowing from the right to a fair trial, enshrined in Article 6 of the ECHR'.[95] Art. 4a FD

[95] The Explanations relating to the Charter of Fundamental Rights state that Art. 47(2) Charter corresponds to Art. 6(1) ECHR (*OJ* 2007 C303, p. 17). As a consequence and in accordance with Art. 52(3) Charter, Art. 47(2)

2002/584/JHA, therefore, must be interpreted and applied 'in accordance with the requirements of Article 6 of the ECHR and the relevant case-law of the European Court of Human Rights'.[96]

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)?

Answer

Framework Decision 2002/584/JHA, including Art. 5 par. 1, was transposed by law of 29 April 2004 (Law on Surrender, *Overleveringswet*), which entered into force on 12 May 2004.[97]

The Netherlands exceeded the time limit for transposition.[98]

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

Answer

Art. 2 FD 2009/299/JHA was transposed by law of 12 May 2011,[99] which entered into force on 1 August 2011.[100]

The Netherlands exceeded the time limit for transposition.[101]

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

Answer

Charter has the same meaning and scope as Art. 6(1) ECHR (although Union law may provide more extensive protection than Art. 6(1) ECHR).

[96] CoJ, judgment of 22 December 2017, *Ardic*, C-571/17 PPU, ECLI:EU:C:2017:1026, paras 73-74 (emphasis added).

[97] *Stb*. 2004, 195.

[98] FD 2002/584/JHA should have been transposed on 31 December 2003 at the latest (Art. 34(1) FD 2002/584/JHA).

[99] *Stb*. 2011, 232.

[100] *Stb*. 2011, 342.

[101] FD 2002/584/JHA should have been transposed on 28 March 2011 at the latest (Art. 8(1) FD 2009/299/JHA).

Apart from some minor terminological points,[102] the Netherlands fully transposed Art. 2 FD 2009/299/JHA, **with one notable deviation**. Art. 4a FD 2002/584/JHA contains an **optional** ground for refusal, whereas the Dutch transposition of Art. 4a – Art. 12 Law on Surrender – contains a **mandatory** ground for refusal.

The **mandatory** character of Art. 12 Law on Surrender prohibits the Dutch executing judicial authority, after it has found that the cases described in paragraph 1(a) to (d) of Article 4a FD 2002/584/JHA do not cover the situation of the person who is the subject of the EAW, from taking into account other circumstances that enable it to ensure that the surrender of the person concerned does not entail a breach of his rights of defence.[103]

It is debatable whether Member States may transpose an optional ground for refusal as a mandatory ground for refusal. As regards the optional ground for refusal contained in Art. 4(6) FD 2002/584/JHA, the CoJ held that it followed from the wording of that provision ('The executing judicial authority may refuse to execute the [EAW] (…)') that the executing judicial authority must have a 'margin of discretion as to whether or not it is appropriate to refuse to execute the EAW'.[104] The opening sentence of Art. 4a is almost identical to that of Art. 4 ('The executing judicial authority may also refuse to execute the [EAW] (…)'). Although in the *Tupikas* and *Zdziaszek*-cases Advocate-General Bobek was of the opinion that Art. 12 Law on Surrender is not in conformity with Art. 4a because of the former provision's mandatory character,[105] the CoJ confined itself to reiterating what it said in *Dworzecki* on the optional nature of Art. 4a – which allows the executing judicial authority to take into account other circumstances that enable it to ensure that the surrender of the person concerned does not entail a breach of his rights of defence – and adding that in this way FD 2002/584/JHA 'does not **prevent** the executing judicial authority from ensuring that the rights of the person concerned are upheld by taking due consideration of all the circumstances characterising the case before it (…)'.[106] One cannot but conclude that the CoJ has not (yet) ruled that Art. 4a **requires** leaving a margin of discretion to the executing judicial authority for taking into account such circumstances.[107]

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?

Answer

[102] *E.g.*, 'vonnis' instead of 'beslissing', 'de behandeling ter terechtzitting die tot het vonnis heeft geleid' instead of 'het proces dat tot de beslissing heeft geleid'.
[103] Compare CoJ, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, para 50-51.
[104] CoJ, judgment of 29 June 2017, *Popławski*, C-579/15, ECLI:EU:C:2017:503, para 21.
[105] Opinion of 26 July 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:609, paras 70-78; opinion of 26 July 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:612, paras 106-108.
[106] COJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:68, paras 96-97; CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 106-108 (emphasis added).
[107] None of the questions in *Tupikas* and *Zdziaszek* referred to the CoJ related to this issue.

The Dutch legislator transposed **all** grounds for refusal – either mandatory or optional – as **mandatory** grounds for refusal.

The Government did not give any reason for proposing to transpose Art. 4a as a mandatory ground for refusal. There was no debate on this matter when the proposal was before Parliament.

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?

Answer

One can argue that Member States do not have to transpose Art. 4a.

The opening sentence of Art. 4a FD 2002/584/JHA is similar to that of Art. 4 FD 2002/584/JHA ('The executing judicial authority may also refuse to execute the European arrest warrant (…)'). The latter provision contains grounds for refusal which Member States can transpose if they please.[108] The wording of Art. 4a, therefore, seems to indicate that Member States have discretion with regard to transposing this provision.

However, according to recital (15) of the preamble of FD 2009/299/JHA, that discretion is not limitless:

> 'The grounds for non-recognition are optional. However, the discretion of Member States for transposing these grounds into national law is particularly governed by the right to a fair trial, while taking into account the overall objective of this Framework Decision to enhance the procedural rights of persons and to facilitate judicial cooperation in criminal matters'.

Be that as it may, the question is somewhat academic. All Member States have transposed Art. 4a, except Greece. According to the European Judicial Network, Greece is in the process of transposing Art. 4a.[109]

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

Answer

[108] See CoJ, judgment of 6 October 2009, *Wolzenburg*, C-123/08, ECLI:EU:C:2009:616, para. 58 (' It follows that a national legislature which, **by virtue of the options afforded it by Article 4 of the Framework Decision** (…)'); CoJ, judgment of 29 June 2017, *Popławski*, C-579/15, ECLI:EU:C:2017:503, para 21 ('(…) where a Member State **chose** to transpose that provision into domestic law (…)'), emphasis added.
[109] See the Table of implementation on the website of the EJN: https://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx (last visited on 22 August 2018).

In the context of questions 19 and 20 I understand the words 'apply this (…) ground for refusal' to mean: to **examine** whether this ground for refusal is applicable, *i.e.*, whether:

- the person concerned appeared in person at the trial resulting in the decision;

- if not: whether any of the situations mentioned in Art. 4a(1)(a-d) FD 2002/584/JHA is applicable;

- if not: whether surrendering the person concerned nonetheless would not entail a breach of his right of defence.

Under Art. 26(1) Law on Surrender the District Court of Amsterdam – the Dutch executing judicial authority – is under a duty to examine the 'possibility of surrender' (*de mogelijkheid van overlevering*). Where a mandatory ground for refusal is applicable, surrender is not possible. Under Art. 28(2) Law on Surrender the District Court of Amsterdam must refuse the execution of an EAW, if it finds that surrender cannot be allowed (*dat de overlevering niet kan worden toegestaan*), *i.e.* when a mandatory ground for refusal is applicable.

It follows from these provisions that the District Court of Amsterdam must examine *proprio motu* whether any mandatory ground for refusal forms an obstacle to the execution of an EAW. If so, it must refuse to execute the EAW.

If the District Court of Amsterdam is of the opinion that a ground for refusal does not form an obstacle to the execution of the EAW, it does not have to give reasons for not applying that ground for refusal, unless that ground for refusal was invoked by the requested person or the Public Prosecutor. Absent any invocation of the ground for refusal by the defendant or the Public Prosecutor, in its judgment the court may confine itself to stating that it is established that surrender is not blocked by any ground for refusal (a general statement which is contained in every judgment allowing surrender).

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?

Answer

At present, Art. 12 Law on Surrender contains a mandatory ground for refusal. However, the Government are considering submitting a proposal to Parliament for turning Art. 12 Law on Surrender into an **optional** ground for refusal.[110]

[110] The Dutch Ministry of Justice and Security consulted with a delegation from the District Court of Amsterdam. I was part of that delegation.

Assuming that Art. 12 Law on Surrender will indeed be turned into an optional ground for refusal, the question arises if the District Court of Amsterdam must apply that optional ground for refusal *proprio motu*.

Given the wording of Art. 26(1) Law on Surrender (according to which the District Court of Amsterdam must examine the **possibility** of surrender, see the answer to question 19), two interpretations are possible.

One interpretation is that the District Court of Amsterdam must examine *proprio motu* whether to apply an optional ground for refusal. In case of an optional ground for refusal, one can only conclude that surrender is possible after having **ruled out** refusal on the basis of the optional ground for refusal.

According to the other interpretation, surrender is possible with regard to optional grounds for refusal, because the executing judicial authority is not under a duty to refuse surrender. Therefore, the court is not bound to examine *proprio motu* whether to apply an optional ground for refusal.

Of course, arguments based solely on national law cannot be decisive in this regard.

Normally, in the absence of Union rules governing the matter, it is for the Member States, in accordance with the principle of the **procedural autonomy** of the Member States, to lay down the detailed **procedural** rules governing the application of Union law. This procedural autonomy is limited by the principles of equivalence and effectiveness.[111]

There is an argument to be made that the principle of procedural autonomy does not apply to the issue of *proprio motu* application of optional grounds for refusal.

FD 2002/584/JHA seeks to harmonise, *inter alia*, the rules relating to surrender **procedures.**[112] Given the existence at Union level of rules governing the application of Union law, it remains to be established whether these rules pertain to the issue at hand.

The mere fact that a specific ground for refusal is optional and that the executing judicial authority, therefore, has a certain **margin of discretion** as to whether or not it is appropriate to refuse to execute the EAW[113] does not settle the issue. One should distinguish between examining whether a ground for refusal is applicable and deciding to refuse the execution of the EAW on the basis of that ground for refusal. A margin of discretion as to the decision

[111] See, *e.g.*, CoJ, judgment of 27 June 2018, *Diallo*, C-246/17, ECLI:EU:C:2018:499, para 45.
[112] CoJ, judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, ECLI:EU:C:2007:261, paras 29-30.
[113] CoJ, judgment of 29 June 2017, *Popławski*, C-579/15, ECLI:EU:C:2017:503, para 21; CoJ, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, para 50; CoJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:68, para 96; CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 106-107.

does not necessarily mean that there is no duty to examine the applicability of the ground for refusal *proprio motu*.

One can argue that a duty of *proprio motu* application of optional grounds for refusal is **inherent** in the **system** of that **framework decision**. According to recital (8) of the preamble of that framework decision, the decision on the execution of the EAW must be subject to 'sufficient controls' by judicial authorities. Because the entire EAW-procedure, from the decision to issue an EAW to the decision to execute that EAW, is under the **supervision** of judicial authorities, that procedure in itself provides for an effective remedy against possible violations of (fundamental) rights and freedoms guaranteed by Union law, regardless of how Member States transpose FD 2002/584/JHA.[114] Indeed, this framework decision is 'founded on the principle that decisions relating to [EAW's] are attended by all the guarantees appropriate for decisions of such a kind, inter alia those resulting from the fundamental rights and fundamental legal principles referred to in Article 1(3) of the Framework Decision'.[115] The words 'controls' and 'supervision' seem to require an active stance of the judicial authorities, especially with regard to fundamental rights issues.

Furthermore, it is arguable that a duty of *proprio motu* application not only is inherent in the system of the framework decision, but also follows from the wording of Art. 15(1) FD 2002/584/JHA. According to this provision, the executing judicial authority '**shall** decide, within the time-limits and **under the conditions defined in this Framework Decision**, whether the person is to be surrendered'. Those 'conditions' refer to the grounds for refusal, without differentiating between mandatory and optional grounds for refusal and without requiring invocation of a ground for refusal. The second paragraph of Art. 15 FD 2002/584/JHA could be cited in support of this argument: 'If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Articles 3 to 5 and Article 8 (…)'. Again, this provision does not distinguish between mandatory and optional grounds for refusal. In this interpretation, the executing judicial authority is under a duty to examine the applicability of an optional ground for refusal and to decide whether to refuse the execution of the EAW, irrespective of whether the requested person invoked that optional ground for refusal.

With regard to Art. 4a specifically, it should be recalled that the objective of this provision is 'to enable the executing judicial authority to **allow** surrender, despite the absence of the requested person at the trial resulting in their conviction, while **fully** upholding the rights of defence'.[116]

[114] CoJ, judgment of 26 May 2013, *Jeremy F.*, C-168/13 PPU, ECLI:EU:C:2013:358, paras 45-47.
[115] CoJ, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, para 37; CoJ, judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, ECLI:EU:C:2016:858, para 39.
[116] See, *e.g.*, CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 63 (emphasis added).

Again, the wording seems to require an active approach by the executing judicial authority: in order for the executing judicial authority to conclude that it may allow surrender, it must first have examined whether the rights of defence were fully respected. It can only reach that conclusion, after having established either that one of the conditions set out in subparagraphs (a), (b), (c) or (d) of Art. 4a are met or, if none of those conditions are met, that surrender nonetheless does not entail a breach of the requested person's rights of defence.

Of course, one important argument against a duty of *proprio motu* application of optional grounds for refusal would be that such a duty would run counter to the aims of simplifying and accelerating surrender. It cannot be denied that this argument carries much weight. But even conceding that such an argument could be decisive with regard to optional grounds for refusal in general, one can still argue that this argument does not dispose of the issue with regard to Art. 4a in particular. What is at stake here is the duty to respect fundamental rights. After all, as the CoJ itself said, the executing judicial authority cannot tolerate a breach of those rights,[117] such as the rights of defence.

In conclusion, therefore, it is posited here that, as a matter of Union law, the executing judicial authority must examine whether Art. 4a is applicable *proprio motu*.

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

Answer

Issuing authorities

Every Public Prosecutor (*officier van justitie*) may issue an EAW (Art. 44 Law on Surrender).

The Public Prosecutor of the FAST (Fugitive Active Search Team) – formerly TES (*Team Executie Strafzaken*) – of the Public Prosecution Service is tasked with issuing an EAW in cases in which the requested person was sentenced to a final custodial sentence of which at least 120 days remain to be served.[118]

Executing judicial authorities

The Public Prosecutor in Amsterdam, the Examining Magistrate (*rechter-commissaris*) in the District Court of Amsterdam and the District Court of Amsterdam itself are designated as executing judicial authorities.

Both the Public Prosecutor in Amsterdam and the Examining Magistrate in the District Court of Amsterdam have duties regarding the deprivation of liberty of a requested person.

[117] CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para 105.
[118] Directive on enforcement of sentences, *Stcrt*. 2014, 37617 (*Aanwijzing executie*).

The Public Prosecutor in Amsterdam receives all EAW's, issued by judicial authorities of other Member States and sent to the Netherlands.

The Public Prosecutor in Amsterdam is tasked with the decision whether a requested person who has consented to his surrender will be surrendered via the so-called shortened procedure (Art. 41 Law on Surrender).

When it is evident that an EAW cannot lead to surrender, the Public Prosecutor in Amsterdam may summarily dismiss the EAW (art. 23(1) Law on Surrender). The case is then not brought before the District Court. There is no remedy against such a decision; it is not subject to judicial review.[119]

In all cases in which:

- the Public Prosecutor has decided that the requested person who has consented to his surrender will not be surrendered via the so-called shortened procedure;

- the requested person has not consented to his surrender and the Public Prosecutor has not summarily dismissed the EAW,

the Extradition Chamber (*Internationale Rechtshulpkamer*), a specialized three-judge division of the District Court of Amsterdam, will decide whether the requested person will be surrendered.

No **ordinary** legal recourse – appeal or appeal on points of law – lies against a judgment of the District Court of Amsterdam concerning the (non)-execution of an EAW (Art. 29(2) Law on Surrender).

The Procurator-General at the Supreme Court of the Netherlands may lodge an **extraordinary** appeal on points of law, if the interests of justice so require (*cassatie in het belang der wet*) (Art. 29(2) Law on Surrender). If the Supreme Court quashes the judgment of the District Court in the interests of justice, this does not have any effect on the disposition of the case.[120]

Only in two cases appeal lies from a decision of the District Court of Amsterdam in EAW-matters:

[119] The lack of a review mechanism was criticized by the Council: Council document 15370/08, p. 49.
[120] In over 14 years since the entry into force of the Law on Surrender the Prosecutor-General lodged an extraordinary appeal on points of law in 5 EAW-cases. In all these cases the Supreme Court quashed the judgment. In none of these cases did the Supreme Court decide to make a preliminary reference to the CoJ, although all of these cases raised questions which were neither 'acte clair' nor 'acte éclairé'.
.

- the Public Prosecutor can appeal a decision to release the requested person provisionally from remand. If the decision was taken by the Examining Magistrate, the District Court is competent to hear the appeal; if the decision was taken by the District Court, the Court of Appeal is competent to hear the appeal (Art. 64(2) Law on Surrender in connection with Art. 87(1) CPC);

- the Public Prosecutor and the person concerned can appeal against a decision of the District Court on awarding damages for wrongful detention with the Court of Appeal (Art. 67(2) Law on Surrender in connection with Art. 91(1) CPC).

B. Your Member State as issuing Member State

22.

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

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

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?

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

Answer

(Answers based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

a) One should distinguish between filling in the EAW and issuing the EAW.

Every Public Prosecutor (*officier van justitie*) may **issue** an EAW (Art. 44 Law on Surrender). However, only the Public Prosecutor of the Fugitive Active Search Team (FAST) of the National Office (*Landelijk Parket*) of the Public Prosecution Service (*Openbaar Ministerie*) may issue an EAW for the purpose of executing a custodial sentence or a detention order.

An assistant public prosecutor (*parketsecretaris*) or a junior assistant public prosecutor (*junior parketsecretaris*) of FAST **fills in** the EAW. The (junior) assistant public prosecutors of FAST all have legal degrees.

Additional remarks by the researcher

Unlike Public Prosecutors, assistant public prosecutors and junior assistant public prosecutors are not a part of the judiciary (see Art. 1(b)(7) of the Law on the Organisation of the Judiciary), but are civil servants.

The exercise of any of the powers of a Public Prosecutor – such as the power to issue an EAW – may be transferred to a civil servant of the Public Prosecution Service who is not a Public Prosecutor himself – such as an (junior) assistant public prosecutor – (Art. 126(1) Law on the Organisation of the Judiciary), unless this is contrary to the rules on which the power is based or against the nature of that power (Art. 126(3) Law on the Organisation of the Judiciary).

One can argue that transferring the exercise of the power to issue an EAW to a civil servant who is not a Public Prosecutor – and therefore not a member of the judiciary – is contrary to the rules on which that power is based and/or goes against the nature of that power. An EAW may only be issued by a judicial authority (Art. 1(2) and Art. 6(1) FD 2002/584/JHA). The issue of an EAW by a non-judicial officer, such as an assistant public prosecutor, does not provide the executing judicial authority with an assurance that the issue of that EAW has undergone judicial approval and cannot, therefore, suffice to justify the high level of confidence between the Member States on which the system of the EAW is based.[121]

b) The EAW must conform to the model which is annexed to the Law on Surrender and must at least contain the following information (Art. 2(2) Law on Surrender):

(a) the identity and nationality of the requested person;
(b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;
(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision;
(d) the nature and legal classification of the offence, particularly in respect of Article 7(1)(a)(i) Law on Surrender;
(e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;
(f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;
(g) if possible, other consequences of the offence.

The FAST uses the model form of the EAW available on the website of the European Judicial Network. The specifics of the case are entered on the form. A Public Prosecutor the checks the EAW and, if all is in order, signs the EAW. The EAW is then transmitted via the national SIRENE[122] Bureau in the Schengen Information System.

[121] Compare CoJ, judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, ECLI:EU:C:2016:858, para 45.
[122] Supplementary Information Request at the National Entries. Each Member State operating the SIS has a national SIRENE Bureau.

c) In the past, the FAST always ticked one of the options of point 3 of section (d) of the EAW, if the requested person did not appear in person at the trial resulting in the decision. If the situation in the case at hand did not fully correspond to one of the options of point 3, the option which most closely resembled the situation would be ticked. An example: if the requested person was convicted in absentia at first instance and on appeal and was not summoned in person at first instance and on appeal, but legal counsellor lodged an appeal against the first instance judgment and an appeal on points of law against the judgment on appeal, point 3.1.b would be ticked.

Recently, the FAST became aware, first of all, that in some cases none of the options of point 3 of section (d) of the EAW applies and, furthermore, that ticking one of those options is not always required. See the example given above. Another example: if the person concerned was convicted in absentia on appeal and a notification of the judgment on appeal was served on him in person, while he did not lodge an appeal on points of law against that judgment, it is not possible to tick point 3.3, as an appeal on points of law does not constitute a retrial or an appeal as referred to in Art. 4a(1)(c) FD 2002/584/JHA.

Additional remarks by the researcher

Having reviewed a number of *in absentia*-EAW's issued by the FAST, I alerted one of the assistant public prosecutors of a problem in one of those EAW's. Option 3.3. was ticked, but it seemed to me that this option 3.3. was not applicable, because an appeal on points of law does not constitute a retrial or an appeal in the sense of Art. 4a(1)(c) FD 2002/584/JHA. I explained that one must only tick one of the options of point 3.3, if that option is actually applicable and that, if none of those options is applicable, the issuing judicial authority can illustrate why in its view the defendant's rights of defence were nonetheless fully observed.

See also the answer to question 88.

In every case, the proceedings will described in their entirety under point 4 of section (d) of the EAW, whether or not one of the options of point 3 applies.

d) The proceedings will described in their entirety. First of all, the FAST will describe the first instance proceedings: how the person concerned was summoned; whether the person concerned appeared in person at the hearing at which the merits of the case were dealt with; whether the person concerned was assisted by a legal counsellor; whether the person concerned was assisted by an interpreter; what the first instance judgment entailed and, in particular, which sentence was imposed on the person concerned.

If an appeal was lodged against the first instance judgment, the FAST will mention who lodged the appeal (the defendant, an authorised legal counsellor, another person authorised by the defendant or the Public Prosecutor) and when the appeal was lodged. The proceedings on appeal will be described in the same way as the first instance proceedings.

If an appeal on points of law was lodged against the judgment on appeal, the FAST will mention who lodged the appeal, the outcome of the appeal on points of law and when the judgment on appeal became irrevocable.

If a provisional release (*voorwaardelijke invrijheidstelling*) or a conditional suspension of the enforcement of a sentence was subsequently revoked, the FAST will describe the proceedings resulting in that decision. The same applies to a decision dismissing an objection lodged against the order to execute 'default detention' when the person concerned did not (fully) complete a penalty of community service. (In imposing a penalty of community service, the court will also impose a default custodial sentence, which latter penalty will be enforced if the person concerned fails to satisfactorily complete the community service (Art. 22d Penal Code). The Public Prosecutor disposes of a (small) margin of discretion whether to forego executing the 'default custodial sentence' in 'exceptional circumstances' (Art. 22d(2) Penal Code). The person concerned may lodge an objection against the decision of the Public Prosecutor to execute the 'default custodial sentence').

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?

Answer

Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service

If Art. 4a(1)(d) FD 2002/584/JHA applies, the judgment is not yet irrevocable. The Fugitive Active Search Team of the Public Prosecution Service only handles cases in which the judgment is irrevocable.

Additional remark by the researcher

The competent department of the Public Prosecution Service will serve a notification of the judgment on the surrendered person in accordance with Art. 366 CPC (see the answer to question 8 a)).

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)?

Answer

While the defendant is in remand awaiting his retrial or appeal, the competent Court of Appeal shall, at the request of the Public Prosecutor, decide on the continuation of deprivation

of liberty within regular intervals not exceeding 90 days (art. 75(1) in connection with Art. 66 CPC; Art. 415(1) in connection with 282 CPC).

At any stage of the proceedings the defendant who is in remand may ask the competent Court of Appeal to end remand (Art. 75(1) in connection with Art. 69(1) CPC) or to release him conditionally (Art. 82(1) in connection with Art. 86(1) CPC).

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)?

Answer

The Public Prosecutor will immediately contact the issuing judicial authority and will inform it of the request.

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?

Answer

Yes (Art. 2(2) Law on Surrender).

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?

Answer

As section (d) of the 'old' EAW-form is not tailored to the specific requirements of Art. 4a FD 2002/584/JHA, the EAW will most probably not contain the information needed to verify whether the rights of the defence were fully respected. The District Court of Amsterdam will, therefore, be forced to ask the issuing judicial authority for additional information on the basis of Art. 15(2) FD 2002/584/JHA at least once.[123]

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.]

[123] CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 103-105.

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.**

Answer

The Netherlands did indeed make the declaration provided for in Art. 8(3) FD 2002/584/JHA.[124]

This declaration reads as follows:

> 'In addition to European arrest warrants drawn up in Dutch or English, European arrest warrants in another official language of the European Union are accepted provided that an English translation is submitted at the same time'.

The declaration was not published.

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?

Answer

If a deviation regards form rather than substance,

> *e.g.*, 'It is stated if the person took part in judicial investigation after which the decision was adopted:
> **1. x Yes, the person participated himself in judicial investigation after which the decision was adopted**' instead of 'Indicate if the person appeared in person at the trial resulting in the decision:
> 1. □ Yes, the person appeared in person at the trial resulting in the decision',[125]

that deviation should have no consequences. In such cases it is still possible to verify whether the rights of the defence were fully respected.[126]

[124] Council document 9009/04, 29 April 2004.
[125] District Court of Amsterdam, judgment of 14 March 2017, ECLI:NL:RBAMS:2017:1694.
[126] In the context of section (d), it was clear that the expression 'judicial investigation' referred to a 'trial': both in point 3.3 and point 3.4 the expression 'the right to a retrial' was rendered as 'the right to reinvestigate the lawsuit'. Furthermore, the person concerned confirmed his presence at the trial.

A deviation with regard to substance is a different matter altogether. If, *e.g.*, the EAW mentions:

- 'No, the requested person did not appear in person at the trial during which the judgment was pronounced' instead of 'No, the person did not appear in person at the trial resulting in the decision',[127] or

- the person concerned was summoned in person 'by registered mail',[128]

these statements should lead to a request for additional information in accordance with Art. 15(2) FD 2002/584/JHA, unless the matter can be clarified by other means (*e.g.* on the basis of a statement by the requested person).[129]

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 to 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,

[127] District Court of Amsterdam, judgment of 26 April 2018, ECLI:NL:RBAMS:2018:2701 (not published).
[128] District Court of Amsterdam, judgment 22 June 2017, ECLI:NL:RBAMS:2017:4747.
[129] Regarding the first example: on the basis of the statements of the person concerned, the court established that he was indeed present at the trial resulting in the decision. Regarding the second example: on the basis of supplementary information the court established that the person concerned did not in fact receive the summons in person, but rather the summons remained uncollected at the post office.

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?

Answer

If it cannot be deduced from the EAW with reasonable certainty to which decision(s) section (d) of the EAW applies, a request for additional information in accordance with Art. 15(2) FD 2002/584/JHA should be made at least once.[130]

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?

[130] CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 103-105.

Answer

In confirming the deal between the Public Prosecutor and the defendant, the judge in effect imposes a penalty on the defendant. As a judicial decision imposing a penalty implies a finding of guilt, it is hard to see why confirmation of a deal could not be considered as a conviction in the sense of the CoJ's case-law on Art. 4a.[131] The judicial confirmation of a deal between the Public Prosecutor and the defendant as to the penalty to be imposed is, therefore, a 'decision' in the sense of Art. 4a.

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?

Answer

Judicial decisions imposing a penalty

Again, the imposition of a penalty is a conviction and, therefore, a decision in the sense of Art. 4a (see the answer to question 31).

If a penalty was imposed without having held a trial, *i.e.* without having held a hearing, this is all the more reason to verify whether the rights of the defence were fully respected.

Not holding a hearing does not necessarily violate Art. 6(1) ECHR. The obligation to hold a hearing is not absolute. In cases:

- which do not carry any significant degree of stigma and
- which do not strictly belong to traditional criminal law, such as administrative penalties,

Art. 6(1) ECHR does not necessarily apply with its full rigour as it does in regular criminal cases.[132]

Although not holding a hearing may be justified **only in rare cases**, 'there may be proceedings in which an oral hearing may not be required, for example where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written

[131] Compare CoJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, paras 78 and 83; CoJ, judgment of 10 august 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para 77.
[132] ECtHR (Grand Chamber), judgment of 23 November 2006, *Jussila v. Finland*, ECLI:CE:ECHR:2006:1123JUD007305301, § 43.

materials' and the domestic authorities may have regard to 'the demands of efficiency and economy'.[133]

In this respect it should be noted that Directive 2016/343/EU explicitly recognises proceedings in which no hearing is held. According to Art. 8(5) Directive 2016/343/EU and recital (41) of the preamble, the provisions about the right to be present at the trial are not applicable to proceedings or certain stages thereof which are conducted **in writing**, **provided that these proceedings comply with the right to a fair trial**.

Non-judicial decisions imposing a penalty

First of all, it should be remembered that the expression 'decision' in Art. 4a FD 2002/584/JHA refers to 'the **judicial** decision which finally sentenced the person whose surrender is sought in connection with the execution of a European Arrest Warrant'.[134] This decision need not necessarily be the 'enforceable judgment' or 'any other enforceable judicial decision having the same effect' as referred to in Art. 8(1)(c) FD 2002/584/JHA,[135] but it must be a **judicial** decision.

It follows that a **non**-judicial decision imposing a penalty as such does not come within the ambit of Art. 4a FD 2002/584/JHA.

One may object that this line of reasoning would undermine the high level protection of the person concerned which Art. 4a seeks to provide. On closer inspection, however, one must concede that this objection is groundless. After all, without the existence of an enforceable **judgment** or any other **judicial** decision having the same effect no EAW for the enforcement of a penalty imposed by a **non**-judicial decision can even be issued (Art. 8(1)(c) FD 2002/584/JHA).

In this regard, it is relevant that Art. 6 ECHR does not exclude a **non-judicial** authority from imposing a penalty, **on condition** that the person concerned may take this decision before a **tribunal that does offer the guarantees of Article 6 ECHR** and has **full jurisdiction**.[136]

It is only the final decision of such a tribunal that comes within the ambit of Article 4a FD 2002/584/JHA.

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[133] ECtHR (Grand Chamber), judgment of 23 November 2006, *Jussila v. Finland*, ECLI:CE:ECHR:2006:1123JUD007305301, § 41. See for offences of a minor character ECtHR, decision of 17 May 2011, *Suhaldolc v. Slovenia*, ECLI:CE:ECHR:2011:0517DEC005765508 and ECtHR, decision of 17 May 2016, *Van Velzen v. the Netherlands*, ECLI:CE:ECHR:2016:0517DEC002149610.

[134] CoJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para 74 (emphasis added).

[135] CoJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para 76.

[136] See, *e.g.*, ECtHR, judgment of 21 February 1984, *Öztürk v. Germany*, ECLI:CE:ECHR:1984:0221JUD000854479, § 56; ECtHR, judgment of 24 February 1994, *Bendenoun v. France*, ECLI:CE:ECHR:1994:0224JUD001254786, § 41; ECtHR, judgment of 23 July 2002, *Janosevic. v. Sweden*, ECLI:CE:ECHR:2002:0723JUD003461997, § 81.

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?**

Answer

Yes, on both counts.

The Public Prosecutor (*officier van justitie*) may issue a punishment order (*strafbeschikking*) (Art. 257a(1) CPC) and impose, *e.g.*, the penalty of community service (Art. 257a(2) CPC), if he establishes that a misdemeanour (*overtreding*) or a crime (*misdrijf*) which carries a statutory term of imprisonment not exceeding six years has been committed.

It is not possible to impose a custodial sentence or a detention order (Art. 257a(2) CPC), nor is it possible to impose an alternative custodial sentence if the person concerned does not perform the community service as he should. [137]

It follows, therefore, that a punishment order cannot never constitute the – sole –[138] basis for issuing an EAW (see Art. 2(1) FD 2002/584/JHA).

The Police and some bodies or persons charged with public duties have similar, but less far-reaching powers (Art. 257b and Art. 257ba CPC).

In some cases a punishment order may only be issued after the Public Prosecutor has heard the defendant and after the defendant has stated that he is prepared to comply (cases in which community service, disqualification from driving motor vehicles, and/or instructions pertaining to the behaviour of the suspect are imposed) (Art. 257c(1) CPC).

A copy of the written punishment order must be delivered to the person concerned, either in person or otherwise (Art. 257d CPC). He may file an objection against the punishment order within fourteen days after the copy has been delivered to him in person, or a circumstance has otherwise occurred from which it follows that he knows about the punishment order (Art. 257e(1) CPC). [There are two exceptions: 1) the defendant has waived his right to do so by voluntarily complying with the punishment order and 2) the defendant, having the legal representation of a defence counsel, has waived his right to do so in writing].

[137] In such a case, the only option left to the Public Prosecutor is to indict the person concerned.
[138] Assuming that FD 2002/584/JHA does not prohibit so-called 'accessory surrender', an EAW could be issued for the purpose of the execution of a punishment order, if the EAW *also* pertains to an offence or a penalty which does comply with the requirements of Art. 2(1) FD 2002/584/JHA.

If the objection is lodged on time, a full trial will ensue. The case is dealt with by the District Court as if the Public Prosecutor had indicted the defendant (Art. 257f(1) CPC).

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

Explanation
In the experience of the *District Court of Amsterdam* issuing judicial authorities sometimes interpret the word 'the trial resulting in the decision' as the 'court date at which the judgment was pronounced'. Given that one of the objectives of FD 2009/299/JHA is to enhance the procedural rights of persons subject to criminal proceedings (art. 1(1)), this raises the question whether this interpretation is correct or not. One could argue that, unless the trial and the pronouncement of the judgment took place at the same date and the defendant was also present at the trial, the mere presence of the defendant at the pronouncement of the judgment does not support a conclusion that the rights of the defence have been fully respected.

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

Answer

In the *Tupikas* case the CoJ held that the concept of a 'trial resulting in the decision' must be understood as referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of an EAW.[139]

Given that it is up to the executing judicial authority to verify whether the rights of the defence were fully respected - *i.e.* if one the situations referred to in Article 4a(1)(a) to (d) of the Framework Decision exists – when the requested person did not appear in person at the trial resulting in the decision, it follows that Art. 4a presumes that the rights of the defence were indeed respected when the requested person appeared in person at that trial. Put differently, according to the internal logic of Art. 4a, presence in person at the trial obviates the need to check whether the rights of the defence were respected during that trial.

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 of conviction cannot support the conclusion that the rights of the defence were respected during the trial leading to that judgment.

If one were to interpret Art. 4a in such a way that mere presence at the pronouncement of the judgment would suffice to preclude the applicability of that provision, that interpretation

[139] CoJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para 74.

would blatantly run counter to one of its objectives: to enhance the procedural rights of persons subject to criminal proceedings (Art. 1(1) FD 2009/299/JHA).

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?

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?

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'?

Answer

Introduction

All the sub questions raise the issue of the meaning of the expression 'trial resulting in the decision'. This expression must be regarded as an **autonomous** concept of Union law, which must be interpreted **uniformly** throughout the Union, taking into account the context of the provision and the objective pursued by the legislation in question.

Art. 4a(1) FD 2002/584/JHA 'seeks to guarantee a **high** level of protection and to allow the executing judicial authority to surrender the person concerned despite that person's failure to attend the trial which led to his conviction, while **fully** respecting his rights of defence'.[140]

[140] CoJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para 58 (emphasis added).

Because Art. 4a FD 2002/584/JHA is only applicable on condition that the requested person was **absent** at the trial which resulted in his conviction, it, therefore, necessarily follows that there is a **presumption** that the requested person's rights of defence were **fully** respected if he was **present** at the trial which resulted in his conviction (see also the answer to question 34).

Against this background, let us consider three possible interpretations:

> 1) to exclude the applicability of Art. 4a, the defendant must have been present at **every** hearing,
>
> 2) to exclude the applicability of Art 4a, it suffices that he was present at **only one** of the hearings, regardless of what transpired at that hearing and
>
> 3) to exclude the applicability of Art. 4a, the defendant must have been present at the hearings at which the court dealt with the **merits of the case**.

First interpretation

This interpretation has the advantage of practicability. It will be relatively easy for the judicial authorities to conclude whether Art. 4a is applicable or not.

The first interpretation may be asking too much. Consider a hearing which was adjourned immediately after the opening of the hearing, because of the non-attendance of a witness. Is the fact that the defendant was not present at this hearing, while he was present at all of the other hearings, in itself, enough to conclude that his rights of defence were not fully respected? I would think not.

Second interpretation

The second interpretation is also practicable.

Against the background of the presumption underlying Art. 4a, the second interpretation may be asking too little. Consider again a hearing which was adjourned because of non-attendance of a witness. Is the presence of the defendant at this hearing, in itself, enough to conclude that his rights of defence were fully respected? It would seem not.

One could, of course, argue that, having once attended a hearing, it is the responsibility of the defendant to enquire after the date and place of the next hearing. Such a line of reasoning,[141] however, conflates the question of the applicability of Art. 4a with the question whether – once applicable – there are circumstances which enable the executing judicial authority to ensure that the surrender of the person concerned does not entail a breach of his rights of defence. Furthermore, such a line of reasoning would significantly lower the high level of protection Art. 4a is designed to ensure.

[141] See for this line of reasoning the answer to question 8a).

Third interpretation

A third possible interpretation is that to exclude the applicability of Art. 4a, the defendant must have been present at the hearing(s) at which the court dealt with the merits of the case.

A disadvantage of this interpretation is that it may not always be easy to distinguish between hearings at which the merits of the case were dealt with and other hearings.

This interpretation is in line with the presumption underlying Art. 4a, identified above. If the defendant was present at the hearing(s) at which the court dealt with the merits of the case, one may safely assume that he had the opportunity to defend himself and that, therefore, his rights of defence were **fully** respected.

In comparison with the second interpretation, the third interpretation accords well with the aim of seeking to guarantee a **high** level of protection.

The third interpretation is also in line with the case-law of the ECtHR. The case-law of this court shows that under Art. 6 ECHR it is indeed relevant what transpires at a hearing at which the defendant is not present: *e.g.* whether at that hearing all the evidence was examined in the absence of the defendant[142] or whether, by contrast, at that hearing no activity took place which required the presence of the defendant.[143]

Conclusion

On balance, the third interpretation seems the most acceptable of the three interpretations.

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[142] See ECtHR, judgment of 22 May 2012, *Idalov v. Rusland*, ECLI:CE:ECHR:2012:0522JUD000582603, § 178: the applicant was removed from the courtroom for improper behaviour; **all the evidence**, including witnesses, was examined in his **absence**; because the court had not warned the applicant or considered a short adjournment in order to make the applicant aware of the potential consequences of his ongoing behaviour, the ECtHR was unable to conclude that, notwithstanding his disruptive behaviour, the applicant had unequivocally waived his right to be present at his trial. His removal from the courtroom meant that he was not in a position to exercise that right.
Compare ECtHR, judgment of 25 November 2008, *Boyarchenko v. Ukraine*, ECLI:CE:ECHR:2012:0522JUD000582603, § 3: the applicant was charged with an infringement of custom regulations; the applicant and the Customs Office participated in the court hearing, in which the applicant was given an opportunity to advance any arguments in his defence and provide any piece of evidence in support of his submissions; the court sent the case-file back to the Customs Office for technical reasons; at the next hearings, at which the applicant was not present, the Customs Office did not offer any **new arguments** in support of their position; the applicant did not suggest that the court had **examined** any **new evidence or arguments** or that he had any **new arguments or proofs to present**: the ECtHR held that in these circumstances, the decision to continue with the case in the absence of the applicant did not disclose any unfairness.

[143] ECtHR, decision of 8 December 2009, *Previti v. Italy*, ECLI:CE:ECHR:2009:1208DEC004529106, § 196-198: 108 hearings were held at first instance, 33 hearings in appeal and 8 in cassation; the applicant was absent at only one of the hearings of the first instance court; the ECtHR ruled that when a considerable number of hearings were held, it will only be in exceptional circumstances that the absence of the defendant at one of these hearings can compromise the fairness of the entire proceedings; such exceptional circumstances did not present themselves in this case: at the one hearing at which the applicant was absent no activity took place which required the presence of the applicant in person 'telle que, par exemple, **la production de moyens de preuve**' (emphasis added).

Therefore, questions a), b) and c) will be answered on the basis of the assumption that in the context of multiple court hearings within one instance the expression 'trial' means the hearing(s) at which the court examined the **merits of the case**, in particular the hearing(s) at which the evidence was examined, and which resulted in the decision.

Of course, to qualify as a 'trial resulting in the decision' the hearing(s) at which the court examined the merits of the case must have led to that decision. A mere t**emporal connection** between the hearing(s) and the decision – in the sense that the hearing(s) preceded the decision – is not enough. There must also be a **factual connection**, in the sense that the decision is actually taken on the basis of the hearing(s). If, after having adjourned a hearing at which the defendant was present, at the next hearing the court decides to **start** the examination of the merits of the case **afresh** (*e.g.*, because the court is not sitting in the same composition as at the previous hearing) and if the court for that reason is **barred from taking into account what happened at the previous hearing**, the defendant's presence at the previous hearing does not constitutes presence in person at the trial **resulting** in the decision. After all, in reaching the decision the court is to disregard the previous hearing and thus any argument the defence may have put forward at that hearing.

a) It depends on what transpired at the hearing(s) at which the defendant was present. If the court examined the merits of the case at the hearing(s) at which the defendant was present, then Art. 4a is not applicable.

b) Yes, it does matter what transpired at the hearing(s) at which the defendant was present. No, the mere presence of the defendant at one of the hearings is not enough to preclude the applicability of Art. 4a.

c) The relevant criterion is whether the merits of the case were examined at the relevant hearing.

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 to 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'?

Answer

The expression 'in due time' means that the defendant must have received the information about the date and the place of the trial 'sufficiently in time to allow him or her to participate in the trial and to effectively exercise his or her right of defence'.[144] In other words: between having received the information about the date and the place of the trial and the trial itself enough time must have elapsed for the defendant to adequately prepare his defence.

The national courts must ascertain whether an absent defendant was informed of the upcoming hearing sufficiently in advance. The answer to this question enables them to determine whether the hearing must be adjourned pending due notification.[145]

Whether the defendant had adequate time to prepare for his defence depends on the circumstances of each case, having regard to, *inter alia*, the nature of the proceedings, the complexity of the case and the stage of the proceedings.[146]

37.

[144] Recital (7) of the preamble of FD 2009/299/JHA.
[145] See, *e.g.*, ECtHR, judgment of 31 May 2016, *Gankin e.a. v. Russia*, ECLI:CE:ECHR:2016:0531JUD000243006, § 70.
[146] See, *e.g.*, ECtHR, 10 July 2012, *Gregačević v. Croatia*, ECLI:CE:ECHR:2012:0710JUD005833109, § 51.

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?

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?

Answer

Both questions concern situations in which the summons was not served on the defendant in person, but in which the defendant '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' as mentioned in Art. 4a(1)a(i) FD 2002/584/JHA.

a) Art. 4a(1)(a)(i) requires that it is *unequivocally* established that the defendant actually received the information about the date and the place of the trial.[147]

Evidence that would support the conclusion that the requested person actually received the information about the date and the place of trial could, *e.g.*, consist of:

- a receipt signed by the defendant when collecting the summons at the post office;

- a letter by the defendant to the judicial authorities requesting an adjournment of the scheduled trial. Such a letter would unequivocally establish that he was aware of the date and the place of the trial;[148]

- a letter by the legal counsellor of the defendant stating that the defendant appointed him to assist the defendant at a specific hearing. Again, such a letter would unequivocally establish that the defendant was aware of the date and the place of the trial.

Regarding situations in which the summons was given to a third party, it is doubtful whether a statement of that third party that he passed the information about the date and place of the trial on to the defendant **unequivocally** establishes that the defendant **actually** received that information, where the defendant **disputes** that statement.

In this regard, Art. 4a seems more stringent than Art. 6 ECHR. In case the summons was delivered at the address given by the defendant to a family member of the defendant and the

[147] CoJ, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, para 47.
[148] See ECtHR, decision of 20 October 2015, *Di Silvio v. Italy*, ECLI:CE:ECHR:2015:1020DEC005663513, § 33; ECtHR, decision of 3 October 2017, *Giurgiu v. Romania*, ECLI:CE:ECHR:2017:1003DEC002623909, § 98. See also ECtHR, decision of 19 June 2012, *Sulejmani v. Albania*, ECLI:CE:ECHR:2012:0619DEC001611410, § 23: 'a power of attorney by which the applicant acknowledged the start of the proceedings against him and appointed lawyers B. and J. to represent him'.

defendant has never stated that he is no longer in contact with that family member, according to the ECtHR it is **not unreasonable** to **infer** that the defendant was aware of the proceedings against him.[149]

b) As Art. 4a FD 2002/584/JHA aims at protecting the rights of the defendant, once the defendant confirms or does not dispute that he actually received the summons, this suffices to conclude that the condition of Art. 4a(1)(a)(i) FD were met.

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 to 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?

[149] See ECtHR, decision of 6 March 2018, *Nicolae Popa v. Romania*, ECLI:CE:ECHR:2018:0306DEC005524212, § 73; ECtHR, judgment of 2 February 2017, *Ait Abbou v. France*, ECLI:CE:ECHR:2017:0202JUD004492113, § 63-65.

Answer

Art. 4a(1)(b) FD 2002/584/JHA refers to cases in which the person concerned 'must be deemed to have waived, voluntarily and unambiguously, his right to be present at his trial'.[150] The case-law of the ECtHR distinguishes between an express waiver and a tacit waiver of the right to be present.[151] It is a prerequisite for a valid waiver – either express or tacit – that the person concerned was sufficiently aware of the proceedings and the charges against him.[152] After all, waiving a right presupposes that the person concerned knows of the existence of that right and, therefore, of the proceedings within which to exercise that right.[153]

The expression 'being are of the scheduled trial' must, therefore, be understood as meaning that the person concerned also was aware of the charges against him.

A comparison of Art. 4a(1)(b) FD 2002/584/JHA with Art. 4a(1)(a)(i) FD 2002/584/JHA shows that it is not required that the defendant was aware of **the date and the place** of the trial, but rather that he was aware of the **scheduled** trial.

In these circumstances the expression 'being aware of the scheduled trial' means that the defendant was aware that a trial would be held, without it being necessary that he was also aware of the date and place of that trial.

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

Answer

From the text of Art. 4a(1)(b) FD 2002/584/JHA it follows clearly that it does not matter whether the legal counsellor was appointed by the defendant himself or by the issuing Member State.

The mere fact that the absent defendant is defended by a legal counsellor appointed by himself or by the State is not enough to preclude optional refusal. The preamble clarifies that

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[150] CoJ, judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107, para 52.

[151] ECtHR (Grand Chamber), judgment of 1 March 2006, *Sejdovic v. Italy*, ECLI:CE:ECHR:2006:0301JUD00565810, § 86. On this distinction see also ECtHR, judgment of 12 June 2018, *M.T.B. v. Turkey*, ECLI:CE:ECHR:2018:0612JUD004708106, § 49-50.

[152] ECtHR (Grand Chamber), judgment of 1 March 2006, *Sejdovic v. Italy*, ECLI:CE:ECHR:2006:0301JUD00565810, § 101. See also, e.g., ECtHR, judgment of 23 May 2006, *Kounov v. Bulgaria*, ECLI:CE:ECHR:2006:0523JUD002437902, § 50; ECtHR, decision of 12 December 2006, *Battisti v. France*, ECLI:CE:ECHR:2006:1212DEC002879605; ECtHR, decision of 16 January 2010, *Sulejmani v. Albania*, ECLI:CE:ECHR:2012:0619DEC001611410; ECtHR, judgment of 12 June 2018, *M.T.B. v. Turkey*, ECLI:CE:ECHR:2018:0612JUD004708106, § 49. In this respect, the decision in *Sulejmani v. Albania* is particularly relevant: the applicant had signed a copy of a power of attorney in which he referred to the charges against him and by which he acknowledged the start of the proceedings against him and appointed lawyers B. and J. to represent him. The ECtHR held that '(b)y choosing to leave the country, the applicant must be considered to have intentionally and unequivocally waived his rights under Article 6 of the Convention and could reasonably have foreseen the consequences of his conduct').

[153] See, *e.g.*, ECtHR, judgment of 4 March 2014, *Dilipak and Karakaya v. Turkey*, ECLI:CE:ECHR:2014:0304JUD000794205, § 87.

the defendant 'should **deliberately have chosen** to be **represented** by a legal counsellor **instead of appearing in person at the trial**'.[154]

Against this background, the expression 'the person had given a mandate to a legal counsellor' must be understood to mean that the defendant had **authorised** his legal counsellor to defend him in his absence at the trial.

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?

Answer

It should be recalled that Art. 4a(1)(b) FD 2002/584/JHA concerns situations in which the defendant 'must be deemed to have waived, voluntarily and unambiguously, his right to be present at his trial',[155] which requires, first of all, that the defendant had sufficient knowledge of the proceedings and the charges against him (see the answer to question 38).

It, therefore, necessarily follows that, as the defendant must have authorised his legal counsellor to defend him in his absence at the trial (see the answer to question 39), he must have had actual knowledge of the *ex officio* appointment of the legal counsellor and, in one form or another, must have had actual contact with this legal counsellor in some form.[156]

The case-law of the ECtHR confirms that in cases in which the defendant had no knowledge of the proceedings against him and was defended in his absence by a legal counsellor who was not appointed by himself, there can be no voluntary waiver.[157]

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?

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[154] Recital (10) of the preamble of FD 2009/299/JHA (emphasis added).

[155] CoJ, judgment of 25 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107, para 52.

[156] Compare ECtHR, judgment of 5 November 2013, *Izet Haxhia v. Albania*, ECLI:CE:ECHR:2013:1105JUD003478306, § 63 and ECtHR, judgment of 10 May 2011, *Shkalla v. Albania*, ECLI:CE:ECHR:2011:0510JUD002686605, § 74, both regarding a legal counsellor appointed *by the family of the defendant*: in both cases it was not shown that the defendant 'explicitly or implicitly authorised his family members' actions'.
Quite apart from the question of actual contact as a condition to a valid waver, lack of contact with a legal counsellor appointed *ex officio* also raises the question whether in such circumstances the defence mounted by the legal counsellor may be considered to be effective. See in this regard ECtHR, judgment of 30 July 2009, *Ananyev v. Russia*, ECLI:CE:ECHR:2009:0730JUD002029204, § 54-55: the State-appointed legal counsellor 'never met or otherwise communicated with the applicant'; 'the lack of personal contact with the applicant and the absence of any discussion with him in advance of the hearing, combined with the fact that the State-appointed lawyer did not prepare any grounds of appeal of her own and pleaded the case on the basis of grounds of appeal lodged some four years earlier by the applicant, irreparably impaired the effectiveness of the legal assistance'.

[157] See, e.*g.*, ECtHR (Grand Chamber), judgment of 1 March 2006, *Sejdovic v. Italy*, ECLI:CE:ECHR:2006:0301JUD005658100, § 101.

Answer

Section (d)(4) of the EAW enables the executing judicial authority to verify whether the conditions of Art. 4a(1)(b) FD 2002/584/JHA are met.

If the issuing judicial authority did not fill in section (d)(4) of the EAW (completely), as a rule the executing judicial authority does not have sufficient information to enable it to validly decide on the execution of the EAW. It must, therefore, apply Article 15(2) FD 2002/584/JHA and request the necessary additional information at least once.[158]

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 to 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'.

[158] CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para 103.

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?

Answer

In a number of ways, Art. 4a(1)(c) FD 2002/584/JHA is undoubtedly inspired by the case-law of the ECtHR on *in absentia* proceedings.
First of all, it is important to point out that the description of what a retrial or an appeal should entail ('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'), is based on, *inter alia*, the *Sejdovic*-judgment ('a denial of justice nevertheless undoubtedly occurs where a person convicted *in absentia* is unable subsequently to obtain **from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact**, where it has not been established that he has waived his right to appear and to defend himself (…))'.[159]
Secondly, the rationale of both Art. 4a(1)(c) FD and the ECtHR's case-law is that:

- a fresh determination of the merits of the charge, in respect of both law and fact, in which the person concerned may participate, can remedy any defects in the first instance proceedings[160] and

- failing to make use of the possibility to obtain such a fresh determination constitutes a waiver of the right to be tried in his presence.[161]

It should be recalled that:

- Art. 4a(1) FD 2002/584/JHA seeks to guarantee a **high** level of protection[162] and

- Art. 4a(1)(c) FD 2002/584/JHA in particular concerns situations in which, even though the defendant is entitled to a retrial, he did not ask for a retrial.[163]

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[159] ECtHR (Grand Chamber), judgment of 1 March 2006, *Sejdovic v. Italy*, ECLI:CE:ECHR:2006:0301JUD00565810, § 82 (emphasis added).
[160] See, *e.g.*, ECtHR (Grand Chamber), judgment of 1 March 2006, *Sejdovic v. Italy*, ECLI:CE:ECHR:2006:0301JUD00565810, § 126: 'The Court accordingly considers that, where, as in the instant case, an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation (…)'; ECtHR, judgment of 3 October 2016, *Baratta v. Italy*, ECLI:CE:ECHR:2015:1013JUD002826309, § 78 ('En l'espèce, le nouveau procès dont le requérant a bénéficié a remédié au déni de justice constitué par sa condamnation par contumace. (…)'; ECtHR, decision of 3 October 2017, *Giurgiu v. Romania*, ECLI:CE:ECHR:2017:1003DEC002623909, § 96: '(…) the Court reiterates that – given that the defendant was allowed to appeal against the conviction *in absentia* and was entitled to attend the hearing in the court of appeal, thus opening up the possibility of a fresh factual and legal determination of the criminal charge − the proceedings as a whole may be said to have been fair (…)'.
The CoJ is of the same opinion: CoJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para 85 ('(…) such a breach [of defence rights at first instance] may validly be remedied in the course of the second-instance proceedings, provided that the latter proceedings provide all the guarantees with respect to the requirements of a fair trial').
[161] In support of this statement I cannot refer to case-law of the ECtHR, for the simple reason that if an applicant fails to make use of an opportunity to obtain a fresh determination, he has not exhausted all domestic remedies and his complaint is inadmissible (Art. 35(1) ECHR).
[162] CoJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para 58.
[163] CoJ, judgment of 25 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107, para 52.

In essence, Art. 4a(1)(c) FD 2002/584/JHA sets two alternative conditions:

> 1) the defendant expressly stated that he or she does not contest the decision or
>
> 2) the defendant did not request a retrial or an appeal within the applicable time frame.

As said before, part of the rationale of Art. 4a is that a defendant who fails to make use of an opportunity to obtain a fresh determination of the merits of the charge waives his right to be tried in his presence. Both conditions, therefore, relate to a voluntary waiver of the right to be (re)tried in his presence, the former condition an express waiver, the latter condition a tacit one.

One cannot validly waive the right to a recourse against a judgment, if one has no effective knowledge of that judgment and of the possible recourses against it (see the answers to question 38).

Even though Art. 4a(1)(c) FD 2002/584/JHA does not specify how the judgment must be served on the defendant nor how the information about the right to a recourse must be provided to him, it follows, therefore, that the judgment must be served and that the information must be provided in such a way that the defendant has **actual** knowledge thereof. In other words: the defendant must have actually received the judgment and the information about the right to a recourse.

This interpretation is confirmed:

- firstly, by the wording of Art. 4a(1)(c) FD 2002/584/JHA itself. In order to expressly state that one does not contest the decision (Art. 4a(1)(c)(i) FD 2002/584/JHA), one has to have knowledge of that decision.

- secondly, by the case-law of the ECtHR. According to the ECtHR, the object of expressly informing the defendant of the right to a retrial or an appeal is to enable him to exercise that right in accordance with the law of issuing Member State.[164] When serving a judgment of conviction on the defendant, particularly when at the moment of service he is detained or he is not represented by a legal counsellor, he must be informed in an reliable and official manner of the possible recourses against that judgment and the time frame within which to exercise those recourses.[165] What is needed is a document which indicates the formalities to be respected when exercising the right to a retrial or an appeal in such a way that it does not require the interpretation of the applicable legislation or the advice of a legal counsellor. [166]

[164] ECtHR, judgment of 1 March 2011, *Faniel v. Belgium*, ECLI:CE:ECHR:2011:0301JUD001189208, § 30.
[165] ECtHR, judgment of 1 March 2011, *Faniel v. Belgium*, ECLI:CE:ECHR:2011:0301JUD001189208, § 30. *A propos* the time frame see ECtHR, judgment of 29 June 2010, *Hakimi v. Belgium*, ECLI:CE:ECHR:2010:0629JUD000066508, § 36.
[166] ECtHR, judgment of 24 May 2007, *Da Luz Domingues Ferreira v. Belgium*, ECLI:CE:ECHR:2007:0524JUD005004999, § 58.

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?

Answer

Section (d)(4) of the EAW enables the executing judicial authority to verify whether the conditions of Art. 4a(1)(c) FD 2002/584/JHA are met.

If the issuing judicial authority did not fill in section (d)(4) of the EAW (completely), as a rule the executing judicial authority does not have sufficient information to enable it to validly decide on the execution of the EAW. It must, therefore, apply Article 15(2) FD 2002/584/JHA and request the necessary additional information at least once.[167]

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?

Answer

The standard text of point 3.3 of section (d) of the EAW gives expression to the high level of protection Art. 4a(1) FD 2002/584/JHA seeks to guarantee. Deleting words which form an integral part of that standard text detracts from that high level of protection.

If words which form an integral part of point 3.3 were deleted, the executing judicial authority must conclude that the corresponding conditions of Art. 4a(1)(c) FD 2002/584/JHA are not met.

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 to 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:

[167] CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 103-105.

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

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

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

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

Answer

Like Art. 4a(1)(c) 2002/584/JHA, Art. 4(1)(d) FD 2002/584/JHA is inspired by the case-law of the ECtHR on *in absentia* proceedings.
The wording of the guarantee of Art. 4a(1)(d)(i) FD 2002/584/JHA is obviously indebted to the requirement of the possibility for a defendant who was convicted *in absentia* and who did not waive his right to be tried in his presence to obtain a fresh determination of the charge.
Furthermore, one cannot fail to notice the similarities between the description of what a retrial or an appeal entails and the requirement of a fresh determination of the merits of the charge according to the ECtHR's case-law (see the answer to question 42).
Lastly, the rationale of both Art. 4a(1)(d)(i) FD 2002/584/JHA and the requirement of a fresh determination of the merits of the charge is that a retrial/appeal/fresh determination of the charge can remedy any defects of the first instance *in absentia* proceedings (see the answers to question 42).

Against this background, it is important to recall that Art. 4a(1) FD 2002/584/JHA seeks to guarantee a **high** level of protection.[168]

When comparing Art. 5(1) FD 2002/584/JHA with Art. 4a(1)(d) FD 2002/584/JHA, one cannot fail to notice that the latter provision enhances the protection considerably: while the former provision refers to 'an opportunity to **apply** for a retrial of the case', the latter provision speaks of a '**right** to a retrial or an appeal'.

Furthermore, Art. 4a(1)(d) FD 2002/584/JHA refers to '**his** or **her** right to a retrial, or an appeal', thus indicating that what is meant is the recourse that is open **in this particular case to this defendant**, not possible recourses in general.

[168] CoJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para 58.

When ticking point 3.4 of section (d) of the EAW, the issuing judicial authority **guarantees** that the defendant has a **right** to a retrial or an appeal.[169]

However, FD 2009/299/JHA does not seek to harmonise national legislation regarding the right to retrial[170] and Art. 4a(1) FD 2002/584/JHA explicitly refers to 'further procedural requirements defined in the national law of the issuing Member State'.

Accordingly, the right to a retrial or an appeal itself and the formalities for exercising such a right remain within the competence of the Member States.

It follows that, if the defendant asks for a retrial or lodges an appeal in the manner prescribed by the law of the issuing Member State and within the applicable time frame, the judicial authorities of the issuing Member State may not deny him a retrial or an appeal. Put otherwise, the right to a retrial or an appeal may be conditional **only** on compliance with the formalities for exercising these recourses, as they are prescribed by the law of the issuing Member State.

Any other condition, *e.g.* the condition that the defendant did not have effective knowledge of the proceedings or of 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, is not compatible with Art. 4a(1)(d) FD 2002/584/JHA.

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?

Answer

Art. 4a(1)(d)(ii) FD 2002/584/JHA expressly refers to the time frame within which the Requested person to request such a retrial or such an appeal, **as mentioned in the relevant European arrest warrant**.

If the issuing judicial authority failed to mention the applicable time frame in the EAW, the conditions of Art. 4a(1)(d) FD 2002/584/JHA are not met. The executing judicial authority must, therefore, apply Article 15(2) FD 2002/584/JHA and request the necessary additional information at least once.[171]

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?

Answer

[169] See recital (12) of the preamble of FD 2009/299/JHA.
[170] Recital (14) of the preamble of FD 2009/299/JHA.
[171] CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 103-105.

The standard text of point 3.4 of section (d) of the EAW gives expression to the high level of protection Art. 4a(1) FD 2002/584/JHA seeks to guarantee. Deleting words which form an integral part of that standard text detracts from that high level of protection.

If words which form an integral part of point 3.4 were deleted, the executing judicial authority must conclude that the corresponding conditions of Art. 4a(1)(d) FD 2002/584/JHA are not met.

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?

Answer

Point 4 of section (d) of the EAW is not applicable to point 3.4. If the issuing judicial authority has ticked point 3.4 of section (d) of the EAW, it is, therefore, not under any obligation to provide information *proprio motu* about how the conditions of Art. 4a(1)(d) FD 2002/584/JHA are met.

Having provided information *proprio motu* nonetheless, this information should not contradict the standard text of point 3.4. Contradictory information raises the question whether the right to a retrial or an appeal is actually guaranteed. In such circumstances the executing judicial authority is not in a position to ensure that, despite the absence of the requested person at the trial, the rights of defence will be fully observed. It must, therefore, apply Art. 15(2) FD 2002/584/JHA and ask for clarification at least once.[172]

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);

[172] CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 103-105.

- 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?

Answer

If the issuing judicial did not mention that the proceedings took place at several instances and gave rise to successive decisions and if it is apparent that proceedings did indeed take place at several instances leading to successive decisions, the executing judicial authority does not have sufficient information to enable it to validly decide on the execution of the EAW. It must, therefore, apply Art. 15(2) FD 2002/584/JHA and ask for the necessary information at least once.[173]

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?

Answer

In restricting the scope of Art. 4a to the last decision in which a final ruling on the guilt of the person concerned was made and a penalty imposed on him, following an assessment, **in fact and in law**, of the incriminating and exculpatory evidence,[174] the CoJ obviously had in mind the case-law of the ECtHR.

According to that case-law, appeal proceedings and cassation proceedings – *i.e.* proceedings involving **only questions of law**, as opposed to questions of fact – are part of the 'determination of the criminal charge' in the sense of Art. 6(1) ECHR,[175] because the 'charge' is not 'determined' as long as the judgment of conviction or acquittal has not become final.[176] This provision, therefore, applies to such proceedings,[177] but the manner in which Art. 6 ECHR is applied to such proceedings depends, *inter alia*, on the special features of the proceedings involved.[178]

[173] CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 103-105.
[174] CoJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para 81.
[175] Unlike Art. 2(1) of Protocol 7, Art. 6(1) ECHR does not require contracting Parties to provide for appeal proceedings or for cassation proceedings (ECtHR, judgment of 17 January 1970, *Delcourt v. Belgium*, ECLI:CE:ECHR:1970:0117JUD000268965, § 25).
[176] ECtHR, judgment of 17 January 1970, *Delcourt v. Belgium*, ECLI:CE:ECHR:1970:0117JUD000268965, § 25.
[177] See*, e.g.,* ECtHR, decision of 7 September 1999, *Jodko v. Lithuania*, ECLI:CE:ECHR:1999:0907DEC003935098.
[178] ECtHR, judgment of 17 January 1970, *Delcourt v. Belgium*, ECLI:CE:ECHR:1970:0117JUD000268965, § 26.

If on appeal, the appellate court has to examine a case **as to the facts and the law** and make a **full** assessment of the issue of guilt or innocence, it must in principle hear the defendant.[179]

However, proceedings involving **only questions of law, as opposed to questions of fact**, – such as cassation proceedings – may comply with the requirements of Article 6 even where the defendant was not given an opportunity of being heard in person by the cassation court.[180]

The scope of appeal and cassation proceedings varies from Member State to Member State. In some Member States, *e.g.*, the defendant can lodge an appeal against a judgment of conviction and restrict the scope of that appeal to questions of law.[181] In some Member States, the cassation court has jurisdiction to examine both the facts of the case and questions of law.[182]

The mere fact that a decision is referred to as resulting from appeal proceedings or cassation proceedings, therefore, is not sufficient to determine whether Art. 4a applies to that decision.

If the issuing judicial authority indicated that proceedings took place at several instances and gave rise to successive decisions, but did not give any information as to the nature and/or outcome of all of these proceedings, the executing judicial authority does not have sufficient information to enable it to validly decide on the execution of the EAW.

The executing judicial authority must, therefore, apply Art. 15(2) FD 2002/584/JHA and ask for the necessary additional information with reference to the criteria set out by the CoJ in its case-law, at least once.[183]

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?

Answer

The structure of section (d) itself does not force the issuing judicial authority to specify the 'decision'.

When the issuing judicial authority mentions several decisions in the EAW, *e.g.*, in section (b) of the EAW, it is incumbent on the issuing judicial authority to clearly indicate to which of these decisions section (d) applies. Only then can the executing judicial authority verify whether the rights of the defence were fully respected with regard to the relevant decision.

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[179] See, *e.g.*, ECtHR, judgment of 14 February 2017, *Hokkeling v. the Netherlands*, ECLI:CE:ECHR:2017:0214JUD003074912, § 58.

[180] See, e.g., ECtHR [GC], judgment of 26 July 2002, *Meftah and Others v. France*, ECLI:CE:ECHR:2002:0726JUD003291196, § 41.

[181] See, *e.g.*, ECtHR, judgment of 9 June 2009, *Sobolewski (no. 2) v. Poland*, ECLI:CE:ECHR:2009:0609JUD001984707, § 20 and § 41; ECtHR, judgment of 9 June 2009, *Strzałkowski v. Poland*, ECLI:CE:ECHR:2009:0609JUD003150902, §19 and § 47.

[182] See, *e.g.,* ECtHR, judgment of 6 October 2015, *Coniac v. Romania*, ECLI:CE:ECHR:2015:1006JUD000494107, § 59.

[183] CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 103-105.

The executing judicial authority must, therefore, apply Art. 15(2) FD 2002/584/JHA and ask the issuing judicial authority to specify the relevant decision(s) at least once.[184]

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

[184] CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 103-105.

- 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?

Answer

A decision modifying the nature or the *quantum* of the penalty originally imposed falls within the ambit of Art. 4a only on condition that the authority which adopted the decision enjoyed some discretion with regard to the modification of the nature or the *quantum* of the penalty.[185]

If, *e.g.*, the issuing judicial authority mentioned in section (b)2 of the EAW a judgment of conviction and a later decision modifying the nature or the *quantum* of the penalty imposed by the judgment of conviction, without however specifying whether the authority which adopted the later decision enjoyed any discretion with regard to the nature or the *quantum* of the penalty, the executing judicial authority cannot verify to which of the two Art. 4a applies.

The executing judicial authority must, therefore, apply Art. 15(2) FD 2002/584/JHA and ask the issuing judicial authority for additional information at least once.[186]

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?

Answer

This question clearly refers to paras 88-91 of the *Ardic*-judgment, in which the CoJ held that:

- even though a certain decision does not fall within the ambit of Art. 4a, this does not mean that Member States are exempt from the obligation to respect

[185] CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para 90; CoJ, judgment of 22 December 2018, *Ardic*, C-571/17 PPU, ECLI:EU:C:2018:1026, para 77.
[186] CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 103-105.

fundamental rights and fundamental legal principles enshrined in Art. 6 TEU, including the right of defence of persons subject to criminal proceedings;

- this obligation reinforces the high level of trust that must exist between Member States and, consequently, the principle of mutual recognition on which the mechanism of the EAW is based;

- this principle is founded on mutual trust between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at Union level and

- in that context and with a view to effective judicial cooperation, the issuing and executing judicial authorities must make full use of Art. 8(1) and Art. 15 FD 2002/584/JHA, **in order to foster mutual trust on the basis of that cooperation**.[187]

Before answering the question, it may be useful to discuss the ramifications of the CoJ's ruling. The *Ardic*-judgments seems to suggest that there is a right of defence in **Union** law – the CoJ refers to Art. 6 TEU – which does apply to proceedings to which Art. 4a is not applicable. Presumably, the judgment implicitly refers to Art. 47 of the Charter. The CoJ seems to encourage:

- on the one hand the issuing judicial authority to provide information in the EAW which confirms that the rights of the defence are respected and

- on the other hand the executing judicial authority to request additional information in order to confirm that those rights are respected, if that information is lacking.

Apparently, the CoJ presumes that the information provided will always show that the rights of the defence are respected. But what if it doesn't? The executing judicial authority cannot refuse to execute the EAW on the basis of Art. 4a, because that provision does not apply. It is not clear wat consequences, if any, the executing judicial authority should attach to a finding that the rights of the defence were not respected.

Be that as it may, the mere fact that the issuing judicial authority did not provide information on the basis of which the executing judicial authority can verify whether the fundamental rights of the respected person were respected in the proceedings resulting in the decision to modify the nature or the *quantum* of the penalty to which Art. 4a does not apply, should not, in itself, have any consequence.

Certainly such information can **foster** mutual trust, but that is not to say that the absence of such information necessarily **detracts from** mutual trust. After all, there is a fundamental presumption that all Member States respect fundamental rights, which is capable of rebuttal only in exceptional circumstances.[188]

[187] CoJ, judgment of 22 December 2018, *Ardic*, C-571/17 PPU, ECLI:EU:C:2018:1026, para 88-91.
[188] CoJ, opinion of 18 December 2014, *Opinion 2/13*, ECLI:EU:C:2014:2454, para 191-192.

If there is no evidence to rebut the presumption of respect for the rights of the defence, the executing judicial authority should not be obliged to ask for additional information, but should instead rely on the presumption.

In one recent case, the District Court of Amsterdam decided to apply Art. 15(2) FD 2002/584/JHA with regard to a decision to revoke the conditional suspension of a custodial sentence. It was argued on behalf of the requested person that the Polish Constitutional Tribunal had declared unconstitutional the Polish provision on which the revocation of the suspension was based, because this provision was held to be in contravention of the right to a fair trial as guaranteed by the Polish constitution. The District Court of Amsterdam decided to verify with the issuing judicial authority whether said provision had indeed been declared unconstitutional and, if so, what consequences this would have for the decision to revoke the suspension and for the EAW which was based on this decision. In doing so, it (implicitly) referred to paras 88-91 of the *Ardic*-judgment.[189]

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?

Answer

As I said in my answer to question 53, it is not clear what the executing judicial authority should do if it reaches the conclusion that the fundamental rights of the defence were not observed in the proceedings leading to a decision which does not fall within the ambit of Art. 4a.

In such circumstances the executing judicial authority would probably have to ask the CoJ for guidance.

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.

[189] District Court of Amsterdam, decision of 12 April 2018, case number 13/751927-16 (not published).

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?

Answer

The Netherlands transposed Art. 4a FD 2002/584/JHA as a *mandatory* ground for refusal (Art. 12 Law on Surrender).[190]

Art. 12 Law on Surrender does, therefore, not allow the executing judicial authority 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. Rather, Art. 12 Law on Surrender forces the executing judicial authority to refuse to surrender the requested person, when the cases referred to in Article 4a(1)(a) to (d) FD 2002/584/JHA do not cover the situation of the requested person, even if it is otherwise established that his surrender would not violate his rights of defence.[191]

As a result of the *Dworzecki*, *Tupikas* and *Zdziaszek*-judgments, in which the CoJ stressed the *optional* character of Art. 4a FD 2002/584/JHA,[192] the Ministry of Justice and Security is currently preparing a proposal to Parliament to amend Art. 12 Law on Surrender by turning it into an optional ground for refusal.

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?**

Answer

Although the situations covered in Art. 4a(1)(a-d) FD 2002/584/JHA relate to situations in which – according to the relevant case-law of the ECtHR – *in absentia* proceedings do not infringe Art. 6(1) ECHR, these situations do not **fully** codify that case-law. In other words, even though none of the situations in Art. 4a(1)(a-d) FD 2002/584/JHA applies, this does not necessarily mean that surrender for the purpose of the enforcement of an *in absentia* conviction would breach the rights of defence of the person concerned.

[190] 'Surrender *will not* be allowed if (…)' (emphasis added).
[191] See, *e.g.*, District Court of Amsterdam, judgment of 16 June 2016, ECLI:EU:C:2016:3643.
[192] CoJ, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, para 50; CoJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, paras 96-97; CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 106-108.

Because of the highly casuistic nature of the case-law of the ECtHR, it is impossible to list exhaustively circumstances which would justify the conclusion that the surrender of the requested person would not entail a breach of his rights of defence.

What follows is an indication of circumstances derived from the ECtHR's case-law which might act as building blocks to support such a conclusion.

Such circumstances will most likely occur only in cases in which, although the defendant was not summoned in person or otherwise officially informed about the date and the place of the trial, **he had sufficient knowledge of the charges against him and the proceedings**[193] and

- either unequivocally waived his right to attend the trial or

- displayed a lack of diligence in taking proper measures to receive official notifications about the date and the place of the trial.

Against this background, the **mere** fact 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,

would probably not suffice. What is lacking here is, to begin with, sufficient knowledge of the charges against him.[194]

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[193] See ECtHR (Grand Chamber), judgment of 1 March 2006, *Sejdovic v. Italy*, ECLI:CE:ECHR:2006:0301JUD005658100, § 101.

[194] See ECtHR, judgment of 23 May 2006, *Kounov v. Bulgaria*, ECLI:CE:ECHR:2006:0523JUD002437902, § 48-50: '48. La Cour a envisagé que dans certaines hypothèses, même en l'absence d'une notification à personne, il ne pouvait être exclu que certains faits avérés puissent démontrer sans équivoque qu'un individu est au courant des poursuites, connaît la nature et la cause des accusations contre lui et n'a pas l'intention de prendre part au procès ou entend se soustraire à la justice (…). 49. Toutefois, la Cour estime que tel n'est pas le cas du requérant en l'espèce. Ainsi, même en admettant la thèse du Gouvernement dans le sens que l'intéressé se serait enfui du commissariat, la Cour considère qu'en l'absence de notification au requérant des charges retenues contre lui, rien dans les éléments produits devant elle ne permet d'établir qu'il a été au courant de l'ouverture des poursuites, de son renvoi en jugement ou de la date de son procès. En effet, les tentatives des autorités de faire exécuter le mandat d'arrêt se sont révélées infructueuses et aucun des actes de la procédure n'a été notifié à l'intéressé, mais à l'avocat commis d'office. **Ayant été interrogé sur les faits par les policiers**, le requérant pouvait seulement supposer que des poursuites allaient être engagées **mais ne pouvait en aucun cas avoir une connaissance précise des charges qui allaient être retenues**. 50. Au vu de ces observations, la Cour **n'estime pas établi** en l'occurrence que le requérant **avait une connaissance suffisante des poursuites et des accusations à son encontre** pour être en mesure de décider de se soustraire à la justice ou de renoncer, de manière non équivoque, à son droit de comparaître en justice et de se défendre (…)' (emphasis added).
See also ECtHR, judgment of 24 April 2012, *Haralampiev v. Bulgaria*, ECLI:CE:ECHR:2012:0424JUD002964803, § 38-44: the applicant was interrogated by the police in the presence of a legal counsellor; he, therefore, had 'une connaissance suffisante des poursuites et des accusations à son encontre pour savoir que le dossier serait probablement renvoyé devant le parquet et que lui-même serait par la suite cité à comparaître et traduit devant les juridictions'. The ECtHR nevertheless examined whether the applicant 'avait eu **une connaissance exacte des accusations portées contre lui**' and stated that one could not conclude that the applicant 'a tenté à

The fact that the defendant made a deal with the Public Prosecutor as to the penalty **to be imposed by the court**, necessarily implies that the defendant had sufficient knowledge of the charges against him, but it does not, in and of itself, imply a waiver of the right to be present at the trial.[195]

It does, however, follow from the deal that the defendant could have reasonably expected to be summoned at the address he had provided.[196] In such circumstances, it is up to the defendant to take appropriate measures to ensure receipt of his mail.[197] A lack of diligence in this regard may lead to the conclusion that the *in absentia* proceedings did not breach Art. 6 ECHR. Indeed, the preamble of FD 2002/584/JHA itself explicitly refers to this line of case-law:

> '(…) In accordance with the case law of the European Court of Human Rights, when considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention could, where appropriate, also be paid to the diligence exercised by the person concerned in order to receive information addressed to him or her'.[198]

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se soustraire à la justice ou qu'il a manifesté de manière non équivoque son refus de comparaître devant les tribunaux' (emphasis added).
Compare ECtHR, decision of 2 September 2004, *Kimmel v. Italy*, ECLI:CE:ECHR:2004:0902DEC003282302: the applicant, who was interrogated by the investigating judge, **was aware of the proceedings against her**, but upon release chose to have every judicial notification delivered at the address of her legal counsellor. 'Aux yeux de la Cour, **la requérante aurait dû savoir qu'à la suite de son élection de domicile, aucun acte ne lui aurait été personnellement communiqué**, et qu'il lui appartenait de prendre contact avec [son avocat] pour obtenir toute information relative au déroulement des instances. Ayant omis d'agir dans ce sens, la requérante pouvait raisonnablement s'attendre à être jugée par contumace, étant représentée à l'audience par son conseil. La Cour conclut partant que l'intéressée a renoncé de manière non équivoque à son droit de comparaître et de se défendre personnellement' (emphasis added).

[195] A-G Bobek, opinion of 11 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:333, para 68.

[196] ECtHR, judgment of 26 January 2017, *Lena Atanasova v. Bulgaria*, ECLI:CE:ECHR:2017:0126JUD005200907, § 48 and § 53.

[197] See, *e.g.*, ECtHR, judgment of 16 December 1992, *Hennings v. Germany*, ECLI:CE:ECHR:1992:1216JUD001212986, § 26 ('The Court (…) considers that the applicant could reasonably have been expected to obtain a key to his letter-box in order to have ready access to any mail addressed to him, particularly since he must have foreseen that proceedings would be brought against him as a result of his failure to reply to the letter of 9 August 1984 from the public prosecutor's office (…). The authorities cannot be held responsible for barring his access to a court because he failed to take the necessary steps to ensure receipt of his mail and was thereby unable to comply with the requisite time-limits laid down under German law'); ECtHR, decision of 15 September 2005, *Maass v. Germany*, ECLI:CE:ECHR:2005:0915DEC007159801 ('The authorities cannot, however, be held responsible for barring an applicant's access to court because he or she failed to take the necessary steps to ensure receipt of his or her mail and was thereby unable to comply with the requisite time-limits laid down in domestic law (…). The Court notes that, after having been questioned by the police, the applicant knew that criminal proceedings were pending against her. Even assuming that the applicant in fact had not received any of the letters sent to her by the German authorities, she could therefore reasonably be expected to take the necessary steps to secure receipt of her mail, especially as she had stated that several other letters had also not reached her or her neighbours'); ECtHR, judgment of 8 October 2015, *Ažđajić v. Slovenia*, ECLI:CE:ECHR:2015:1008JUD007187212, § 56 (' (…) the Court agrees with the Government that the applicant might have expected that an action could be lodged against her. Therefore, in view of the fact that she planned to be absent from her home for two months, it would not be unreasonable to expect from her that she would take some measures to ensure the receipt of her mail in order to be able to comply with the requisite time-limits laid down in the domestic law, in case of institution of proceedings against her').

[198] Recital (8), *in fine*.

Of course, if the defendant is lawfully deprived of his freedom, one can hardly reproach him for having failed to take the necessary steps to ensure receipt of his mail at his regular address. On the contrary, in such circumstances the defendant may reasonably expect the authorities to be aware of this fact and to be able to ascertain his whereabouts.[199]

If a defendant who was sufficiently aware of the proceedings against him was absent at the hearing while his legal counsellor was present, he could have asked his legal counsellor about the progress of the proceedings. Failing to do so, is relevant in reaching the conclusion that the defendant waived his right to be present.[200]

If the defendant was aware of the date of the first hearing, it is up to him to contact his legal counsellor – or the registrar of the court – and to enquire after any subsequent hearings.[201]

A defendant who was present at the first instance trial and who lodges an appeal against the first instance judgment can reasonably expect to be summoned to appear at the hearing on appeal at the address he gave to the authorities.[202] Again, in such circumstances, it is up to the

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[199] ECHR, report of 16 October 1996, *Menckeberg v. the Netherlands*, ECLI:CE:ECHR:1996:1016REP002551494, § 50.

[200] See ECtHR, decision of 2 September 2004, *Kimmel v. Italy*, ECLI:CE:ECHR:2004:0902DEC003282302 ('Aux yeux de la Cour, la requérante aurait dû savoir qu'à la suite de son élection de domicile, aucun acte ne lui aurait été personnellement communiqué, et **qu'il lui appartenait de prendre contact avec Me F. [son avocat d'office] pour obtenir toute information relative au déroulement des instances**'); ECtHR, decision of 14 September 2006, *Booker v. Italy*, ECLI:CE:ECHR:2006:0914DEC001264806 ('La Cour en conclut que le requérant était au courant de la date de l'audience (…). Cependant, il décida de son plein gré de ne pas y participer. **Le requérant a également omis de prendre contact avec son conseil, présent à l'audience incriminée, pour se renseigner quant au déroulement de la procédure et à la date de l'audience suivante, fixée par le juge en présence des représentants des parties**'); ECtHR, decision of 23 November 2006, *Zaratin v. Italy*, ECLI:CE:ECHR:2006:1123DEC003310406 ('(…) la Cour note que dans chacune des procédures en cause le requérant était au courant des poursuites entamées à son encontre. (…) A la lumière de ce qui précède, la Cour considère que **le requérant aurait pu, à l'occurrence par l'intermédiaire des avocats de son choix, se renseigner quant aux dates des audiences, auxquelles ces derniers ont participé**. Il avait donc une possibilité effective d'être présent aux débats ; il a cependant de son plein gré choisi de ne pas s'en prévaloir'); ECtHR, decision of 22 May 2007, *Böheim v. Italy*, ECLI:CE:ECHR:2007:0522DEC003566605 ('La Cour en conclut que le requérant était au courant des accusations portées contre lui et des conséquences qui auraient pu découler de son inertie. Cependant, il a décidé de son plein gré de ne pas élire domicile en Italie, de ne pas nommer un avocat de son choix et **de ne contacter ni les autorités ni l'avocat d'office**, pour se renseigner quant au déroulement de la procédure et aux dates des audiences') ; ECtHR, decision of 28 September 2010, *Tedeschi v. Italy*, ECLI:CE:ECHR:2010:0928DEC002568506: 'Force est de constater qu'à aucun moment, le requérant ne rectifia l'élection de domicile auprès du cabinet de [son avocat]. Au contraire, il réitéra expressément ladite élection de domicile lors de l'appel introduit le 4 février 2001. Aux yeux de la Cour, le requérant aurait dû savoir qu'à la suite de son élection de domicile, et faute de rectification de sa part, aucun acte ne lui serait personnellement communiqué, **et qu'il lui appartenait de prendre contact avec [son avocat] pour obtenir toute information relative au déroulement des instances** (…)' (emphasis added).

[201] ECtHR, decision of 20 October 2015, *Di Silvio v. Italy*, ECLI:CE:ECHR:2015:1020DEC005663513, § 33-34: 'La Cour estime aussi établi que le requérant avait connaissance de la date initialement fixée pour les débats d'appel, à savoir le 21 janvier 2011. En effet, il a produit un certificat médical dans le but d'obtenir le renvoi de cette audience (…). (…) Dans ces circonstances, la Cour considère **qu'il appartenait au requérant de prendre contact avec le conseil de son choix pour savoir si le renvoi sollicité avait été octroyé et, dans l'affirmative, quelle date avait été fixée pour les débats d'appel** (…). **L'intéressé aurait pu également s'adresser au greffe de la cour d'appel pour se renseigner quant au déroulement de son procès**' (emphasis added).

[202] ECtHR, decision of 23 February 1999, *De Groot v. the Netherlands*, ECLI:CE:ECHR:1999:0223DEC003496697.

defendant to take appropriate measures to ensure receipt of his mail and again, a lack of diligence in this regard may lead to the conclusion that the *in absentia* proceedings did not breach Art. 6 ECHR.

This case must be distinguished from cases in which the Public Prosecutor lodges an appeal against the first instance judgment and the defendant does not have sufficient knowledge of the proceedings on appeal. The mere fact that the defendant was present at the trial at first instance which resulted in his acquittal and that he, therefore, could reasonably expect the Public Prosecutor to lodge an appeal, does not justify, in and of itself, the conclusion that he waived his right to be present on appeal (compare with Dutch case-law referred to in the answer to question 2a) under H).[203]

If the defendant, who had sufficient knowledge of the proceedings against him and who was assisted by a legal counsellor, changed his address without notifying the proper authorities of his new address, even though a restriction was imposed on him not to leave his residence without the authorisation of the public prosecutor's office, he by his own actions brought about a situation that made him unavailable to be informed of and to participate in the trial. In such circumstances the *in absentia* proceedings do not breach Art. 6 ECHR.[204]

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[203] See, *e.g.*, ECtHR, judgment of 25 March 2008, *Gaga v. Romania*, ECLI:CE:ECHR:2008:0325JUD000156202: the first instance court acquitted the applicant in his absence of murder. The Public Prosecutor appealed against that judgment. The second instance court rejected the appeal in the presence of the applicant. The Public Prosecutor appealed against that judgment. The applicant was summoned for the third instance hearing at the address of his former wife, who earlier had notified the second instance court that the applicant had not resided there since 1995 and had explicitly asked the court to stop sending summonses of her former husband to her address. The third instance court convicted the applicant to a custodial sentence *in absentia*. The ECtHR rejected the argument of Romania that the applicant could have been informed of the date of the third instance hearing by other means (*via* his former wife). According to the ECtHR such vague and informal knowledge does not suffice to conclude that the applicant waived his right to be present at the third instance hearing. What is noteworthy here is that – although one could argue that the applicant, having been acquitted twice, should reckon with another appeal by the Public Prosecutor and should, therefore, take the necessary steps to receive the summons for the third instance hearing –, there is not the slightest indication that the ECtHR found the applicant's responsibility for the receipt of his mail or the fact that he could have reckoned with an appeal by the Public Prosecutor relevant to this case. Of course, the Romanian authorities gave notification of the third instance hearing at an address of which they aware it was no longer the applicant's address. It could be that the ECtHR felt that this error on the part of the Romanian authorities was decisive or at least weighed far heavier than any responsibility on the part of the applicant.
See also ECtHR, judgment 22 May 2018, *Muca v. Albania*, ECLI:CE:ECHR:2018:0522JUD005745611, § 34-37: the applicant was present at the first instance trial, was assisted by his chosen legal counsellor, was acquitted and went abroad. The defendant was not informed of the appeal lodged by the Public Prosecutor, but his legal counsellor was. The defendant's chosen legal counsellor continued to represent him on appeal and the defendant was convicted *in absentia*. However, the ECtHR held that it could not be inferred that the legal counsellor was acting on the defendant's express instructions. Furthermore, in later retrial proceedings the same legal counsellor represented the defendant, having been appointed by the court. The ECtHR concluded that the applicant did not have sufficient knowledge of the appeal proceedings and found a violation of Art. 6 ECHR. Again, there is no inkling that the ECtHR found relevant that the applicant should have reckoned with an appeal lodged by the Public Prosecutor or that he should have remained in contact with his legal counsellor. What seems to be decisive in this case is that the applicant was not aware of the proceedings on appeal.
[204] ECtHR, judgment of 28 February 2008, *Demebukov v. Bulgaria*, ECLI:CE:ECHR:2008:0228JUD006802001, § 57. See also ECtHR, decision of 20 May 2003, *Riekwel v. the Netherlands*, ECLI:CE:ECHR:2003:0520DEC007420801: the applicant might reasonably have been expected, either through his representative or in person, to ensure that his change of address was communicated to the registrar of the Supreme Court; ECtHR, decision of 28 September 2010, *Tedeschi v. Italy*, ECLI:CE:ECHR:2010:0928DEC002568506: 'Force est de constater qu'à aucun moment, le requérant ne rectifia

A judgment commuting into a single sentence one or more sentences previously imposed on the person concerned comes within the ambit of Art. 4a, where the proceedings resulting in that judgment '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'.[205] This is so, because compliance with the requirement of a fair trial 'entails the right of the person concerned to be present at the hearing [resulting in the determination of a sentence] because of the significant consequences which it may have on the quantum of the sentence to be imposed (…)'.[206] However, even though the competent court has a margin of discretion, when the **scope for sentencing** is **limited** and when the **original sentences** were **not imposed *in absentia***, the competent court can determine the new sentence on the basis of the case-file and written submissions.[207]

H. National legislation

57. Please provide:

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

- **an English translation thereof.**

Answer

See Annex 3 and Annex 4.

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l'élection de domicile auprès du cabinet de [son avocat]. Au contraire, il réitéra expressément ladite élection de domicile lors de l'appel introduit le 4 février 2001. Aux yeux de la Cour, le requérant aurait dû savoir qu'à la suite de son élection de domicile, et **faute de rectification de sa part**, aucun acte ne lui serait personnellement communiqué, et qu'il lui appartenait de prendre contact avec [son avocat] pour obtenir toute information relative au déroulement des instances (…)'; ECtHR, judgment of 26 January 2017, *Lena Atanasova v. Bulgaria*, ECLI:CE:ECHR:2017:0126JUD005200907, § 52: 'En conclusion, compte tenu des circonstances spécifiques de l'espèce, la Cour estime que la situation dénoncée par la requérante ne s'analyse pas en une restriction injustifiée de son droit de participer à l'audience de son affaire pénale. La requérante avait été dûment informée de l'existence d'une procédure pénale à son encontre et des charges retenues contre elle. Elle avait reconnu les faits, s'était déclarée prête à négocier les termes de sa condamnation et pouvait donc raisonnablement s'attendre à être citée à comparaître devant les tribunaux. **Elle a pourtant quitté l'adresse qu'elle avait préalablement communiquée aux autorités sans leur signaler le changement de son domicile.** Son allégation selon laquelle elle aurait donné aux autorités l'adresse de son compagnon est restée complètement non étayée. Les autorités ont entrepris les démarches raisonnablement nécessaires afin d'assurer sa comparution devant le tribunal de district pendant son procès : elles ont d'abord cherché à la convoquer à l'adresse qu'elle leur avaient laissée et qu'elle avait quittée sans les prévenir ; elles ont ensuite cherché à établir les autres adresses connues de la requérante et à la convoquer à celles-ci ; elles ont cherché à la localiser dans les établissements pénitentiaires ; elles se sont assurées qu'elle n'avait pas quitté le territoire du pays. A la lumière de toutes ces circonstances, la Cour considère que la requérante a sciemment et valablement renoncé, de manière implicite, à son droit de comparaître en personne devant les tribunaux dans le cadre de la procédure pénale menée à son encontre. (…)' (emphasis added).

[205] CoJ, judgment of 10 August 2018, C-271/17 PPU, *Zdziaszek*, ECLI:EU:C:2017:629, para 88.

[206] CoJ, judgment of 10 August 2018, C-271/17 PPU, *Zdziaszek*, ECLI:EU:C:2017:629, para 87.

[207] ECtHR, judgment of 28 November 2013, *Aleksandr Dementyev v. Russia*, ECLI:CE:ECHR:2013:1128JUD004309505, § 45-47. The domestic court had to commute a sentence of six months' community work into a prison sentence, **ranging from 1 day to 2 months**.

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.

Answer

Yes.

Cases in which the issuing judicial authority used the old EAW-form after the Netherlands transposed Art. 2 FD 2009/299/JHA – the legislation transposing Art. 2 FD 2009/299/JHA entered into force on 1 Augustus 2011 – are certainly not uncommon (see the statistics in answer to question 90e)).

E.g., in two judgments of 7 December 2017 the District Court of Amsterdam dealt with Italian EAW's, both issued on 20 April 2017 – according to the website of the European Judicial Network Italy transposed FD 2009/299/JHA on **23 March 2016** –[208] and both containing the old text of section (d) of the EAW.

On the basis of the Dutch transposition of Art. 15(2) FD 2002/584/JHA, in both cases the Amsterdam Public Prosecution Service asked the issuing judicial authority to fill in the correct version of section (d) of the EAW-form in advance of the District Court's hearing. The issuing judicial authority complied. In both cases a copy of the correct version of section (d), filled in by the issuing judicial authority, was available at the hearing and was taken into consideration by the District Court, when ruling on the execution of the EAW's.[209]

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.

Answer

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

[208] See the table of implementation at https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=104 (visited on 24 August 2018).
[209] District Court of Amsterdam, judgment of 7 December 2017, case number 13.751861-17 (not published); District Court of Amsterdam, judgment of 7 December 2017, case number 13.751862-17 (not published).

The Fugitive Active Search Team of the Public Prosecution Service has not experienced any problems with the standard EAW-form.

Language Problems	Explanation
See Part 2.2 (E)	

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

Answer

The official language of the Netherlands is Dutch. In most cases by far, the EAW is translated in the language designated by the Netherlands in accordance with Art. 8(3) FD 2002/584/JHA, *viz*. English (see question 61).

In those few cases in which the EAW was translated in Dutch, no real problems did occur, except for the problem identified in the answer to question 61.

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.

Answer

The Netherlands made a declaration as provided for in Art. 8(3) FD 2002/584/JHA. The designated language is English.

One recurrent problem is that the translator in the issuing Member State translates the original EAW **as a whole** – *i.e.* including the standard text of the EAW-form – instead of using the official English EAW-form and only translating into English the text which the issuing judicial authority added to the EAW-form.

This leads to numerous cases in which the English translation provided by the issuing judicial authority deviates from the official English EAW-form.

In cases in which a deviation does not concern the substance, but rather the form of the standard text, the District Court will not attach any consequences to such a deviation.

If the translator did not use the official EAW-form, one particular deviation almost always occurs. This deviation concerns the question whether the requested person appeared in person at the trial resulting in the decision.

The official text is as follows:

> *(d) Indicate if the person appeared in person at the trial resulting in the decision:*

1. □ *Yes, the person appeared in person at the trial resulting in the decision.*
2. □ *No, the person did not appear in person at the trial resulting in the decision.*

Especially in Polish EAW's, this standard text is usually translated as 'the trial during which the judgment was pronounced'. In these cases the deviation – potentially –[210] concerns the substance of the standard text.[211]

Point 3.4 of section (d) also frequently gives rise to diverging translations, *e.g.* the right to repeat the trial ('zijn recht op herhaling van het proces') instead of 'the right to a retrial'.[212]

In cases in which the deviation concerns the substance of the standard text, the District Court of Amsterdam will disregard the affected part of section (d). If, *e.g.*, the English translation of the EAW states that the requested person did not appear in person 'at the trial during which the judgment was pronounced (…)', the court will examine, first, whether the requested person appeared in person 'at the trial resulting in the decision'. If so, the court will hold that the Dutch transposition of Art. 4a is not applicable.[213] If not, the court will examine whether any of the situations mentioned in the Dutch transposition of Art. 4a(1)(a-d) FD 2002/584/JHA applies.

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.

Answer

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

At the request of the authorities of the executing Member State, the Fugitive Active Search Team of the Public Prosecution Service provides for a translation of an EAW in the official language of the executing Member State, after the requested person is apprehended in the executing Member State.

The Fugitive Active Search Team uses sworn translators. As far as the Fugitive Active Search Team is aware, the translations provided by it have never raised any problems.

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[210] *Viz*. if the actual trial and the pronouncement of the judgment took place at different hearings (see also the answer to question 34).

[211] See, *e.g.*, District Court of Amsterdam, judgment of 25 March 2016, ECLI:NL:RBAMS:2016:2381, concerning a Croatian EAW: 'Haal aan of de gezochte persoon aanwezig was op de terechtzitting waarop het vonnis is uitgesproken (…) 2. Nee, de gezochte persoon was niet aanwezig op de terechtzitting waarop het vonnis werd uitgesproken' instead of 'Gelieve te vermelden of de betrokkene in persoon is verschenen op het proces dat heeft geleid tot de beslissing (…) 2. • Neen, de betrokkene is niet in persoon verschenen op het proces dat heeft geleid tot de beslissing'. The court held that the statement in the EAW did not pertain to the presence of the person concerned **at the trial resulting in the decision**, but rather to his presence **at the pronouncement of the judgment**. As the person concerned declared that he was not present at the trial resulting in the decision, the court ruled that Art. 12 Law on Surrender was not applicable.

[212] District Court of Amsterdam, judgment of 25 March 2016, ECLI:NL:RBAMS:2016:2381.

[213] See, *e.g.*, District Court of Amsterdam, judgment of 26 April 2018, ECLI:NL:RBAMS:2018:2701 (not published).

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.

Answer

Yes.

Problems regularly arise when section (b)2 refers to multiple judgments (*e.g.* judgments at first instance and judgments on appeal) or to a judgment of conviction and other decisions, where the EAW does not contain any information on the basis of which the District Court of Amsterdam can verify whether the judgment on appeal or the other decisions come within the ambit of Art. 4a.

Some examples.

A Croatian EAW mentioned the existence of a judgment and a decision in section (b) of the EAW, whilst point 3.4 of section (d) of the EAW referred to 'the decision'. The Public Prosecutor requested supplementary information and it turned out that point 3.4 applied to the judgment only. The court allowed surrender.[214]

In the case of a Lithuanian EAW, section (b) of the EAW mentioned a judgment of conviction and no less than three other decisions, *viz.* two 'rulings' and a 'court penalty order'. The 'court penalty order' imposed a fine for an unspecified offence. The first 'ruling' was not specified, the second 'ruling' concerned revoking the suspension of execution of the custodial sentence imposed by the judgment of conviction. The Amsterdam Public Prosecutor asked for supplementary information on the first 'ruling': it turned out that this ruling concerned a decision on the procedure of execution of both penalties (the custodial sentence and the fine), which decision was taken in proceedings without a hearing. In the end the District Court of Amsterdam refused to surrender the requested person for the execution of the fine and allowed surrender for the execution of the custodial sentence.[215]

In a number of Italian EAW's, section (b)2 of the EAW mentioned one or more judgments of conviction and a decision by a Public Prosecutor concerning the merger of the custodial sentence imposed by the judgment of conviction with custodial sentences imposed by other judgments of conviction (*provvedimento di cumulo*). The EAW did not contain the information needed to verify whether this decision met the criteria set out in the *Zdziaszek*-

[214] District Court of Amsterdam, judgment of 25 March 2016, ECLI:NL:RBAMS:2016:2381.
[215] See District Court of Amsterdam, interlocutory judgment of 14 December 2017, ECLI:NL:RBAMS:2017:10549 (not published) and District Court of Amsterdam, judgment of 28 December 2017, ECLI:NL:RBAMS:2017:9890 (not published).

judgment. The Amsterdam Public Prosecutor requested supplementary information on this point from the issuing judicial authority. The District Court of Amsterdam concluded on the basis of the supplementary information that the decision did not come within the ambit of Art. 4a, because the Italian Public Prosecutor did not dispose of a margin of appreciation.[216]

In a number of other cases concerning Italian EAW's, section (b)(2) of the EAW mentioned a first instance judgment and a judgment on appeal. In section (d) point 3.2 was ticked. However, section (d) did not state to which of the two judgments point 3.2 applied. As the Amsterdam Public Prosecutor had already applied Art. 15(2) FD 2002/584/JHA a number of times and as some of the requests for supplementary information still had not been answered, even though the time limit had expired, the court decided:

- not to ask the issuing judicial yet again for additional information and

- to refuse the execution of the EAW, because the court did not dispose of the information for assessing whether the rights of the defence were fully respected.[217]

In a case concerning a Romanian EAW, section (b)2 of the EAW mentioned a 'criminal sentence', while another section of the EAW referred to another 'criminal sentence'. From the answers to a request for supplementary information it emerged that the 'criminal sentence' mentioned in section (b)2 was a decision to revoke the conditional suspension of the execution of a custodial sentence, which was imposed by the other 'criminal sentence' mentioned in the EAW. Section (d) applied to the decision to revoke the conditional suspension of execution. The District Court of Amsterdam could not verify whether Art. 4a was applicable to the judgment of conviction, as the EAW did not contain any information in this regard. Because of the problem of conditions in Romanian prisons, the District Court of Amsterdam would most probably not be in a position to decide on the execution of the EAW within a reasonable time.[218] For expediency's sake, therefore, the District Court of Amsterdam decided to forego requesting supplementary information about the judgment of conviction and to refuse surrender.[219]

In a case concerning a Bulgarian EAW, section (b)2 of the EAW mentioned a judgment of a first instance court, which was repealed by a judgment of a higher court, which latter judgment was in turn confirmed by the Court of Cassation. According to section (d) of the EAW, the requested person appeared in person at the trial resulting in the first instance judgment. The EAW did not contain information regarding the second instance judgment which would enable the District Court to verify whether Art. 4a was applicable to that judgment. The Amsterdam Public Prosecutor requested and received supplementary information regarding the second instance judgment. It turned out that the second instance judgment met the criteria set out in the *Tupikas*-judgment and that the requested person appeared in person at the trial resulting in that judgment. The District Court of Amsterdam, therefore, ruled that Art. 4a was not applicable to the second instance judgment. In the absence of any indication that Art. 4a was applicable to the third instance judgment and as the

[216] See District Court of Amsterdam, judgment of 26 October 2017, ECLI:NL:RBAMS:2017:7865.
[217] See, *e.g.*, District Court of Amsterdam, judgment of 7 December 2017, case number 13/751852-17 (not published).
[218] See, CoJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, par. 104.
[219] District Court of Amsterdam, judgment of 14 November 2017, ECLI:NL:RBAMS:2017:8860.

defence had not put forward any argument to that effect, the District Court of Amsterdam held that Art. 4a was not applicable to that judgment.[220]

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.

Answer

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

If the EAW pertains to multiple sentences – i.e. multiple judgments –, the Fugitive Active Search Team will clearly indicate this and will clearly distinguish between these judgments. As far as the Fugitive Active Search Team is aware, no problems have arisen with regard to such EAW's.

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.

Answer

Yes.

In Polish cases the EAW regularly mentions that the requested person and the Public Prosecutor struck a deal as to the penalty to be imposed, which was subsequently ratified by a court.

The District Court of Amsterdam has repeatedly held that Art. 12 Law on Surrender applies to such proceedings, because in such proceedings, according to Polish legislation, the court assesses the evidence for and against the defendant and has to refer the case for a regular trial when the court has doubts about the guilt of the defendant or about the adequacy of the agreed penalty.[221]

[220] District Court of Amsterdam, interlocutory judgment of 20 February 2018, ECLI:NL:RBAMS:2018:1096.
[221] See, *e.g.*, District Court of Amsterdam, judgment of 28 September 2017, ECLI:NL:RBAMS:2017:7387; District Court of Amsterdam, judgment of 18 January 2018, ECLI:NL:RBAMS:2018:415 (not published); District Court of Amsterdam, judgment of 26 July 2018, ECLI:NL:RBAMS:2018 (not published).

The District Court of Amsterdam has explicitly ruled that agreeing to a deal with the Public Prosecutor as to the penalty to be imposed, does not constitute a waiver to be present at the hearing at which the court decides whether to confirm the deal or not.[222]

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.

Answer

Yes.

In a Hungarian case a Hungarian court had merged previously imposed penalties into one penalty without having held a hearing. Because this decision amended the *quantum* of the penalties and finally determined the sentence and because the competent court had taken this decision after having exercised discretion,[223] the District Court of Amsterdam held that Art. 12 Law on Surrender applied to that decision. As the requested person still had a right to appeal, the District Court of Amsterdam allowed surrender for this decision.[224]

In the Italian case mentioned in the answer to question 63, an Italian Public Prosecutor had taken a decision to merge previously imposed sentences. Because in doing so he lacked a certain margin of discretion, the District Court held that this decision did not fall within the ambit of Art. 12 Law on Surrender.[225]

In a German case, a German court had taken a decision to merge previously imposed sentences (a so called *Gesamtstrafenbeschluss*). The decision was taken after 'written proceedings' ('schriftliches Verfahren'). Two of the sentences were imposed by a 'penal order' ('Strafbefehl') after written proceedings. The District Court of Amsterdam decided to refuse to execute the EAW, because, as regards the *Gesamtstrafenbeschluss*, none of the situations referred to in Art. 4a(1)(a-d) FD 2002/584/JHA was applicable; from the *Zdziaszek*-judgment it follows clearly that *both* the underlying judgments *and* the later decision which amends the *quantum* of the penalties originally imposed must comply with Art. 4a.[226]

In the Lithuanian case mentioned in the answer to question 63 a Lithuanian court had imposed a fine in a 'written procedure'. The District Court of Amsterdam refused the execution of the EAW in so far it concerned the execution of that fine, because an EAW can only be issued for the execution of a custodial sentence or a detention order.[227] Therefore, no Art. 4a-issue arose.

In a Latvian case, the proceedings on appeal took place in a 'written procedure, at which [the person concerned] could not have been present in person'. The person concerned was,

[222] See, *e.g.*, District Court of Amsterdam, judgment of 18 January 2018, ECLI:NL:RBAMS:2018:415 (not published)
[223] See CoJ, judgment of 10 August 2018, C-271/17 PPU, *Zdziaszek*, ECLI:EU:C:2017:629, para 93.
[224] District Court of Amsterdam, judgment of 22 May 2018, case number 13/751154-17 (not published).
[225] District Court of Amsterdam, judgment of 26 October 2017, ECLI:NL:RBAMS:2017:7856.
[226] District Court of Amsterdam, judgment of 8 May 2018, ECLI:NL:RBAMS:2018:3544 (not published). See also District Court of Amsterdam, judgment of 2 August 2018, ECLI:NL:RBAMS:2018:5805 (not published).
[227] District Court of Amsterdam, judgment of 28 December 2017, ECLI:NL:RBAMS:2017:9890 (not published).

however, represented by his mandated legal counsellor who defended him in those proceedings. The court allowed surrender.[228]

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.

Answer

Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service

The Fugitive Active Search Team of the Public Prosecution Service has not experienced any problems in this regard. In the Dutch legal system, only a judge can impose a penalty.

Additional remark by the researcher

It is not strictly true that only a judge can impose a penalty. Only a judge can impose a custodial sentence or a detention order. See the answer to question 33.

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.

Answer.

Yes. See the answer to question 61.

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.

[228] District Court of Amsterdam, judgment of 17 July 2018, ECLI:NL:RBAMS:2018:5275.

Answer.

Yes.

In a number of cases in which the trial consisted of several hearings and the defendant was present at one or more but not all of these hearings, the District Court of Amsterdam held that Art. 12 Law on Surrender was not applicable: if a trial consists of several hearings, it is not required that the defendant was present at *every* hearing.[229]

Some of these rulings seem to suggest that, in determining whether or not the defendant appeared in person at the trial resulting in the decision:

- it does not matter what transpired at the hearing(s) at which the defendant did appear in person[230] or that is sufficient that at the hearing(s) at which the defendant did appear in person he made a statement about the offences with which he was charged;[231]

- it is relevant whether the defendant who was present at a hearing was informed at that hearing of the date and the place of the next hearing;[232]

- it is the responsibility of the defendant to enquire after the date and the place of the next hearing if he appeared at a hearing.[233]

In more recent judgments the District Court of Amsterdam seems to have adopted a more restrictive approach. The defendant cannot be deemed to have appeared in person at the trial resulting in the decision, if he was not present at the hearing(s) at which the court in the issuing Member State dealt with the 'merits of the case'[234] or discussed the evidence and whether the defendant was guilty or not.[235]

[229] District Court of Amsterdam, judgment of 24 April 2012, ECLI:NL:RBAMS:2012:BZ0413; District Court of Amsterdam, judgment of 22 January 2013, ECLI:NL:RBAMS:2013:BZ0687; District Court of Amsterdam, judgment of 31 October 2014, ECLI:NL:RBAMS:2014:7319; District Court of Amsterdam, judgment of 24 January 2017, ECLI:NL:RBAMS:2017:858; District Court of Amsterdam, judgment 14 February 2017, ECLI:NL:RBAMS:2017:838; District Court of Amsterdam, judgment of 14 March 2017, ECLI:NL:RBAMS:2017:1694.

[230] District Court of Amsterdam, judgment of 22 January 2013, ECLI:NL:RBAMS:2013:BZ0687: according to the issuing judicial authority the defendant was not present 'when the court heard the merits''; District Court of Amsterdam, judgment of 24 January 2017, ECLI:NL:RBAMS:2017:858: a witness was heard at the hearing at which the defendant was not present.

[231] District Court of Amsterdam, judgment of 22 January 2013, ECLI:NL:RBAMS:2013:BZ0687; District Court of Amsterdam, judgment of 24 January 2017, ECLI:NL:RBAMS:2017:858.

[232] District Court of Amsterdam, judgment of 24 April 2012, ECLI:NL:RBAMS:2012:BZ0413.

[233] District Court of Amsterdam, judgment of 24 April 2012, ECLI:NL:RBAMS:2012:BZ0413; District Court of Amsterdam, judgment of 22 January 2013, ECLI:NL:RBAMS:2013:BZ0687.

[234] District Court of Amsterdam, judgment of 27 March 2018, ECLI:NL:RBAMS:2018:2130; District Court of Amsterdam, judgment of 27 March 2018, ECLI:NL:RBAMS:2018:2136.

[235] District Court of Amsterdam, judgment of 7 June 2018, ECLI:NL:RBAMS:2018:4017.

In one of these cases, the defendant was present at a hearing at which he pleaded guilty,[236] but not at a later hearing at which the court heard five witnesses, dealt with the other evidence and gave judgment. According to the District Court of Amsterdam, the latter hearing was the 'trial' to which Art. 12 Law on Surrender referred. Because none of the situations mentioned in the Dutch transposition of Art. 4a(1)(a-d) FD 2002/584/JHA was applicable to that hearing, the District Court of Amsterdam refused to execute the EAW.[237]

In another case, the defendant pleaded guilty in pre-trial proceedings and had reached a deal with the Public Prosecutor as to the penalty to be imposed. At the first two hearings the court adjourned the case without any further ado. At the third hearing the court 'heard and examined the matter'. The defendant was present at none of these hearings. The District Court of Amsterdam regarded only the third hearing as the trial resulting in the decision. Therefore, the fact that the defendant was summoned **in person** for the **second** hearing was irrelevant under Art. 12 Law on Surrender.[238]

In both cases the District Court of Amsterdam added that, although it could be argued that the defendant was partially to blame for his absence at the trial, this could not preclude the District Court of Amsterdam from refusing to execute the EAW. Art. 12 Law on Surrender does not leave any margin to the executing judicial authority to 'take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence',[239] once it is established that none of the situations of Art. 4a(1)(a-d) FD 2002/584/JHA applies. After all, Art. 12 Law of Surrender contains a mandatory ground for refusal (see also the answer to question 83).

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.

Answer

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

No, the Fugitive Active Search Team of the Public Prosecution Service has not experiences any problems in such cases.

Personal summons

Explanation
See Part 2.2 (G.4).

[236] It is noteworthy that, although the defendant pleaded guilty, the Public Prosecutor dismissed his suggestion as to the penalty to be imposed.
[237] District Court of Amsterdam, judgment of 27 March 2018, ECLI:NL:RBAMS:2018:2130.
[238] District Court of Amsterdam, judgment of 27 March 2018, ECLI:NL:RBAMS:2018:2136.
[239] CoJ, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, para 50; CoJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para 96; CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para 103.

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.

Answer

Yes.

Point 3.1.a

The District Court of Amsterdam has sometimes been confronted with cases in which,

- point 3.1.a was ticked, but
- according to the information given in point 4 of section (d) the summons was actually handed over to a **third party**.

In such cases the Amsterdam Public Prosecutor will, on its own motion or at the behest of the District Court of Amsterdam, apply the Dutch transposition of Art. 15(2) FD 2002/584/JHA and ask for additional information.

Barring information which does unequivocally establish that the defendant actually received the summons, in such cases the District Court of Amsterdam will hold that the Dutch transposition of Art. 4a(1)(a) FD 2002/584/JHA is not applicable.[240]

Point 3.1.b

The District Court of Amsterdam has repeatedly been confronted with cases in which:

- the summons was handed over at the address of the defendant to a third party who undertook to pass on the summons to the defendant;
- point 3.1.b was ticked, but
- the evidence on which the issuing judicial authority based its conclusion that point 3.1.b was applicable did not, in the view of the District Court of Amsterdam, unequivocally establish that the third party actually passed the summons on to the defendant.

In such cases the Amsterdam Public Prosecutor will, on its own motion or at the behest of the District Court of Amsterdam, apply the Dutch transposition of Art. 15(2) FD 2002/584/JHA and ask for additional information.

Barring information which unequivocally establishes that the defendant actually received the summons, in such cases the District Court of Amsterdam will hold that the Dutch transposition of Art. 4a(1)(a) FD 2002/584/JHA is not applicable.[241]

[240] See, *e.g.*, District Court of Amsterdam, judgment of 15 June 2017, ECLI:NL:RBAMS:2017:5434.
[241] See, *e.g.*, District Court of Amsterdam, judgment of 13 October 2016, ECLI:NL:RBAMS:2016:6766 (not published); District Court of Amsterdam, judgment of 6 December 2016, ECLI:NL:RBAMS:2016:9010; District

All such cases concern Polish EAW's. It is noteworthy that in one of those cases, the Polish issuing judicial authority explained that current Polish legislation does not require that the actual delivery of the letter to the addressee has to be confirmed or acknowledged in any form.[242]

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.

Answer.

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

In the past, the Fugitive Active Search Team of the Public Prosecution Service dealt which some cases in which non-nationals were detained at Schiphol Airport for drug offences, were summoned in person and, at the same, were deported form the Netherlands. The defendants were not provided with a translation of the summons in a language the understood. The defendants were convicted *in absentia* without being inform in a language they understood of the charge against them and of the consequences of non-appearance. Both Portuguese and British authorities reprimanded the Netherland for not providing a translation of the summons, as this is in contravention of Art. 6 ECHR. Thereupon, it was decided to withdraw the EAW's.

At present, the Fugitive Active Search Team experiences some difficulties in cases in which the defendant was summoned in person, was convicted *in absentia* by the single-judge division of a District Court (*politierechter*) and did not loge an appeal against the judgment of conviction. In such cases, the judgment is recorded only summarily (see Art. 378a CPC). If the executing judicial authority requests a copy of the judgment, the Fugitive Active Search Team cannot provide it with a full judgment [Note of the researcher: if the Public Prosecutor so requests within three months after the judgment, the summarily recorded judgment shall be set out in detail in the official record of the hearing (Art. 378(2)(b) CPC).]

The Fugitive Active Search Team hardly ever ticks point 3.1.b of section (d) of the EAW.

Defence by a legal counsellor

Explanation
See Part 2.2 (G.5).

Court of Amsterdam, judgment of 25 July 2017, ECLI:NL:RBAMS:2017:5329 (not published); District Court of Amsterdam, interlocutory judgment of 18 January 2018, ECLI:NL:RBAMS:2018:415 (not published).

[242] District Court of Amsterdam, judgment of 22 February 2018, ECLI:NL:RBAMS:2018:1047.

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.

Answer.

Yes.

Under the Dutch transposition of Art. 4a(1)(b) FD 2002/584/JHA it does not matter whether the defendant was represented by a mandated legal counsellor appointed by himself or by the State.[243]

However, point 3.2. is particularly problematic when the court in the issuing Member State appointed a legal counsellor to represent the defendant *ex officio*.

In a Polish case, it was clear that the *ex officio* appointed legal counsellor of the defendant was present at the trial on appeal, but it was not clear whether he had actually defended his client at that trial. The District Court of Amsterdam held that the Dutch transposition of Art. 4a(1)(b) FD 2002/584/JHA was not applicable.[244]

In another Polish case, the defendant was represented on appeal by a legal counsellor appointed *ex officio*. When asked whether the defendant had given an mandate to that legal counsellor, the issuing judicial authority replied that in case of an *ex officio* appointment of a legal counsellor the defendant is not required to grant any additional power of attorney to such legal counsellor. Therefore, the District Court of Amsterdam held that the Dutch transposition of art. 4a(1)(b) FD 2002/584/JHA was not applicable.[245]

In a Hungarian case, the defendant was defended at the trial on appeal by a legal counsellor appointed *ex officio*. According to the issuing judicial authority, the defendant was informed of this – without specifying how the defendant was informed – and he did not object to the legal counsellor. The District Court of Amsterdam held that the Dutch transposition of Art. 4a(1)(b) FD 2002/584/JHA was not applicable. The mere fact that the defendant did not object to the *ex officio* appointment does not support the conclusion that he was aware of this appointment, nor that he had given a mandate to that legal counsellor.[246]

In a German case, in the written proceedings leading to a *Gesamtstrafenbeschluss* the defendant was defended by a legal counsellor appointed *ex officio*. However, it could not be established that the defendant had given a mandate to that legal counsellor. The District Court of Amsterdam held that the Dutch transposition of Art. 4a(1)(b) FD 2002/584/JHA was not applicable.[247]

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[243] See, *e.g.*, District Court of Amsterdam, judgment of 30 March 2012, ECLI:NL:RBAMS:2012:BW8975.
[244] District Court of Amsterdam, judgment of 30 August 2017, ECLI:NL:RBAMS:2017:6289 (this judgment concerns the *Zdziaszek*-case).
[245] District Court of Amsterdam, judgment of 20 March 2018, ECLI:NL:RBAMS:2018:3035 (not published). See also District Court of Amsterdam, judgment of 30 August 2017, ECLI:NL:RBAMS:2017:6273 (this judgment concerns the *Tupikas*-case).
[246] District Court of Amsterdam, judgment of 22 May 2018, case number 13/751154-17 (not published).
[247] District Court of Amsterdam, judgment of 4 May 2018, case number 13/751146-18 (not published).

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

Answer

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

The Fugitive Active Search Team of the Public Prosecution Service has experienced some problems with EAW's in which point 3.2 was ticked.

Example 1. The absent defendant was defendant was defended by a legal counsellor who declared that the defendant had explicitly authorised him to do so. Under Duct criminal procedural law, the proceeding were considered to be contradictory proceedings (art. 279 CPC). The German executing judicial authority wanted to know *when* the defendant authorised his legal counsellor. It was of the opinion that an authorisation could only count as a mandate in the sense of Art. 4a(1)(b) FD 2002/584/JHA, if the defendant was aware of the date and the place of the proceedings when giving the authorisation. The Fugitive Active Search Team explained that under Art. 279 CPC is up to the legal counsellor to determine whether he is authorised to conduct the defence and that the courts may not enquire whether the legal counsellor was indeed authorised by the defendant to conduct the defence in his absence. Furthermore, authorisation by the defendant implies that the person concerned was aware of the proceedings (see the answer to question 6). The case is still pending.

Example 2. The defendant appeared in person at the first instance hearing. He lodged an appeal against the first instance conviction. The summons on appeal was not served in person on the defendant. The defendant did not appear in person at the hearing on appeal, but his legal counsellor did. The legal counsellor declared that the absent defendant had explicitly authorised him to conduct the defence. The legal counsellor did indeed conduct the defence. The German executing judicial authority refused to execute the EAW, because:

- the defendant was convicted in his absence, while on appeal a higher sentence was imposed on him, even though only the defendant had lodged an appeal;
- the defendant was not aware of the date of the hearing on appeal and
- he did not have a right to a retrial or an appeal.

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.

Answer

Yes.

The way the judgment was served

Initially, the District Court of Amsterdam did not require that the judgment was served on the defendant in a specific way. In particular, the District Court of Amsterdam held that the Dutch transposition of Art. 4a(1)(c) FD 2002/584/JHA does not require **personal** service of the judgment.[248] In that case, the summons had been sent to the address previously indicated by the defendant.

In later cases the District Court of Amsterdam edged away from this interpretation. Referring to the legislative history of Art. 12 Law on Surrender, the District Court of Amsterdam held that, even though personal service is not required *per se*, the defendant must have had actual knowledge of the judgment and must have had an opportunity to institute the applicable recourse against that judgment (se also the answer to question 77).[249]

In essence, it must be unequivocally established that the defendant **actually** received the judgment and the information about his right to a retrial or an appeal at a time when it was still possible to exercise that right. The District Court of Amsterdam's interpretation of the Dutch transposition of Art. 4a(1)(c) FD 2002/584/JHA, therefore, is comparable to the CoJ's interpretation of Art. 4a(1)(a) FD 2002/584/JHA.

Sending the judgment and the information about the right to a trial or an appeal by regular post to the person concerned will not satisfy the conditions of the Dutch transposition of Art. 4a(1)(c), unless it is clear that the defendant actually received both and in a timely fashion.[250]

Neither will handing over to a third party do, again with the same exception.[251]

Deletion of standard passages

Deletion of standard passages of point 3.3 of section (d) of the EAW by the issuing judicial authority, such as the passage about the scope of the right to a retrial or an appeal, will entail the non-applicability of the Dutch transposition of Art. 4a(1)(c) FD 2002/584/JHA.[252]

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)

[248] District Court of Amsterdam, judgment of 3 August 2012, ECLI:NL:RBAMS:2012:BY2002.
[249] District Court of Amsterdam, judgment of 2 October 2012, ECLI:NL:RBAMS:2012:BY2664; District Court of Amsterdam, judgment of 21 December 2012, ECLI:NL:RBAMS:2012:BZ0683; District Court of Amsterdam, judgment of 22 January 2013, ECLI:NL:RBAMS:2013:BZ0925; District Court of Amsterdam, judgment of 5 January 2017, ECLI:NL:RBAMS:2017:333.
[250] See, *e.g.*, District Court of Amsterdam, judgment of 8 May 2018, case number 13/751146-18 (not published); District Court of Amsterdam, judgment of 17 April 2018, ECLI:NL:RBAMS:2018:3005; District Court of Amsterdam, judgment of 7 July 2016, ECLI:NL:RBAMS:2016:5144 (not published).
[251] See, *e.g.*, District Court of Amsterdam, judgment of 22 February 2018, ECLI:NL:RBAMS:2018:1047.
[252] See, *e.g.*, judgment of 16 October 2012, ECLI:NL:RBAMS:2012:8141 (not published); District Court of Amsterdam, interlocutory judgment of 24 February 2016, ECLI:NL:RBAMS:2016:868 (in this case, the EAW mentioned that a copy of the judgment was collected by an adult occupant of the address of the person concerned; however, point 3.3. was stricken entirely).

was ticked? If so, please describe the difficulties and state the decision taken by the executing judicial authority.

Answer

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

The Fugitive Active Search Team of the Public Prosecution Service has not experienced difficulties in this regard.

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.

Answer.

Yes.

(Un)conditionality of the right to a retrial or a an appeal

The District Court of Amsterdam has repeatedly held that Art. 12(d) Law on Surrender requires an **unconditional** right to a retrial or an appeal.[253]

The District Court of Amsterdam describes what an unconditional right to a retrial or an appeal entails in a number of – diverging – ways, *e.g.*:

- the right to a retrial or an appeal must not be dependent on any other condition than those contained in Art. 12 Law on Surrender;[254]

- the right to a retrial or an appeal must not be dependent on any other condition than purely administrative conditions;[255]

[253] See, *e.g.*, District Court of Amsterdam, judgment of 18 October 2016, ECLI:NL:RBAMS:2016:7717; District Court of Amsterdam, judgment of 10 January 2017, ECLI:NL:RBAMS:2017:435; District Court of Amsterdam, judgment of 14 February 2017, ECLI:NL:RBAMS:2017:838; District Court of Amsterdam, interlocutory judgment of 25 July 2017, ECLI:NL:RBAMS:2017:5327; District Court of Amsterdam, judgment of 13 March 2018, ECLI:NL:RBAMS:2018:2115.

[254] District Court of Amsterdam, judgment of 10 January 2017, ECLI:NL:RBAMS:2017:435; District Court of Amsterdam, judgment of 8 August 2017, ECLI:NL:RBAMS:2017:5887; District Court of Amsterdam, judgment of 12 October 2017, ECLI:NL:RBAMS:2017:7815 (not published).

[255] District Court of Amsterdam, judgment of 17 November 2015, ECLI:NL:RBAMS:2015:7971.

- the right to a retrial or an appeal must not be dependent on any other condition than those relating to the timely exercise of that right;[256]

- the exercise of the right to a retrial or an appeal must automatically lead to a retrial or an appeal.[257]

If, in order to obtain a retrial or an appeal, the person concerned must prove that

- his absence at the trial was not his own fault[258] or

- he had no knowledge of the date and the place of the trial or of the *in absentia* judgment,[259]

the right to a retrial or an appeal is not considered to be unconditional.

If, in deciding whether to grant a retrial or an appeal, the competent court in the issuing Member State will examine whether the person concerned had knowledge of the proceedings or of the *in absentia* judgment and voluntarily waived appearing at the trial or instituting an appeal against the *in absentia* judgment, the right to a retrial or an appeal is equally not unconditional.[260]

One can deduce from the case-law of the District Court of Amsterdam that only those conditions are acceptable which relate to the manner in which to exercise the right to a retrial or an appeal and to the time frame within which to exercise that right.[261]

Normally, in cases in which the issuing judicial authority has ticked point 3.4 of section (d) of the EAW the District Court of Amsterdam will take the information contained therein at face value and will trust that, upon surrender, the requested person will have an effective right to a retrial or an appeal.[262] Only in cases in which the District Court of Amsterdam is aware *ex officio* that the right to a retrial of an appeal is not unconditional or in which the issuing judicial authority itself raises doubt about the unconditional nature of the right to a retrial or an appeal, does the District Court of Amsterdam enquire further into the matter.

<u>Deletion of standard passages</u>

Deletion of standard passages of point 3.4 of section (d) of the EAW by the issuing judicial authority, such as the passage about informing the person concerned about his right to a retrial

[256] District Court of Amsterdam, judgment of 8 May 2018, ECLI:NL:RBAMS:2018:3548 (not published).
[257] District Court of Amsterdam, judgment of 12 September 2017, ECLI:NL:RBAMS:2017:7139.
[258] See, *e.g.*, District Court of Amsterdam District Court of Amsterdam, interlocutory judgment of 25 July 2017, ECLI:NL:RBAMS:2017:5327.
[259] District Court of Amsterdam, judgment of 5 April 2018, ECLI:NL:RBAMS:2018:2088.
[260] District Court of Amsterdam, judgment of 8 May 2018, ECLI:NL:RBAMS:2018:3548 (not published).
[261] Cases in which the District Court held that Art. 12(d) Law on Surrender did not apply because of the conditionality of the right to a retrial or an appeal concern either Polish or Italian cases. In Polish cases the issuing judicial authority regularly refers to Art. 540b of the Polish CPC. In Italian cases the issuing judicial authority regularly refers to Art. 175 of the Italian CPC as in force between 2005 and 2014.
[262] See, *e.g.*, District Court of Amsterdam, judgment of 15 March 2018, ECLI:NL:RBAMS:2018:2145 (not published).

or an appeal and/or the passage about the time frame within with to exercise that right, will entail the non-applicability of the Dutch transposition of Art. 4a(1)(d) FD 2002/584/JHA.[263]

Not ticking the box of point 3.4 of section (d) of the EAW, but merely reproducing the text of the issuing Member State's rules on lodging the applicable legal recourse, without referring to the requested person's right to participate in the retrial or the appeal and without mentioning that the retrial or the appeal allows the merits of the case, including fresh evidence, to be re-examined, does not suffice.[264]

Time frame for exercising the right to a retrial or an appeal not mentioned

Point 3.4 of section (d) of the EAW requires the issuing judicial authority to fill in the time frame for exercising the right to a retrial or an appeal.

If the EAW does not mention the applicable time frame, the executing judicial authority should request supplementary information at least once. Unfortunately, in a number of cases the District Court of Amsterdam rejected the argument that the EAW should mention the applicable time frame.[265][266]

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.

Answer

Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service

The Fugitive Active Search Team of the Public Prosecution Service never ticks point 3.4 of section (d) of the EAW, because the Fugitive Active Search Team only deals with cases in which the judgment of conviction is final.

Under point 4 of section (d) of the EAW, the Fugitive Active Search Team will always describe the proceedings *in extenso* in order to show that the requested person had a fair trial.

In case of a final judgment, it is unclear to the Fugitive Active Search Team whether under Dutch law it is possible to guarantee that the requested person still has the right to a retrial or an appeal as referred to in Art. 4a(1)(d) FD 2002/584/JHA when the executing judicial authority makes the execution of the EAW conditional on such a guarantee. However, it is

[263] See, *e.g.*, District Court of Amsterdam 16 October 2012, ECLI:NL:RBAMS:2012:8141 (not published).
[264] District Court of Amsterdam, interlocutory judgment of 9 May 2018, ECLI:NL:RBAMS:2018:3057 (not published). The court decided to ask the issuing judicial authority whether the requested person would have the right to participate in a retrial and whether a retrial would allow a re-examination of the merits of the case, including fresh evidence *et cetera*.
[265] See District Court of Amsterdam, judgment op 17 May 2013, ECLI:NL:RBAMS:2013:CA0920; District Court of Amsterdam, judgment of 17 May 2013, ECLI:NL:RBAMS:2013:2834; District Court of Amsterdam, judgment of 3 May 2015, ECLI:NL:RBAMS:2015:3180 (not published).
[266] In Hungary, there is no time frame for exercising the right to a retrial or an appeal: District Court of Amsterdam, judgment of 4 August 2016, ECLI:NL:RBAMS:2016:4966; District Court of Amsterdam, judgment of 25 July 2017, ECLI:NL:RBAMS:6708.

clear that such a guarantee, once given, is binding on every person or body charged with a public duty (Art. 45a(2) Law on Surrender).

Additional remark by the researcher

Once the judgment is irrevocable, under Dutch law the person concerned does not have a right to a retrial or an appeal as referred to in Art. 4a(1)(d) FD 2002/584/JHA. The issuing judicial authority should, therefore, not tick point 3.4 of section (d) of the EAW, even if the execution of the EAW depended on it.

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.

Answer

Yes.

It is a rather common occurrence that section (b) of the EAW mentions the existence of a first instance judgment and the existence of a judgment on appeal, while section (d) of the EAW:

- either refers solely to the first instance judgment or
- does not make clear to which judgment(s) it applies.[267]

In these cases either the Public Prosecutor, either on its own motion or at the behest of the District Court of Amsterdam, asked the issuing judicial authority for supplementary information.

In some cases the EAW did not mention appeal proceedings at all, although on the basis of information provided either by the issuing judicial authority or by the requested person it

[267] See, *e.g.*, District Court of Amsterdam, judgment of 30 August 2017, ECLI:NL:RBAMS:2017:6273 (this judgment concerns the *Tupikas*-case); District Court of Amsterdam, judgment of 12 September 2017, ECLI:NL:RBAMS:2017:7140; District Court of Amsterdam, judgment of 13 February 2018, ECLI:NL:RBAMS:2018:867 (not published); District Court of Amsterdam, judgment of 20 February 2018, ECLI:NL:RBAMS:2018:1096; District Court of Amsterdam, judgment of 22 February 2018, ECLI:NL:RBAMS:2018:1049 (not published); District Court of Amsterdam, judgment of 1 March 2018, ECLI:NL:RBAMS:2018:3646; District Court of Amsterdam, judgment of 1 March 2018, ECLI:NL:RBAMS:2018:1334; District Court of Amsterdam, judgment of 20 March 2018, ECLI:NL:RBAMS:2018:3035 (not published).

turned out that there had indeed been an appeal.[268] In some cases the issuing judicial authority was asked to provide (further) supplementary information.[269] In another case, the EAW mentioned that the requested person had appeared in person at the trial resulting in the first instance judgment; as regards the proceedings on appeal, the District Court of Amsterdam relied on the statement of the requested person that he had appeared in person at the trial resulting in the decision on appeal, thus rendering further information about the proceedings in appeal irrelevant.[270]

In the aftermath of the *Tupikas*-judgment of the CoJ, the Public Prosecutor and the District Court of Amsterdam refer to the criteria set out in that judgment when requesting supplementary information about proceedings on appeal and the District Court of Amsterdam explicitly examines whether these proceedings meet those criteria or not.[271]

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.

Answer

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

The Fugitive Active Search Team of the Public Prosecution Service has issued such EAW's, but has not experienced any problems in this regard.

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.

Answer

[268] See, *e.g.*, District Court of Amsterdam, judgment of 3 October 2017, ECLI:NL:RBAMS:2017:8541 (not published); District Court of Amsterdam, judgment of 3 April 2018, ECLI:NL:RBAMS:2018:1870 (not published); District Court of Amsterdam, judgment of 17 June 2018, ECLI:NL:RBAMS:2018:5275.
[269] See, *e.g.*, District Court of Amsterdam, judgment of 3 October 2017, ECLI:NL:RBAMS:2017:8541 (not published); District Court of Amsterdam, judgment of 17 June 2018, ECLI:NL:RBAMS:2018:5275.
[270] District Court of Amsterdam, judgment of 3 April 2018, ECLI:NL:RBAMS:2018:1870 (not published).
[271] Although in some cases the District Court of Amsterdam seems less than rigorous in the application of the *Tupikas*-criteria: see, *e.g.*, District Court of Amsterdam judgment 15 March 2018, ECLI:NL:RBAMS:2018:1549; District Court of Amsterdam, judgment of 20 March 2018, ECLI:NL:RBAMS:2018:3035 (not published); District Court of Amsterdam, judgment 10 April 2018, ECLI:NL:RBAMS:2018:2087 (not published); District Court of Amsterdam, judgment of 28 June 2018, ECLI:NL:RBAMS:2018:4884; District Court of Amsterdam, judgment of 26 July 2018, ECLI:NL:RBAMS:2018:5428 (not published).

Zdziaszek-decisions

Prior to the judgment of the CoJ in the *Zdziaszek*-case, the District Court of Amsterdam was of the opinion that proceedings in which previously imposed penalties were merged into a new penalty (a so-called *cumulative sentence*) did not come within the ambit of Art. 4a.[272] According to the court, that provision only applied to those stages of the 'determination (…) of any criminal charge' (Art. 6(1) ECHR) in which the 'merits of the case' (Art. 4a(1)(c and d) FD 2009/229/JHA) were examined. Because a decision to merge previously imposed sentences does not involve a finding of guilt, it was not considered to be a decision on the 'merits of the case'.[273]

Ever since the *Zdziaszek*-judgment, the District Court of Amsterdam checks whether proceedings resulting in a cumulative sentence meet with the conditions set out in that judgment.

It follows from the *Zdziaszek*-judgment that *both* the underlying judgments of conviction *and* the *Zdziaszek*-decision itself must comply with Art. 4a,[274] the rationale being that both the finding of guilt and the imposition of a penalty must respect the rights of the defence. However, in case of a cumulative sentence, the EAW rarely contains the necessary information about the underlying judgments of conviction, requiring the Public Prosecutor to request the issuing judicial authority to provide supplementary information.[275]

If the *Zdziaszek*-decision merged at least two penalties and one of the underlying judgments of conviction does not pass muster, while the other judgment of conviction and the *Zdziaszek*-decision itself do, then the District Court of Amsterdam will execute the EAW only with regard to the *Zdziaszek*-decision and the latter judgment of conviction and will refuse to execute the EAW with regard to the former judgment of conviction. After surrender, it is then up to the authorities of the issuing Member State to decide which part of the penalty corresponds to the offences for which surrender was allowed and to limit the execution of that penalty to that part in accordance with the rule of speciality.[276] It should be noted here that, sporadically, there have been indications that Polish authorities do not feel themselves bound to take into account a partial refusal and that they will execute the entire penalty.[277]

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[272] See, *e.g,* District Court of Amsterdam, interlocutory judgment of 8 November 2013, ECLI:NL:RBAMS:2013:9883.

[273] See, *e.g,* District Court of Amsterdam, interlocutory judgment of 8 November 2013, ECLI:NL:RBAMS:2013:9883.

[274] CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 93-94.

[275] See, *e.g*. District Court of Amsterdam, judgment of 25 January 2018, ECLI:NL:RBAMS:2018:367; District Court of Amsterdam, judgment of 22 May 2018, ECLI:NL:RBAMS:2018:3493; District Court of Amsterdam, judgment of 21 June 2018, ECLI:NL:RBAMS:2018:4388.

[276] See, e.g., District Court of Amsterdam, judgment of 22 February 2018, ECLI:NL:RBAMS:2018:1047; District Court of Amsterdam, judgment of 10 April 2018, ECLI:NL:RBAMS:2018:2089 (not published).

[277] As a rule, the District Court of Amsterdam will assume that the authorities of the issuing Member State will comply with the rule of speciality. See, *e.g.*, District Court of Amsterdam, interlocutory judgment of 13 November 2013, ECLI:NL:RBAMS:2013:9883. In this case, execution of the EAW could not be allowed for some offences (because these offences did not meet the dual criminality requirement), while it could for others. When the issuing judicial authority was apprised of this, it notified the court that the requested person would, nonetheless, have to serve the *entire* custodial sentence. In these exceptional circumstances, the District Court of Amsterdam decided to enquire further into the matter. Eventually, **after having been confronted with the**

If the *Zdziaszek*-decision merged at least two penalties and all of the underlying judgments of conviction pass muster, while the *Zdziaszek*-decision itself does not, the District Court will refuse to execute the EAW.[278] In such a case, one cannot revert to the penalties originally imposed by the underlying judgments of conviction, because these penalties were superseded by the penalty imposed by the *Zdziaszek*-decision.

Ardic-decisions

Prior to the judgment of the CoJ in the *Ardic*-case, the District Court of Amsterdam was of the opinion that a decision to revoke the suspension of a previously imposed custodial sentence does not come within the ambit of Art. 4a. According to the court, that provision only applied to those stages of the 'determination (…) of any criminal charge' (Art. 6(1) ECHR) in which the 'merits of the case' (Art. 4a(1)(c and d) FD 2009/229/JHA) are examined. Because a decision to revoke the suspension of the execution of a previously imposed sentence does not involve a finding of guilt, it was not considered to be a decision on the 'merits of the case'.[279]

In the *Ardic*-judgment, the CoJ ruled that decisions regarding the execution of a penalty previously imposed do not come within the ambit of Art. 4a 'except where the purpose or

text of Art. 607e Polish CPC by the Dutch judicial authorities, the issuing judicial authority informed the District Court of Amsterdam that:

- 'under Article 607 e § 1 and 2 of the Code of Criminal Procedure (or the CPC for short): a person handed over as a result of enforcing a warrant may neither be prosecuted for other offenses than those forming the basis of surrender nor any adjudged towards him/her penalties of custodial sentence or other measures involving deprivation of liberty may be subject of enforcement. The Court that lawfully adjudged in the matter, can order the enforcement of the sentence only for those offences, making the basis of surrender of the prosecuted person';

- *'*under Art. 597 of the CPC, if upon the extradition the condition is imposed concerning the person extradited that formerly imposed penalties will be executed only to the extent of the offences for which the extradition has been granted, the court which has validly decided the case, shall issue in session a judgment, if necessary, amending the prior decision so that the penalty shall be executed only as to the offences for which the extradition was granted. The prosecutor and the prosecuted person are allowed to attend the court sitting';

- 'Under those provisions, the response to the queries of the District Court in Amsterdam, contained in items 1 and 2 [*1. Is it correct that, if surrender would be allowed for offence III only, the Polish authorities would hold a court session to determine whether the enforcement of the cumulative sentence is in accordance with the rule of speciality? 2. If so, may the judge in those proceedings order limiting the enforcement of the cumulative sentence to that part of the sentence which corresponds with offence III?*], should according to my opinion be positive'.

This answer satisfied the District Court of Amsterdam that the Polish authorities would, in the end, respect the rule of speciality: District Court of Amsterdam, judgment of 28 October 2014, ECLI:NL:RBAMS:2014:9873. (The same question has also risen in British EAW-proceedings: *Brodziak v Circuit Court In Warsaw, Poland* [2013] EWHC 3394 (Admin) (11 November 2013)).

[278] District Court of Amsterdam, judgment of 8 May 2018, ECLI:NL:RBAMS:2018:3544 (not published); District Court of Amsterdam, judgment of 2 August 2018, ECLI:NL:RBAMS:2018:5805.

[279] See, *e.g.,* District Court of Amsterdam, interlocutory judgment of 8 November 2013, ECLI:NL:RBAMS:2013:9883.

effect of that decision is to modify either the nature or quantum of that sentence and the authority which adopted it enjoyed some discretion in that regard'.[280]

Inasmuch as decisions to revoke the suspension of the execution of previously imposed custodial sentences do not affect the nature or the *quantum* of custodial sentences imposed by final conviction judgments, they do not come within the ambit of Art. 4a. Not coming within the ambit of Art. 4a, generally they do not pose a problem, because no information about the proceedings resulting in those decisions is needed (see also the answer to question 53).[281]

After the *Ardic*-judgment, the District Court of Amsterdam was confronted with a Polish case in which the person concerned was originally sentenced to a custodial sentence of one year and three months and a fine of 8,000.00 PLN, equal to *400* days custody, with each day of custody amounting to 20,000 PLN (*sic*; probably a *lapsus calami* for '20 PLN'). Because the person concerned did not pay the fine, a Polish court imposed a custodial sentence of *200* days. The District Court of Amsterdam held that the latter decision did not come within the ambit of Art. 4a, because it did not modify the nature or the *quantum* of the sentence previously imposed.[282] It is hard to see how this decision did not modify the *quantum* of the original sentence, which after all was equal to 400 days custody.

In a Latvian case, the EAW mentioned a decision to partially substitute a penalty of community service with a custodial sentence. When asked whether in reaching that decision the competent Latvian court enjoyed a margin of discretion with regard to the level or the nature of that penalty, the issuing judicial replied that the decision related to the enforcement of a judgment and that this decision was, therefore, not a decision as mentioned in Art. 4a FD 2002/584/JHA. The issuing judicial authority referred to Art. 40 of the Latvian Penal Code.[283] From the answer given by the issuing judicial authority and on the basis of Art. 40 of the Latvian Penal Code, the court concluded that the competent Latvian court did not enjoy any discretion in substituting community service with a custodial sentence where the person concerned evaded performing community service and that the decision, therefore, did not come within the ambit of Art. 4a.[284]

In the same Latvian case, the EAW also mentioned a decision merging three previously imposed penalties into one penalty (*sic*): community service and a custodial sentence. When asked whether in reaching that decision the competent Latvian court enjoyed a margin of discretion, the issuing judicial replied that the decision related to the enforcement of a judgment and that this decision was, therefore, not a decision as mentioned in Art. 4a FD 2002/584/JHA. The court concluded that that the competent Latvian court did not enjoy any discretion in merging the penalties and observed that the penalty imposed was equal to the sum total of the previously imposed penalties.[285]

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[280] CoJ, judgment of 22 December 2018, *Ardic*, C-571/17 PPU, ECLI:EU:C:2018:1026, para 77.

[281] In one instance, section 9d) of a Romanian EAW referred to a decision which turned out to be a decision to revoke the suspension of the execution of a custodial sentence, while no reference was made of the judgment of conviction. The District Court of Amsterdam decided to refuse the execution of the EAW (see also the answer to question 63).

[282] District Court of Amsterdam, judgment of 22 March 2018, ECLI:NL:RBAMS:2018:1674.

[283] Art. 40(3) Latvian Penal Code (as found on www.legislation.org): '(3) If a person punished with community service (…) evades, in bad faith, serving the punishment, a court **shall** substitute temporary deprivation of liberty for the unserved punishment, **calculating four hours of work as one day of temporary deprivation of liberty**' (emphasis added).

[284] District Court of Amsterdam, judgment of 17 July 2018, ECLI:NL:RBAMS:2018:5305. See

[285] District Court of Amsterdam, judgment of 17 July 2018, ECLI:NL:RBAMS:2018:5305.

In a Belgian case, the EAW mentioned an *in absentia* judgment of the Penal Enforcement Court (*Strafuitvoeringsrechtbank*) revoking limited detention (*herroeping van de beperkte detentie*). The District Court of Amsterdam ruled that, as this judgment did not modify the nature or the *quantum* of the penalties previously imposed, Art. 12 Law on Surrender did not apply to that judgment.[286]

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.

Answer

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

Zdziaszek-decisions

Dutch law does not provide for proceedings in which a previously imposed penalty which has become final is modified nor for proceedings in which two or more previously imposed penalties which have become final are merged into one penalty. If multiple penalties were imposed on the person concerned by multiple final judgments, these penalties will be enforced *seriatim* (Art. 570a CPC).

Ardic-decisions

A decision to revoke a conditional release or a suspension of the execution of a custodial sentence does not modify the nature or the *quantum* of the original penalty. Such a decision does not come within the ambit of Art. 4a.

Under Dutch law, it is not required that the person concerned was aware beforehand of the hearing at which the court decided to revoke either a provisional release or suspension of the execution of a custodial sentence, nor is it required that the person concerned was present at that hearing.

As far as the Fugitive Active Search Team is aware, such decisions have not caused any problems.

Additional remarks by the researcher

While it is true that the person does not have to be present at the hearing, the Public Prosecutor must serve a written notice to appear on the person concerned in order that he becomes aware of the date and the place of that hearing beforehand, if at all possible (Art. 14(3) Penal Code; Art. 15i(6) Penal Code).

3.5. Margin of discretion of the executing judicial authority

[286] District Court of Amsterdam, judgment of 24 April 2018, ECLI:NL:RBAMS:2018:3038 (not published).

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.

Answer

No.

Because Art. 12 Law on Surrender contains a **mandatory** ground for refusal, the District Court of Amsterdam is precluded from taking into account such circumstances.[287]

In some cases, however, the District Court of Amsterdam has intimated that, if Art. 12 Law on Surrender were to contain an **optional** ground for refusal, certain circumstances:

- either would support the conclusion that the surrender of the requested person would not mean a breach of his rights of defence[288] or

[287] See, *e.g.*, District Court of Amsterdam, judgment of 16 June 2016, ECLI:NL:RBASMS:2016:3643 (this judgment concerns the *Dworzecki* case).
[288] See, *e.g.*:

- District Court of Amsterdam, judgment of 16 June 2016, ECLI:NL:RBAMS:2016:3643: the requested person

  - had indicated an address at which the summons was served on a third party;
  - was aware of the charge against him, because he had confessed to having committed the offence and had reached an agreement with the Public Prosecutor as to the penalty to be imposed;
  - could, therefore, reasonably expect that he would be prosecuted and that he would be summoned at the address he himself had indicated,

  leading the court to conclude that the requested person had not been sufficiently diligent in taking the necessary steps to ensure that any official notifications at that address would actually reach him;

- District Court of Amsterdam, judgment of 29 November 2016, ECLI:NL:RBAMS:2016:7718: the requested person

  - had provided an address for service of official documents;
  - was aware of the charges against him and had confessed to having committed the offences;
  - has successfully asked for an adjournment of the first hearing by telephone;

- by contrast, could not support that conclusion.[289]

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?

Answer|

It is entirely dependent on the situation at hand what kind of supplementary information the executing judicial authority usually asks for.

Some examples:

- could, therefore, reasonably have expected to receive a new summons at the address he himself had indicated, but at which he no longer resided,

leading the court to conclude that the requested person had not been sufficiently diligent in taking the necessary steps to ensure that any official notifications at that address would actually reach him.

[289] District Court of Amsterdam, judgment of 18 January 2018, ECLI:NL:RBAMS:2018:415 (not published): the mere fact that the requested person reached an agreement with the Public Prosecutor as to the penalty to be imposed, does not mean that he waived his presence at the trial.

- if the issuing judicial authority used the old version of section (d) of the EAW or left section (d) blank, the executing judicial authority will ask the issuing judicial authority to fill in (the current version of) section (d);

- if the requested person appeared in person at some hearings, while he did not appear at others, the executing judicial authority will ask the issuing judicial authority at which of the hearings the merits of the case were dealt with (see also the answer to question 69);

- if the EAW mentions proceedings on appeal, but it is not clear whether these proceedings meet the criteria set out in the *Tupikas*-judgment, the executing judicial authority will ask the issuing judicial authority for clarification on this point.

In short, the executing judicial authority will ask for any procedural information necessary to ascertain whether:

- Art. 12 Law on Surrender is applicable to the relevant decision and, if so,

- any of the exceptions to the duty to refuse the execution of the EAW apply.

Requests for supplementary information made before the hearing of the District Court of Amsterdam will usually contain a time limit for the receipt of that information, *viz*. if possible before the hearing, but at the latest on the date of the hearing. Other requests will usually contain a short time limit.

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.

Answer

Unfortunately, it is not an uncommon occurrence that after having received supplementary information on the basis of the Dutch transposition of Art. 15(2) FD 2002/584/JHA *once*, the District Court of Amsterdam still could not verify whether the rights of the defence were fully observed.[290]

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

[290] See, *e.g.*, District Court of Amsterdam, judgment of 3 October 2017, ECLI:NL:RBAMS:2017:8541 (not published) (supplementary information received once; surrender was eventually refused); District Court of Amsterdam, judgment of 30 August 2017, ECLI:NL:RBAMS:2017:6273 (supplementary information requested thrice; one request not answered; surrender was eventually refused); District Court of Amsterdam, judgment of 26 April 2018, ECLI:NL:RBAMS:2018:2701 (not published) (supplementary information requested and received once; surrender partially refused); District Court of Amsterdam, interlocutory judgment of 9 May 2018, ECLI:NL:RBAMS:2018:3057 (not published) (supplementary information requested twice; hearing adjourned to await receipt of the information relating to the second request); District Court of Amsterdam, judgment of 27 March 2018, ECLI:NL:RBAMS:2018:1757 (supplementary information requested and received twice; surrender was eventually refused); District Court of Amsterdam, judgment of 27 March 2018, ECLI:NL:RBAMS:2018:2136 (supplementary information requested and received three times; surrender was eventually refused).

judicial authority to decide on the surrender of the requested person, what kind of information are they usually asked for?

Answer

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

The Fugitive Active Search Team of the Public Prosecution Service always fills in the EAW as completely as possible. By describing the entire proceedings and the offences *in extenso*, request for supplementary information are to a large extent avoided. Even so, some foreign authorities regularly request supplementary information on, *e.g.*:

- the status of the judgment (irrevocable or not) and:
- the Dutch legal system.[291]

Authorities from the United Kingdom almost always request supplementary information. They use a standard questionnaire, but not all of the questions are relevant for the execution of the EAW:

- whether the person concerned was arrested and heard in the case at hand;
- whether the person concerned confessed to the crime;
- whether the person concerned was present at the hearings (both the hearing at which the merits of the case were dealt with and the hearing at which the judgment was pronounced);
- how the person concerned was informed of the penalty imposed on him;
- the duration of remand in custody;
- whether the person concerned appealed;
- whether the person concerned is 'unlawfully at large' and whether the person concerned is aware of the fact that he is 'unlawfully at large';
- the reason for the delay between the date on which the judgment became finale and the date on which the EAW was issued;
- whether a suspended or conditional sentence was imposed and, if so, under which conditions;
- whether a measure was taken against the person concerned restricting his freedom to leave the territory of the Netherlands and, if so, whether the person concerned was aware of that measure;

[291] I left out examples which do not pertain to Art. 4a.

- whether the person concerned was under the obligation to report any change of address to the authorities and, if so, whether the person concerned was aware of this obligation;

- whether the person concerned is to be considered a 'fugitive'.

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.

Answer

Yes.

Again, this is not an uncommon occurrence.[292] In such cases the District Court will extend the time limit of 60 days with a further 30 days[293] or will extend the time limit of 90 days for an indefinite period.[294] In the latter case, if the requested person is still in custody, the District Court of Amsterdam must at the same time conditionally release him and notify the issuing judicial authority thereof.[295]

[292] See, *e.g.*, District Court of Amsterdam, judgment of 26 April 2018, ECLI:NL:RBAMS:2018:2701 (not published) (supplementary information requested and received once; surrender partially refused); District Court of Amsterdam, interlocutory judgment of 9 May 2018, ECLI:NL:RBAMS:2018:3057 (not published) (supplementary information requested twice; hearing adjourned to await receipt of the information relating to the second request); District Court of Amsterdam, judgment of 27 March 2018, ECLI:NL:RBAMS:2018:2136 (supplementary information requested and received three times; surrender was eventually refused).
[293] On the basis of Art. 22(3) Law on Surrender.
[294] On the basis of Art. 22(4) Law on Surrender.
[295] *Idem*.

Basing itself on primary and secondary Union law, the District Court of Amsterdam has interpreted Art. 22(4) Law on Surrender in such a way that the time limit is suspended – thereby avoiding that the time limit will exceed the 90 days mark and at the same time avoiding the automatic conditional release envisaged by Art. 22(4) – if the District Court:

- decides to make a preliminary reference to the Court of Justice;

- decides to await the outcome of a preliminary reference made by another judicial authority or

- postpones the decision on the execution of the EAW in accordance with the *Aranyosi and Căldăraru*-judgment.[296]

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.

Answer

Perspective of the executing judicial authority

General observation

Although the wording of the opening sentence of point 3 of section (d) is not entirely clear in this regard ('3. If you have ticked the box under point 2, please confirm the existence of one of the following'), it is self-evident that an issuing judicial authority may only tick one of the boxes of points 3.1-3.4 of section (d) of the EAW – which correspond to the exceptions to optional refusal –, **if that particular point – and, therefore, that particular exception – actually applies to the situation at hand**.

Even so, one sometimes gets the impression that issuing judicial EAW's feel they **must** tick one of the boxes of points 3.1-3.4 of section (d) once they have ticked box 2 ('No, the person did not appear in person at the trial resulting in the decision'), even if that particular point is not applicable.

In one such instance, a Dutch issuing judicial authority ticked point 3.3 – the judgment of conviction on appeal was served on the defendant – knowing full well that only an appeal on points of law lies against judgments on appeal and that an appeal on points of law does not entail a full determination of the merits of the charge in respect of both law and fact. The issuing judicial authority was under the impression that it had to tick one of the boxes and point 3.3 most closely resembled the situation at hand.

[296] District Court of Amsterdam, judgment of 5 April 2016, ECLI:NL:RBAMS:2016:1995; District Court of Amsterdam, judgment of 28 April 2016, ECLI:NL:RBAMS:2016:2630; District Court of Amsterdam, judgment of 10 June 2016, ECLI:NL:RBAMS:2016:9382. In case C-492/18 PPU, the CoJ will answer the question whether this interpretation is in breach of Art. 6 Charter.

Establishing whether a particular point is applicable, requires a two-part operation. The issuing judicial authority must first determine what happened in the proceedings that led to the *in absentia* conviction. Then it must determine whether its findings correspond to one of the situations described in points 3.1-3.4, bearing in the mind the autonomous nature of the expressions used in those points and taking into account the relevant case-law of the CoJ. If so, the issuing judicial authority may tick the applicable box. If its findings correspond to none of points 3.1-3.4, it must not tick any of those boxes.

In the latter case, it remains open to the issuing judicial authority to mention in point 4 of section (d) any circumstance which in its view supports the conclusion that surrender of the requested person would not entail a breach of his rights of defence.

Irrevocability of Belgian judgments of conviction

In a number of Belgian cases, the **Dutch** criminal record of a Dutch national referred to the **Belgian** judgment of conviction as **final**, whereas the EAW contained the guarantee of a **right to a retrial or an appeal**, thereby suggesting that the conviction was not final. Information in a criminal record about a conviction of a Dutch national **in another Member State** is provided by that Member State, in accordance with Framework Decision 2009/315/JHA**.**[297] In these cases, the District Court of Amsterdam, therefore, decided to check with the issuing judicial authority whether the conviction was final.[298]

Perspective of the issuing judicial authority

The Fugitive Active Search Team of the National Office of the Public Prosecution Service has no additional observations.

3.9. Methodology

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

Answer

Perspective of the executing judicial authority

The answers to the questions in Part 3 are based on case-law research. The research focussed on judgments of the District Court of Amsterdam in EAW-matters rendered in the years 2016-2018, because, apart from the *Melloni*-judgment,[299] all the CoJ's case-law on Art. 4a dates from the years 2016 and 2017. In this way, the answer to the questions in Part 3 demonstrate whether – and, if so to what extent – the CoJ's case-law influences the day to day practice of the District Court of Amsterdam.

[297] Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States, *OJ* 2009 L 93, p. 23. The information provided must pertain, *inter alia*, to the date on which the conviction became final (Art. 11(1)(a)(ii)).
[298] See, *e.g.*, District Court of Amsterdam, judgment of 28 June 2018, ECLI:NL:RBAMS:2018:5342 (not published): after having being confronted with the statement in the requested person's criminal record, the issuing judicial authority reiterated that the requested person could still lodge an objection leading to a retrial (*verzet aantekenen*); the court held that the conviction was not final after all.
[299] CoJ, judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107.

Some of the District Court of Amsterdam's judgments are published on the website of the Dutch judiciary (www.rechtspraak.nl), which is accessible to all. When referring to those judgments, the European Case Law Identifier (ECLI) is given.

Most of the District Court of Amsterdam's judgments are deposited in the e-archive of the Dutch judiciary. The e-archive is only accessible to judges and their staff. Every judgment which is deposited in the e-archive, is designated by its own ECLI. Depositing a judgment in the e-archive does not automatically entail publication on the website of the Dutch judiciary. When referring to a judgment which is deposited in the e-archive, but is not published on the website of the Dutch judiciary, its ECLI is given, followed by the words '(not published)'.

Some judgments of the District Court of Amsterdam are not deposited in the e-archive nor published on the website. These judgments are kept on the group data area of the computer system of the court and are accessible only to judges and staff of the Extradition Chamber. When referring to such judgments, the case number (*parketnummer*) is given, followed by the words '(not published)'.

Perspective of the issuing judicial authority

The information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service is based on practical experience, discussions with colleagues and case-file research.

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

b. out of this total number of EAW cases referred to under a.:

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

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

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

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

Before transposition of Art. 2 FD 2009/299/JHA by your Member State

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

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

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

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

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

After transposition of Art. 2 FD 2009/299/JHA by your Member State

- **the total number of cases in which the requested person was present in person at the trial resulting in the decision**

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

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

- **in case of application of Art. 15(2) FD 2002/584/JHA because the information in the EAW was insufficient to verify whether the conditions of Art. 4a had**

been met: the total number of cases in which either the 60 day time limit or the 90 day time limit could not be observed

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

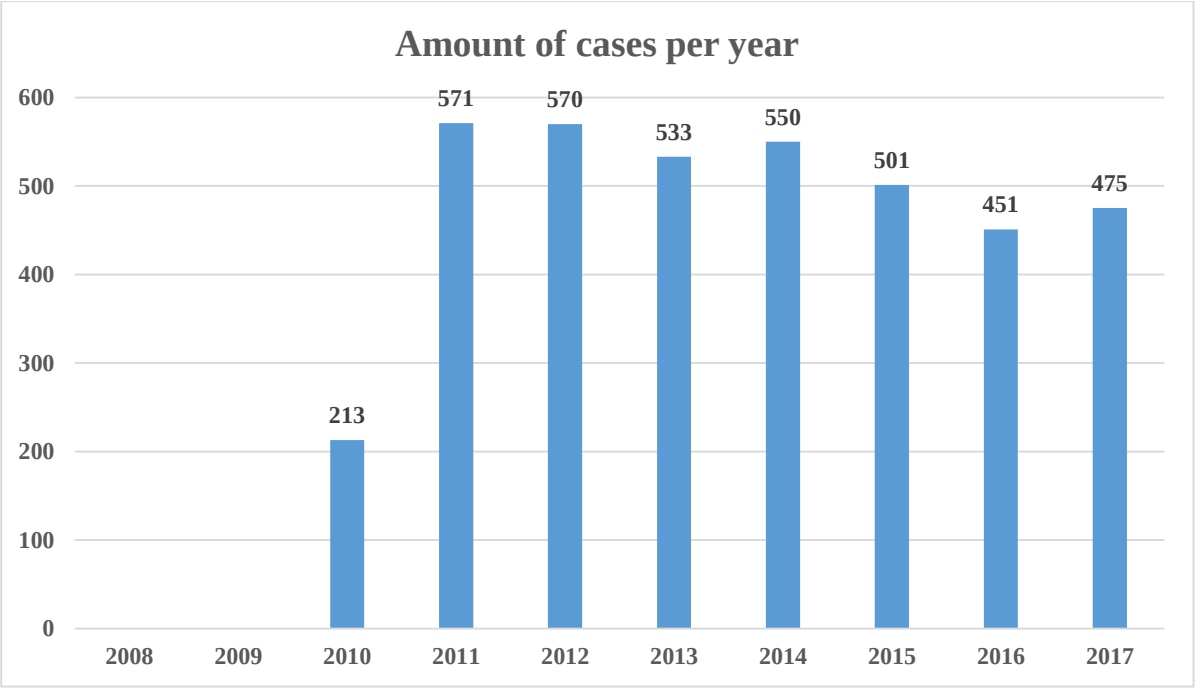
Answer

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

Year	Amount of cases
2008	Unknown
2009	Unknown
2010[300]	213
2011	571
2012	570
2013	533
2014	550
2015	501
2016	451
2017	475[301]

[300] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 was not accessible.

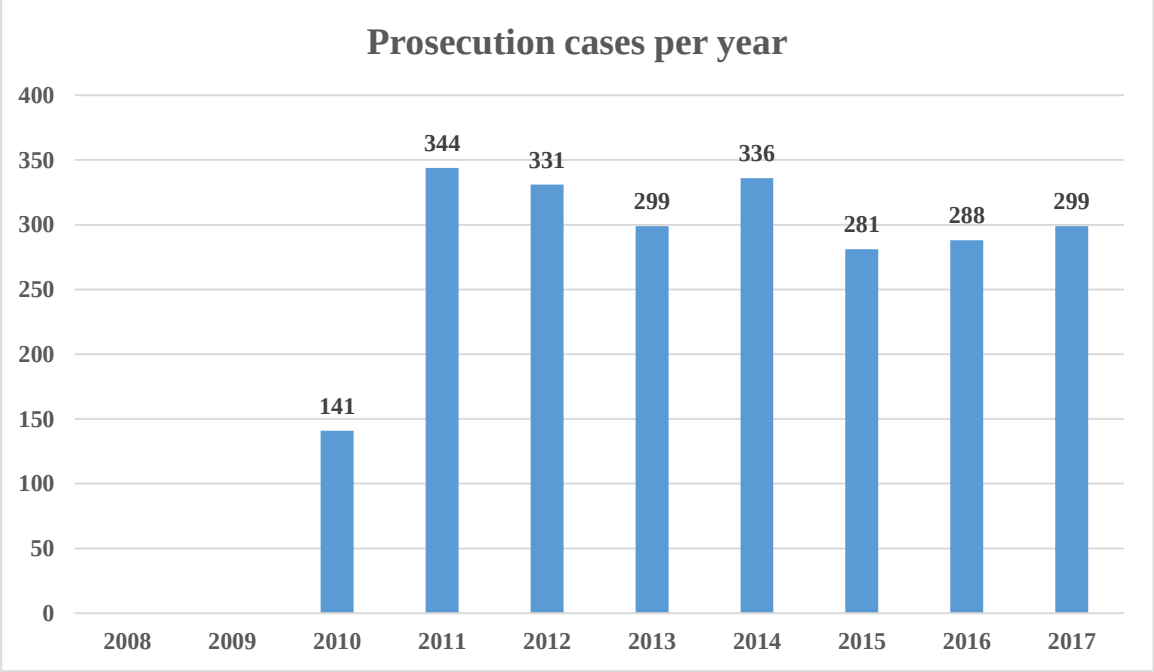
[301] In 9 of those cases the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention condition for the requested person. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)


Amount of cases per year
600
500
400
300
200
100
0
213
571
570
533
550
501
451
475
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017

b. out of this total number of EAW cases referred to under a.:

- **the total number of EAW's for the purpose of <u>prosecution</u>**[302]

Year	Amount of prosecution cases
2008	Unknown
2009	Unknown
2010[303]	141
2011	344
2012	331
2013	299
2014	336
2015	281
2016	288
2017	299[304]



[302] Some EAW´s pertain both to surrender for the purpose of **execution of a custodial sentence or a detention order** and to surrender for the purpose of **prosecution**. These EAW's will be counted in both categories. For this reason, the figures in this table do not necessarily match those in the first table.

[303] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 was inaccessible.

[304] In three of those cases the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention condition for the requested person. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)

- **the total number of EAW's for the purpose of <u>execution of a custodial sentence or detention order</u>[305]**

Year	Amount of execution cases
2008	Unknown
2009	Unknown
2010[306]	77
2011	240
2012	260
2013	243
2014	224
2015	223
2016	165
2017	179[307]

[305] Some EAW´s pertain both to surrender for the purpose of **execution of a custodial sentence or a detention order** and to surrender for the purpose of **prosecution**. These EAW's will be counted in both categories. For this reason, the figures in this table do not necessarily match those in the first table.

[306] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 was inaccessible.

[307] In six of those cases the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention condition for the requested person. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)

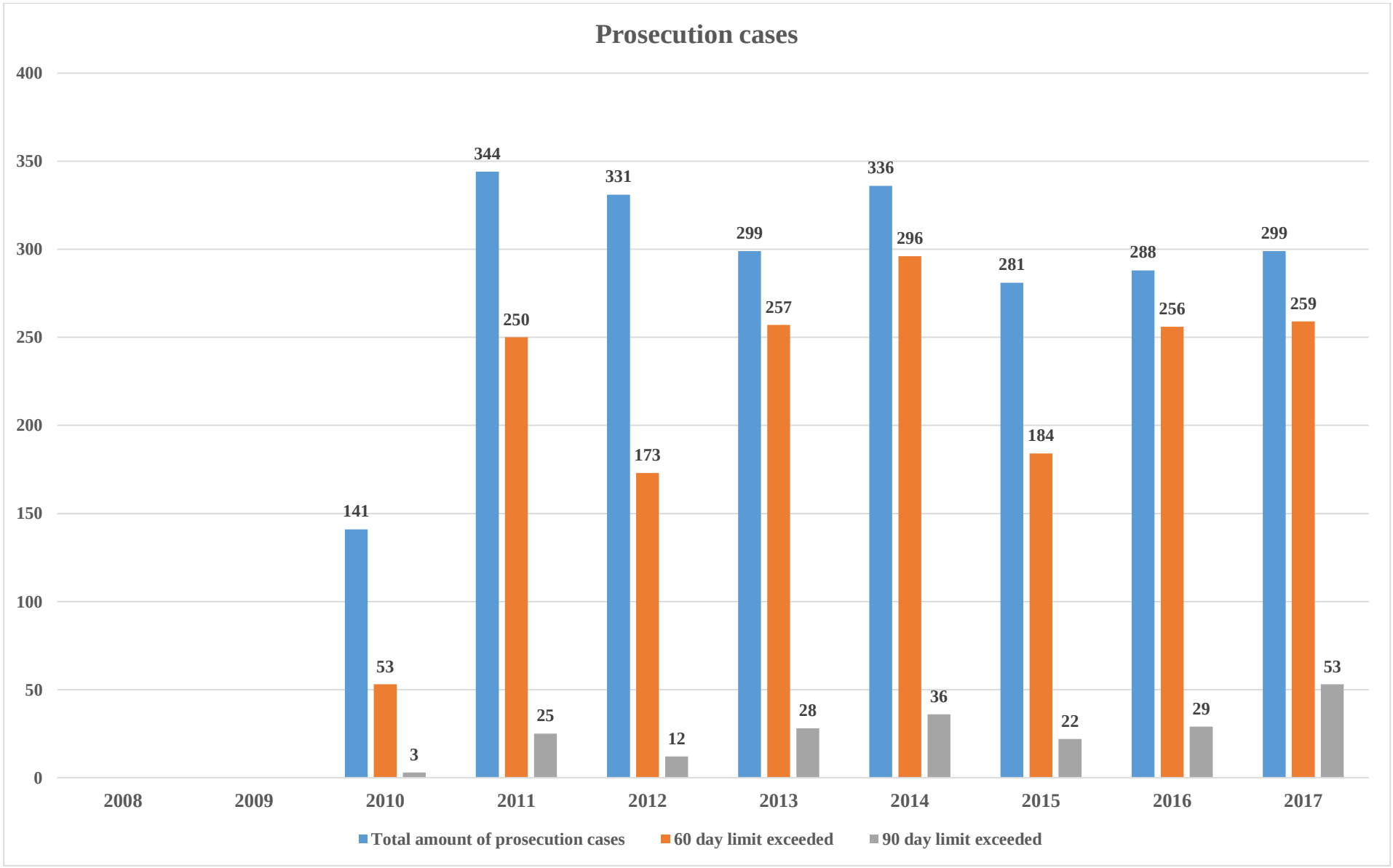
c. out of the total number of EAW cases referred to under a.: the total number of cases in which either the 60 days limit or the 90 days limit could not be observed, broken down into prosecution-EAW's and execution-EAW's

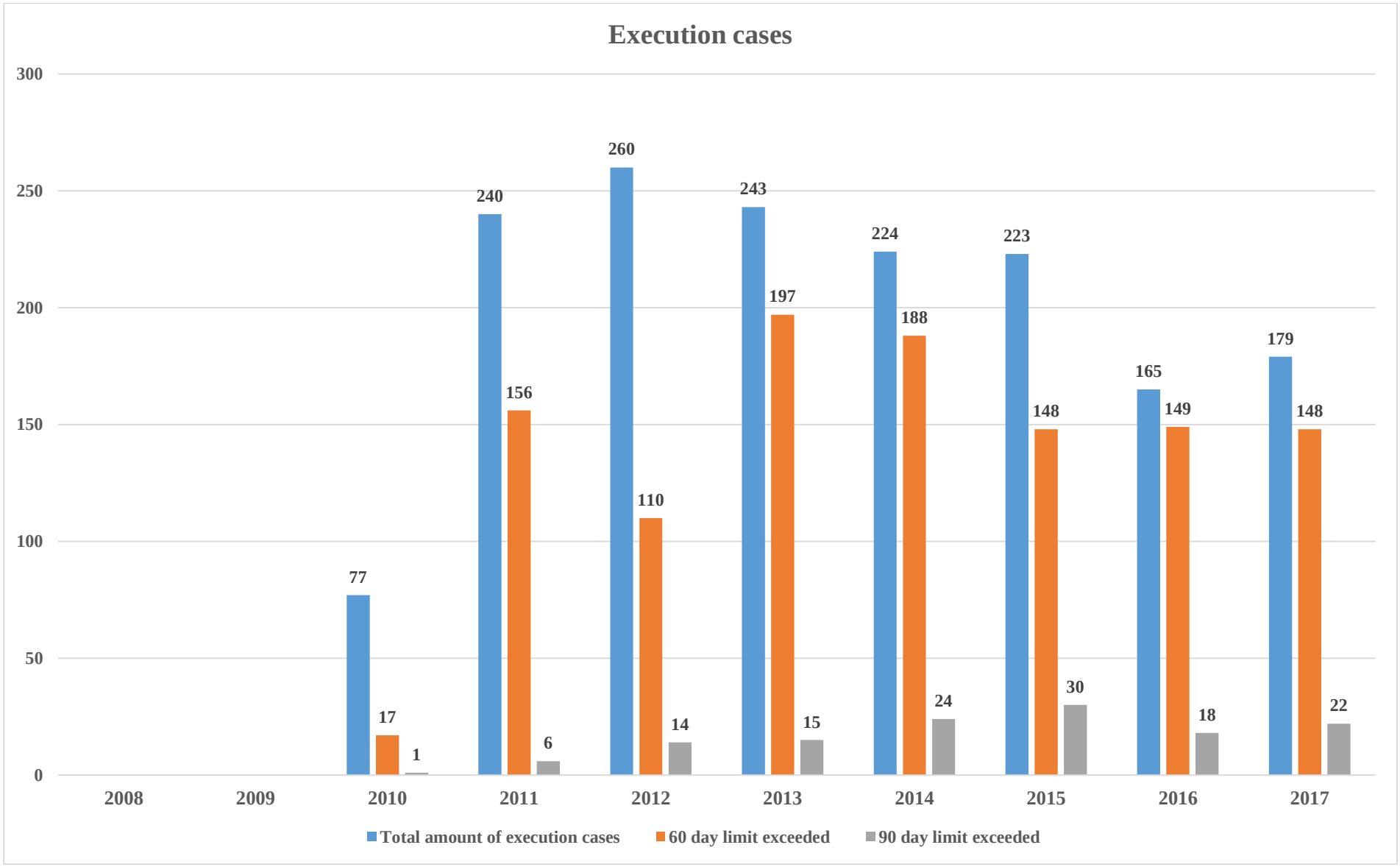
Year	Amount of prosecution cases	60 days limit exceeded	90 days limit exceeded
2008	Unknown	Unknown	Unknown
2009	Unknown	Unknown	Unknown

2010[308]	141	53 (37,6%)	3 (2,1%)
2011	344	250 (72,7%)	25 (7,3%)
2012	331	173 (52,3%)	12 (3,6%)
2013	299	257 (86,0%)	28 (9,4%)
2014	336	296 (88,1%)	36 (10,7%)
2015	281	184 (65,5%)	22 (7,8%)
2016	288	256 (88,9%)	29 (10,1%)
2017	299[309]	259[310] (86,6%)	53[311] (17,7%)

Year	Amount of execution cases	60 days limit exceeded	90 days limit exceeded
2008	Unknown	Unknown	Unknown
2009	Unknown	Unknown	Unknown
2010[312]	77	17 (22,1%)	1 (1,3%)
2011	240	156 (65%)	6 (2,5%)
2012	260	110 (42,3%)	14 (5,4%)
2013	243	197 (81,1%)	15 (6,2%)
2014	224	188 (83,9%)	24 (10,7%)
2015	223	148 (66,4%)	30 (13,5%)
2016	165	149 (90,3%)	18 (10,9%)
2017	179[313]	148[314] (82,7%)	22[315] (12,3%)

[308] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 was inaccessible.
[309] In three of those cases the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention condition for the requested person. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)
[310] In two of those cases the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention condition for the requested person. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)
[311] In two of those cases the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention conditions. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)
[312] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 was inaccessible.
[313] In six of those cases the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention condition for the requested person. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)
[314] In five of those cases the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention condition for the requested person. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)
[315] In one case the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention condition for the requested person. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)


Prosecution cases
400
350
300
250
200
150
100
50
0
141
53
3
344
250
25
331
173
12
299
257
28
336
296
36
281
184
22
288
256
29
299
259
53
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
Total amount of prosecution cases
60 day limit exceeded
90 day limit exceeded


Execution cases
300
250
200
150
100
50
0
77
17
1
240
156
6
260
110
14
243
197
15
224
188
24
223
148
30
165
149
18
179
148
22
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
Total amount of execution cases
60 day limit exceeded
90 day limit exceeded

The following graphs contain **additional** statistical information on execution-EAW's. They are not in response to any direct question. However, in analysing the data gathered during the case-file research, it was felt that these graphs provide a valuable insight in the problems connected with executing *in absentia* EAW's.

The total number of cases in which either the 60 days limit or the 90 days limit could not be observed in relation to execution-EAW's, broken down into cases in which the requested person appeared in person at the trial ('(partially) present') and cases in which he did not appear in person at the trial ('absent').

Year	Amount of execution cases	Amount of cases in which the requested person was present	Amount cases in which the requested person was partially present[316]	Amount of cases in which the requested person was absent	Amount of cases in which his presence is unknown[317]
2008	Unknown	Unknown	Unknown	Unknown	Unknown
2009	Unknown	Unknown	Unknown	Unknown	Unknown
2010[318]	77	47 (61,0%)	9 (11,7%)	21 (27,3%)	0 (0%)
2011	240	155 (64,6%)	20 (8,3%)	64 (26,7%)	1 (0,4%)
2012	260	144 (55,4%)	21 (8,1%)	93 (35,8%)	2 (0,8%)
2013	243	143 (58,8%)	21 (8,6%)	78 (32,1%)	1 (0,4%)
2014	224	113 (50,4%)	28 (12,5%)	81 (36,2%)	2 (0,9%)
2015	223	95 (42,6%)	32 (14,3%)	95 (42,6%)	1 (0,4%)
2016	165	80 (48,5%)	23 (13,9%)	56 (33,9%)	6 (3,6%)
2017	179	55 (30,7%)	20 (11,2%)	101 (56,4%)	3 (1,7%)

Year	Amount of cases in which the requested person was present	60 days limit exceeded	90 days limit exceeded
2008	Unknown	Unknown	Unknown
2009	Unknown	Unknown	Unknown
2010[319]	47	12 (25,5%)	0 (0%)
2011	155	106 (68,4%)	5 (3,2%)
2012	144	62 (43,1%)	4 (2,8%)
2013	143	119 (83,2%)	10 (7,0%)
2014	113	95 (84,1%)	6 (5,3%)
2015	95	64 (67,4%)	9 (9,5%)
2016	80	74 (92,5%)	5 (6,3%)
2017	55	48 (87,3%)	5 (9,1%)

[316] 'Partially present' refers to cases in which the EAW is comprised of multiple underlying sentences and in which the requested person appeared in one (or more) proceedings and did not appear in one (or more) other proceedings.
[317] Due to missing files or incomplete information from the issuing Member State
[318] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 was inaccessible.
[319] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 was inaccessible.

Year	Amount of cases in which the requested person was partially present[320]	60 days limit exceeded	90 days limit exceeded
2008	Unknown	Unknown	Unknown
2009	Unknown	Unknown	Unknown
2010[321]	9	1 (11,1%)	0 (0%)
2011	20	14 (70,0%)	0 (0%)
2012	21	8 (38,1%)	0 (0%)
2013	21	16 (76,2%)	1 (4,8%)
2014	28	24 (85,7%)	1 (3,6%)
2015	32	21 (65,6%)	8 (25,0%)
2016	23	22 (95,7%)	5 (21,7%)
2017	20	18 (90,0%)	4 (20,0%)

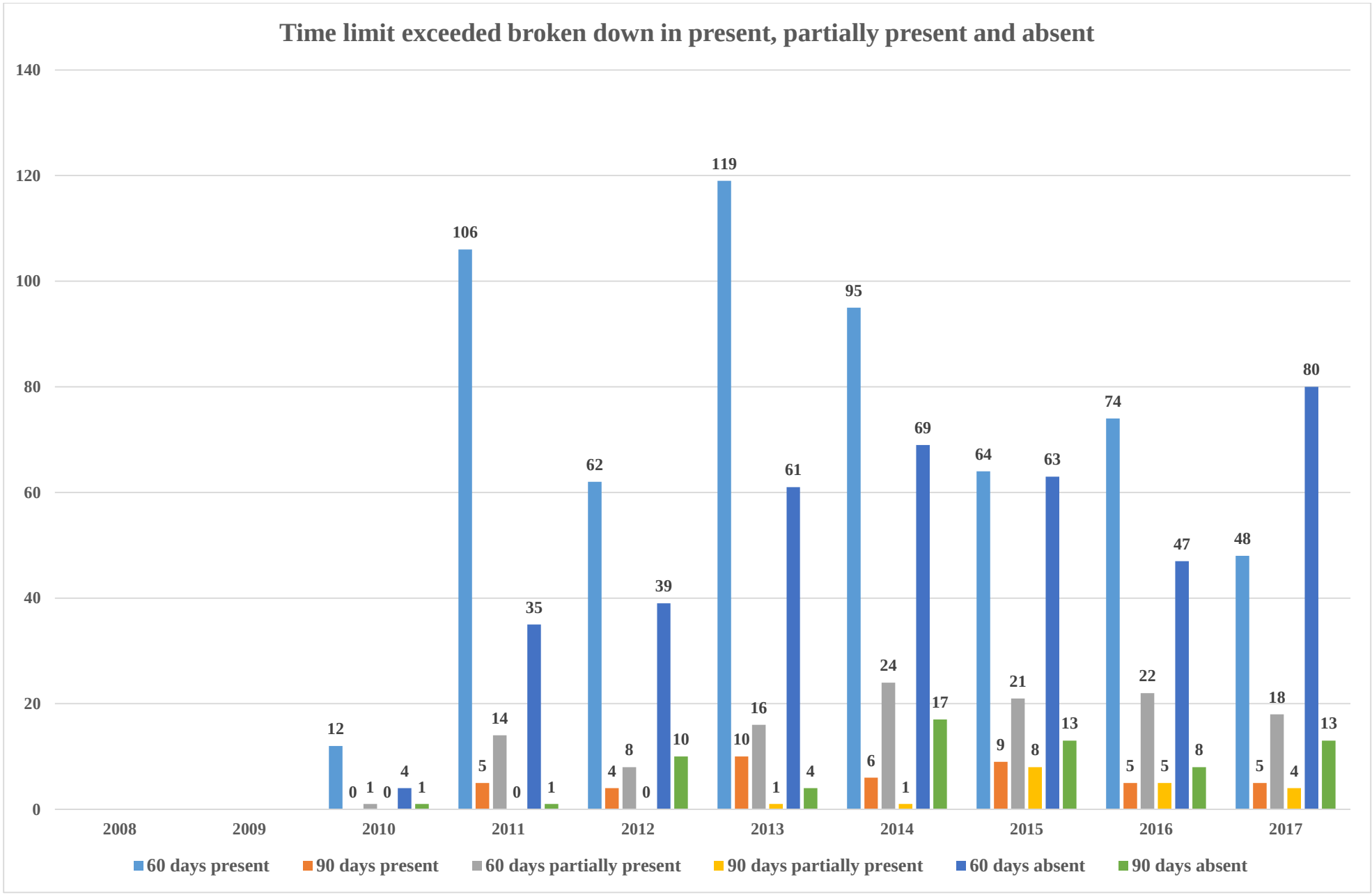
Year	Amount of cases in which the requested person was absent	60 days limit exceeded	90 days limit exceeded
2008	Unknown	Unknown	Unknown
2009	Unknown	Unknown	Unknown
2010[322]	21	4 (19,0%)	1 (4,8%)
2011	64	35 (54,7%)	1 (1,6%)
2012	93	39 (41,9%)	10 (10,8%)
2013	78	61 (78,2%)	4 (5,1%)
2014	81	69 (85,2%)	17 (21,0%)
2015	95	63 (66,3%)	13 (13,7%)
2016	56	47 (83,9%)	8 (14,3%)
2017	101	80 (79,0%)	13 (13,0%)

[320] 'Partially present' refers to cases in which the EAW is comprised of multiple underlying sentences and in which the requested person appeared in one (or more) proceedings and did not appear in one (or more) other proceedings.
[321] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 was inaccessible.
[322] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 was inaccessible.

Year	60 days limit exceeded, requested person present	90 days limit exceeded, requested person present	60 days limit exceeded, requested person partially present[323]	90 days limit exceeded, requested person partially present	60 days limit exceeded, requested person was absent	90 day limit exceeded, requested person was absent
2008	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown
2009	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown
2010[324]	12 (25,5%)	0 (0%)	1 (11,1%)	0 (0%)	4 (19,0%)	1 (4,8%)
2011	106 (68,4%)	5 (3,2%)	14 (70,0%)	0 (0%)	35 (54,7%)	1 (1,6%)
2012	62 (43,1%)	4 (2,8%)	8 (38,1%)	0 (0%)	39 (41,9%)	10 (10,8%)
2013	119 (83,2%)	10 (7,0%)	16 (76,2%)	1 (4,8%)	61 (78,2%)	4 (5,1%)
2014	95 (84,1%)	6 (5,3%)	24 (85,7%)	1 (3,6%)	69 (85,2%)	17 (21,0%)
2015	64 (67,4%)	9 (9,5%)	21 (65,6%)	8 (25,0%)	63 (66,3%)	13 (13,7%)
2016	74 (92,5%)	5 (6,3%)	22 (95,7%)	5 (21,7%)	47 (83,9%)	8 (14,3%)
2017	48 (87,3%)	5 (9,1%)	18 (90,0%)	4 (20,0%)	80 (79,0%)	13 (13,0%)

[323] 'Partially present' refers to cases in which the EAW is comprised of multiple underlying sentences and in which the requested person appeared in one (or more) proceedings and did not appear in one (or more) other proceedings.

[324] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 was inaccessible.

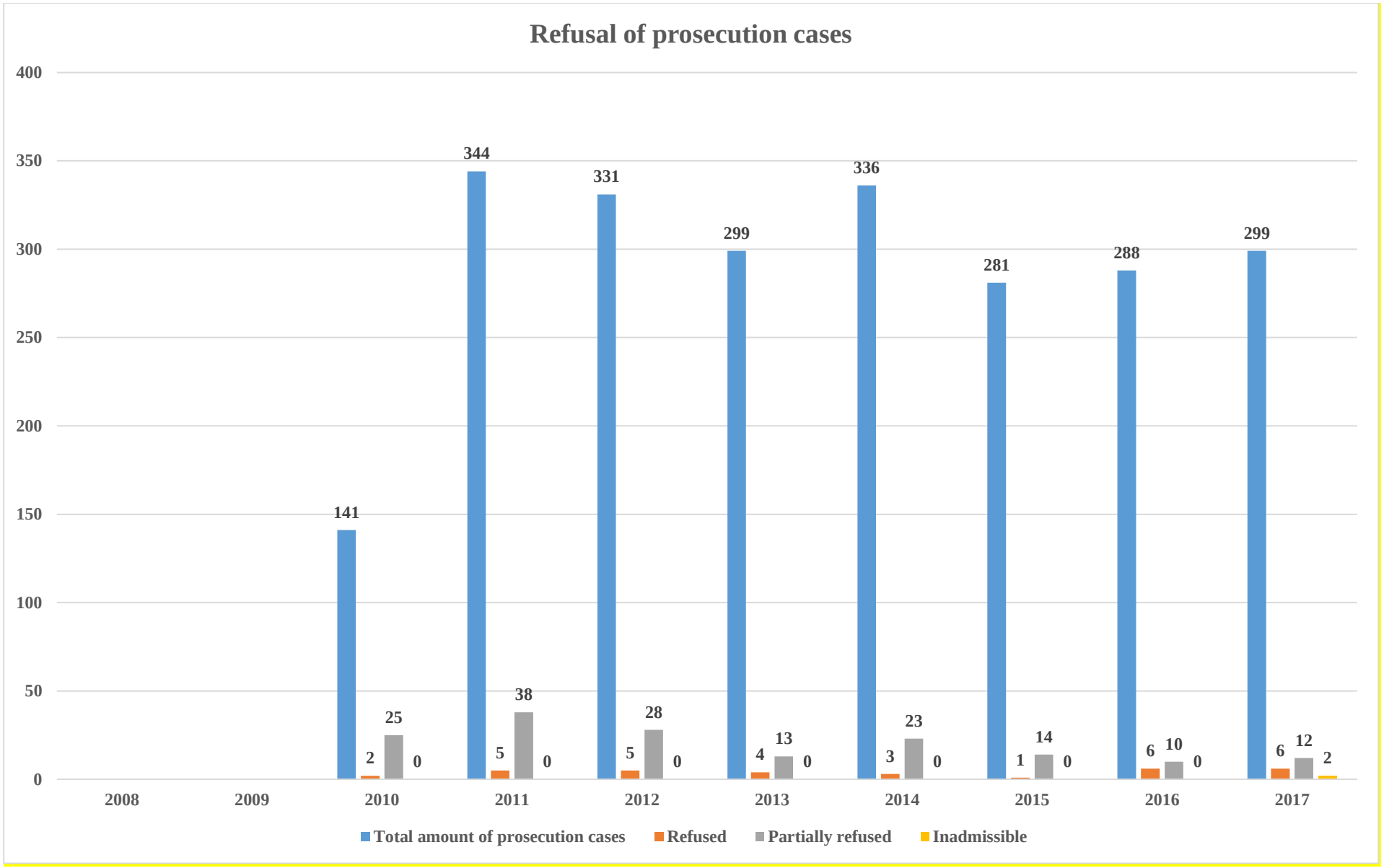

Time limit exceeded broken down in present, partially present and absent
140
120
100
80
60
40
20
0
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
12
0
1
0
4
1
106
5
14
0
35
1
62
4
8
0
39
10
119
10
16
1
61
4
95
6
24
1
69
17
64
9
21
8
63
13
74
5
22
5
47
8
48
5
18
4
80
13
60 days present
90 days present
60 days partially present
90 days partially present
60 days absent
90 days absent

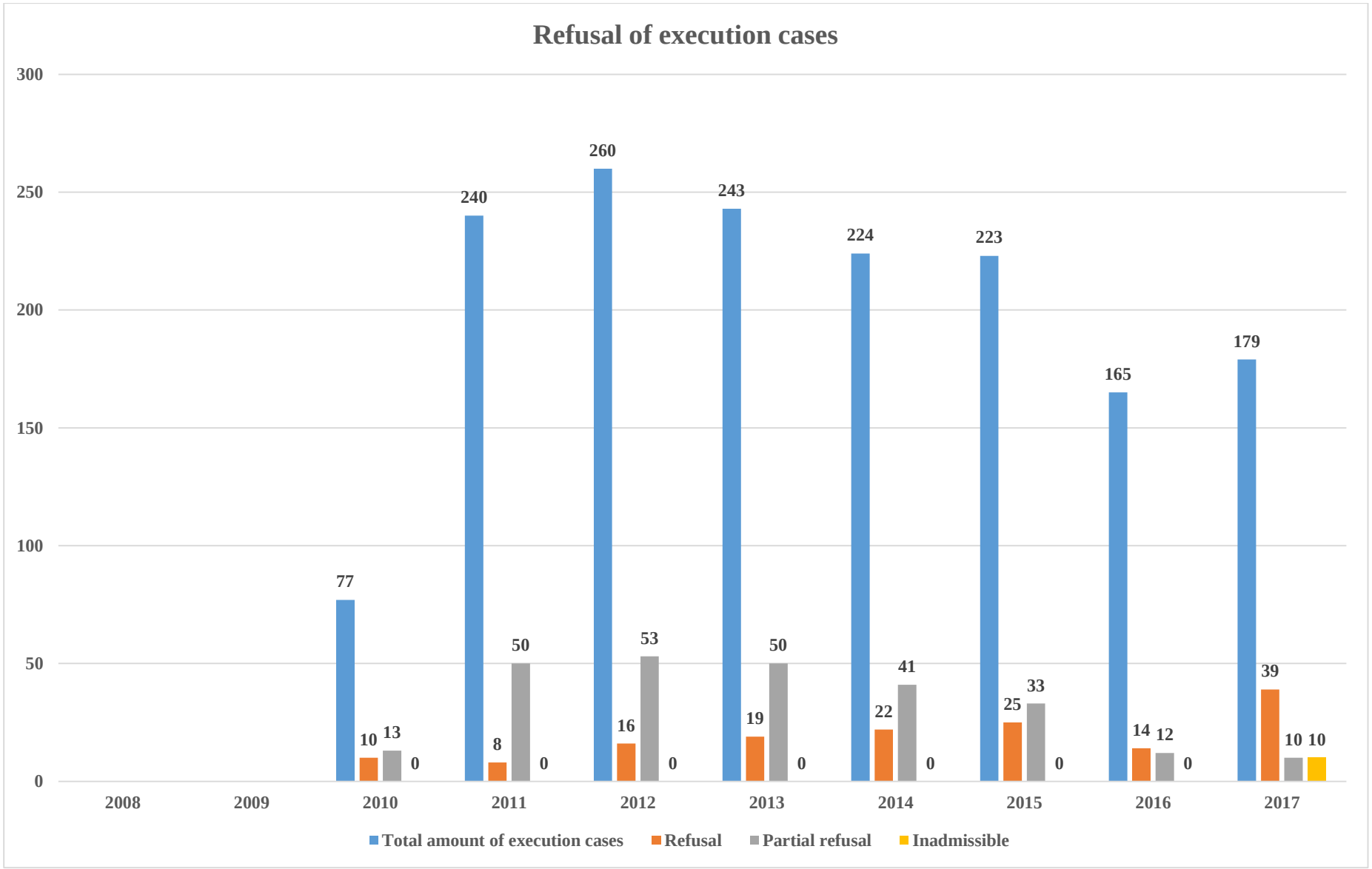
d. out of the total number of EAW cases referred to under a.: the total number of cases in which execution of the EAW was refused, broken down into prosecution-EAW's and execution-EAW's

Year	Amount of prosecution cases	Refused	Partially refused	Public Prosecutor inadmissible (detention conditions)
2008	Unknown	Unknown	Unknown	Unknown
2009	Unknown	Unknown	Unknown	Unknown
2010[325]	141	2 (1,4%)	25 (17,7%)	0 (0%)
2011	344	5 (1,5%)	38 (11,0%)	0 (0%)
2012	331	5 (1,5%)	28 (8,5%)	0 (0%)
2013	299	4 (1,3%)	13 (4,3%)	0 (0%)
2014	336	3 (0,9%)	23 (6,8%)	0 (0%)
2015	281	1 (0,4%)	14 (5,0%)	0 (0%)
2016	288	6 (2,1%)	10 (3,5%)	0 (0%)
2017	299[326]	6 (2,0%)	12 (4,0%)	3 (1,0%)

Year	Amount of execution cases	Refused	Partially refused	Public Prosecutor inadmissible (detention conditions)
2008	Unknown	Unknown	Unknown	Unknown
2009	Unknown	Unknown	Unknown	Unknown
2010[327]	77	10 (13,0%)	13 (16,9%)	0 (0%)
2011	240	8 (3,3%)	50 (20,8%)	0 (0%)
2012	260	16 (6,2%)	53 (20,4%)	0 (0%)
2013	243	19 (7,8%)	50 (20,6%)	0 (0%)
2014	224	22 (9,8%)	41 (18,3%)	0 (0%)
2015	223	25 (11,2%)	33 (14,8%)	0 (0%)
2016	165	14 (8,5%)	12 (7,3%)	0 (0%)
2017	179[328]	39 (21,8%)	10 (5,6%)	10 (5,6%)

[325] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 was inaccessible.
[326] In three of those cases the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention condition for the requested person. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)
[327] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 was inaccessible.
[328] In six of those cases the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention condition for the requested person. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)


Refusal of prosecution cases
400
350
300
250
200
150
100
50
0
141
2
25
0
344
5
38
0
331
5
28
0
299
4
13
0
336
3
23
0
281
1
14
0
288
6
10
0
299
6
12
2
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
Total amount of prosecution cases
Refused
Partially refused
Inadmissible


Refusal of execution cases
300
250
200
150
100
50
0
77
10
13
0
240
8
50
0
260
16
53
0
243
19
50
0
224
22
41
0
223
25
33
0
165
14
12
0
179
39
10
10
2008
2009
2010
2011
2012
2013
2014
2015
2016
2017
Total amount of execution cases
Refusal
Partial refusal
Inadmissible

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

Before transposition of Art. 2 FD 2009/299/JHA by your Member State
(Art. 2 FD 2009/299/JHA was transposed on 1 August 2011. Only cases before this date will be taken into account for this part of the review.)

- **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)**

Year	Total amount of execution cases	Requested person absent	Requested person partially absent[329]	Refused because of insufficient information to review Art. 5 par. 1	Not summoned in person or otherwise informed	Unknown
2008	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown
2009	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown
2010[330]	77	21	9	3	21	0
2011[331]	143	39	11	2	40	1[332]

- **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)[333]**

Year	Refused because of insufficient information to review Art. 5 par. 1	Not summoned in person or otherwise informed	Guarantee deemed necessary	Guarantee not needed due to effective defence possibilities[334]	Guarantee given by issuing JA	Unknown[335]
2008	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown
2009	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown
2010[336]	3	21	19	2	11	0

[329] 'Partially present' refers to cases in which the EAW is comprised of multiple underlying sentences and in which the requested person appeared in one (or more) proceedings and did not appear in one (or more) other proceedings.
[330] The figures for 2010 are incomplete. Only the months May (partially) until December have been reviewed. Data for the period of January-May 2010 was inaccessible.
[331] Until 1 August 2011 (333 cases)
[332] In this case it is unknown whether the person was present or absent.
[333] In some cases more than one option applies. If so, those cases are counted in all applicable categories.
[334] *E.g.*: defence by a chosen lawyer; the judgment was collected by the requested person and he did not lodge an appeal.
[335] Due to missing case-files or insufficient information in the EAW.
[336] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 was inaccessible.

2011[337]	2	40	31	9	26	1[338]

- **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**

Year	Refused because of insufficient information to review Art. 5 par. 1	Not summoned in person or otherwise informed	Guarantee deemed necessary	Guarantee given by issuing Member State in cases a guarantee was deemed necessary[339]	Refused because of insufficient guarantee	Refused because of missing guarantee
2008	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown
2009	Unknown	Unknown	Unknown	Unknown	Unknown	Unknown
2010[340]	3	21	19	11	3	8
2011[341]	2	40	31	23	4	8

[337] Until 1 August 2011 (333 cases)

[338] It is unknown if this is an *in absentia* case.

[339] In some cases the issuing judicial authority gave a guarantee while the executing judicial authority did not deem a guarantee necessary for surrender. These cases are not taken into account for this overview.

[340] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 was inaccessible.

[341] Until 1 August 2011 (333 cases)

- **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 were met and Art. 15(2) FD 2002/584/JHA was applied**

Year	Amount of cases in which the court applied Art. 15(2)	Amount of cases in which the Public Prosecutor applied Art. 15(2)	Unknown[342]
2008	Unknown	Unknown	Unknown
2009	Unknown	Unknown	Unknown
2010[343]	2	32	0
2011[344]	0	76	1

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

Year	Amount of cases in which Art. 15(2) was applied	60 days limit exceeded	90 days limit exceeded
2008	Unknown	Unknown	Unknown
2009	Unknown	Unknown	Unknown
2010[345]	34	8 (23,5%)	2 (5,9%)
2011[346]	76	55 (72,4%)	3 (3,9%)

[342] When the court requests supplementary information, this is mentioned in the final judgment, which is digitally accessible. Whether the Public Prosecutor requested supplementary information, can (in most cases) only be assessed by reviewing the case-file. The unknown category is, therefore, only applicable to the category 'Amount of cases in which the Public Prosecutor applied Art. 15(2)'.
[343] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 were inaccessible.
[344] Until 1 August 2011 (333 cases)
[345] The figures for 2010 are incomplete. Only the months May (partially) until December were reviewed. Data for the period of January-May 2010 were inaccessible.
[346] Until 1 August 2011 (333 cases)

After transposition of Art. 2 FD 2009/299/JHA by your Member State

(Art. 2 FD 2009/299/JHA was transposed on the 1 August 2011. Only the cases after this date will be taken into account for this part of the review.)[347]

- **the total number of cases in which the requested person appeared in person at the trial resulting in the decision**

Year	Amount of execution cases	Amount of cases wherein the requested person was present	Amount of cases in which the presence is unknown[348]
2011[349]	97	63 (64,9%)	0 (0%)
2012	260	144 (55,4%)	2 (0,8%)
2013	243	143 (58,8%)	1 (0,4%)
2014	224	113 (50,4%)	2 (0,9%)
2015	223	95 (42,6%)	1 (0,4%)
2016	165	80 (48,5%)	6 (3,6%)
2017	179[350]	55 (30,7%)	3 (1,7%)

[347] None of the questions in Part 4 relates to the use of the old model of section (d) of the EAW **after** transposition of Art. 2 FD 2009/299/JHA. In analyzing the statistical data gathered during the case-file research, it was felt that providing information on this topic would be useful.

Use of old/new model of section (d) after 1 August 2011

Year	Old model	New model	No model D used	Unknown
2011	96	0	1	0
2012	209	42	8	1
2013	129	104	7	3
2014	90	126	4	4
2015	57	163	0	3
2016	25	131	2	7
2017	35	116	2	17

[348] Due to missing files or incomplete information from the issuing Member State

[349] From 1 August 2011.

[350] The nine cases in which the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention conditions in the issuing member state are not taken into account for this overview. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)

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

Year	Amount of execution cases	Amount cases in which the requested person was partially present[351]	Amount of cases in which the requested person was absent	Amount of cases in which the presence is unknown[352]
2011[353]	97	9 (9,3)	25 (25,8%)	0 (0%)
2012	260	21 (8,1%)	93 (35,8%)	2 (0,8%)
2013	243	21 (8,6%)	78 (32,1%)	1 (0,4%)
2014	224	28 (12,5%)	81 (36,2%)	2 (0,9%)
2015	223	32 (14,3%)	95 (42,6%)	1 (0,4%)
2016	165	23 (13,9%)	56 (33,9%)	6 (3,6%)
2017	179[354]	20 (11,2%)	101 (56,4%)	3 (1,7%)

- **the decision of the executing JA in cases to which Art. 4a was applicable:**

Year	Refused because of insufficient information to conclude that conditions of Art. 4a are met	Art 4a (1) sub a, b or c does not apply	Guarantee needed according to the executing JA	Guarantee given by issuing JA in cases in which the executing JA deemed a guarantee necessary[355]	Refused because of insufficient guarantee	Refused because of missing guarantee
2011[356]	1	19	19	15	1	4
2012	1	55	55	34	2	21
2013	1	45	45	31	3	14
2014	4	37	37	30	1	7
2015	3	60	60	42	6	18
2016	2	41	41	25	1	16
2017	14	70	70	50	5	20

[351] 'Partially present' refers to cases in which the EAW is comprised of multiple underlying sentences and in which the requested person appeared in one (or more) proceedings and did not appear in one (or more) other proceedings.

[352] Due to missing files or incomplete information from the issuing Member State

[353] From 1 August 2011.

[354] The nine cases in which the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention conditions in the issuing member state are not taken into account for this overview. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)

[355] In some cases the issuing judicial authority gave a guarantee while the executing judicial authority did not deem a guarantee necessary for surrender. These cases are not taken into account for this overview.

[356] From 1 August 2011.

- **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 were 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 were met**

Year	Amount of cases in which the court applied Art. 15(2)	Amount of cases in which the Public Prosecutor applied Art. 15(2)	Unknown[357]
2011[358]	0	61	1
2012	0	131	1
2013	0	63	2
2014	3	71	3
2015	3	87	2
2016	7	57	7
2017[359]	1	91	7

- **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 were met: the total number of cases in which either the 60 days limit or the 90 days limit could not be observed**

Year	Amount of cases in which Art. 15 (2) was applied	60 days limit exceeded	90 days limit exceeded
2011[360]	61	32 (52,5%)	1 (1,6%)
2012	131	59 (45,0%)	10 (7,6%)
2013	63	48 (76,2%)	5 (7,9%)
2014	74	65 (87,8%)	14 (18,9%)
2015	90	66 (73,7%)	25 (27,8%)
2016	64	56 (87,5%)	15 (23,4%)
2017[361]	92	75 (81,5%)	15 (16,3%)

[357] When the court asks questions, this is mentioned in the final judgment, which is digitally accessible. Whether the Public Prosecutor asked question, can (in most cases) only be assessed through the case-files. The unknown category is, therefore, only applicable to the category 'Amount of cases in which the Public Prosecutor applied Art. 15(2)'.

[358] From 1 August 2011.

[359] The nine cases in which the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention conditions in the issuing member state are not taken into account for this overview. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)

[360] From 1 August 2011.

[361] The nine cases in which the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention conditions in the issuing member state are not taken into account for this overview. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an

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

Year	Amount of execution cases	Requested person absent or partially absent[362]	Refusal based on Art. 4a	Partial refusal based on Art. 4a[363]
2011[364]	97	34	0 (0%)	7 (20,6%)
2012	260	114	12 (10,6%)	14 (12,3%)
2013	243	99	13 (13,1%)	9 (9,1%)
2014	224	109	7 (6,4%)	6 (5,5%)
2015	223	127	15 (11,8%)	12 (9,4%)
2016	165	79	11 (13,9%)	8 (10,1%)
2017	179[365]	121	33 (27,3%)	8 (6,6%)

end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)

[362] The percentages are based on the numbers in this column.

[363] 'Partially present' refers to cases in which the EAW is comprised of multiple underlying sentences and in which the requested person appeared in one (or more) proceedings and did not appear in one (or more) other proceedings.

[364] From 1 August 2011.

[365] The nine cases in which the Public Prosecutor was declared inadmissible on account of a real risk of inhuman or degrading detention conditions in the issuing member state are not taken into account for this overview. (Declaring the Public Prosecutor inadmissible is the Dutch equivalent of bringing the surrender procedure to an end (CoJ, judgment of 4 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para 104).)

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.

Answer

Perspective of the executing judicial authority

Introduction

In abstracto, the system of Art. 4a FD 2009/299/JHA, as interpreted by the CoJ, is well suited to achieve its objectives of facilitating judicial cooperation and enhancing the rights of the defence.

In achieving its objectives *in concreto*, however, FD 2009/299/JHA is dependent on the national legislation transposing that framework decision and on the actual application of that legislation by the judicial authorities.

National legislation

Because of the **mandatory** nature of Art. 12 Law on Surrender, Dutch legislation currently **unduly hinders** judicial cooperation and **unduly enhances** the rights of the defence in cases in which none of the scenarios described in Art. 4a(1)(a-d) applies but in which it is nonetheless ensured that the surrender of the requested person would not entail a breach of his rights of defence.

This situation can be remedied by amending the legislation.

Actual application

As regards actual application of national legislation, it would be a step forward if the issuing judicial authorities were aware of the relevant case-law of the CoJ on Art. 4a and, when filling in section (d) of the EAW, actually heeded that case-law.

As of now, it seems that most issuing authorities are not cognisant of that case-law or even of the **autonomous** nature of such concepts as a 'personal summons'.

Member States should ensure that all of their issuing judicial authorities are kept abreast of the developments in the CoJ's case-law and are given regular training in EU law in general and in EAW law in particular.

Most Member States decentralised the power to issue EAW's. Decentralising that can have an adverse effect on the quality of the EAW's, because some of the judicial authorities may have only limited experience with EAW and, therefore, only limited incentive to follow the relevant case-law. Furthermore, decentralising the power to issue EAW's can also affect the cost-effectiveness of issuing EAW's. If an issuing judicial authority only issues an EAW once in a very long while, each time it issues an EAW it has to reacquaint itself with the relevant rules and the relevant case-law.

Member States should, therefore, consider centralising the power to issue EAW's and creating a specialised issuing judicial authority, which would at least tackle the issue of lack of experience.

Of course, the same arguments apply, *mutatis mutandis*, to executing judicial authorities.

Perspective of the issuing judicial authority

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

At present, the Fugitive Active Search Team of the Public Prosecution Service has about seven years' worth of experience with issuing EAW's under the regime of Art. 4a.

No member of the Fugitive Active Search Team has had experience with issuing EAW's under the regime of Art. 5 par. 1 FD 2002/584/JHA. The Fugitive Active Search Team, therefore, cannot say whether FD 2009/299/JHA achieved its goals. However, it seems likely that the present format of section (d) of the EAW-model forces the issuing judicial authority to describe the proceedings leading to the judgment more clearly than the old format.

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

Answer

Perspective of the executing judicial authority

Yes.

Although the statistical data pertaining to the application of Art. 5(1) FD 2002/584/JHA is too fragmentary to allow drawing firm conclusions – only the case-files of 2010 (not all months) and 2011 (until 1 August 2011) could be analyzed – it does seem that after transposition of Art. 4a:

- the amount of EAW's for the purpose of executing a sentence decreased slowly, until 2016 and 2017, when the amount dropped significantly. Probably, this has nothing to do with the transposition of Art. 4a, but is the result of the transposition of FD 2008/909/JHA;

- the amount of EAW's for the purpose of executing an *in absentia* conviction more or less remained at the same level (varying from 38% to 46 % of all execution-EAW's, with peaks of 53% (2012) and 57% (2017).

Perspective of the issuing judicial authority

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

The new format of section (d) of the EAW-model is better suited to Dutch criminal procedural law than the old format, because the new format explicitly refers to a defence of an absent defendant by a mandated legal counsellor (see the answer to question 3 and question 6).

It is not possible to answer the question whether FD 2009/299/JHA has made in difference in executing Dutch in absentia-EAW's (see the answer to question 91).

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

Answer

Perspective of the executing judicial authority

The CoJ's case-law makes it clear that the executing judicial authority may, even after having found that none of the scenarios described in Art. 4a(1)(a-d) applies, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence.[366]

Because Art. 4a was transposed as a mandatory ground for refusal, the Dutch executing judicial authority cannot take into account such circumstances, but must refuse to execute the EAW. It cannot be excluded that, had Art. 4a been transposed as an optional ground for refusal, the executing judicial authority might have allowed surrender in some cases.

Perspective of the issuing judicial authority

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

Yes, see the second example mentioned in the answer to question 74.

94. Did you see surrenders granted in *in absentia* cases that should have led to a refusal? (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.)

Answer

Perspective of the executing judicial authority

In answering this question, three categories of cases come to mind.

[366] See, *e.g.*, CoJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, paras 96-97.

I. Before the *Dworzecki*-judgment,[367] the District Court of Amsterdam did not regard the expressions 'summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision' and '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' as autonomous concepts of Union law. Therefore, the law of the issuing Member State determined whether the person concerned was 'summoned in person' or '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'. Where that law stated that service of summons on an adult member of the household of the person concerned was equal to a personal summons, the court would necessarily conclude that the condition of the Dutch transposition of Art. 4a(1)(a)(i) FD 2002/584/JHA was met.[368]

II. Before the *Zdziaszek*-judgment,[369] the District Court of Amsterdam was of the opinion that decision regarding the composition of a cumulative sentence did not come within the ambit of the Dutch transposition of Art. 4a, no matter what. Before the *Zdziaszek*-judgment, the District Court of Amsterdam, therefore, declined to examine whether the proceedings leading to such a decision complied with the Dutch transposition of Art 4a.[370]

III. Prior to the *Tupikas*-judgment,[371] in some cases the District Court of Amsterdam equated the decision referred to in the Dutch transposition of Art. 4a with the **enforceable** judgment referred to in the Dutch transposition of Art. 8(1)(c) FD 2002/584/JHA. Thus, in cases in which:

- the person concerned was personally present at the first instance trial, but was absent at the trial on appeal;

- on appeal, the first instance judgment was upheld and

- section (b) of the EAW referred only to the enforceable first instance judgment,

the court would not verify whether the conditions of the Dutch transposition of Art. 4a were met with regard to the proceedings on appeal.[372]

In all these cases (A-C), it cannot be excluded that, had the court applied the Dutch transposition of Art. 4a correctly and had it verified whether the proceedings met with the conditions of the Dutch transposition of Art. 4a, it would have answered that question in the negative.

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[367] CoJ, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346.

[368] See, *e.g.*, District Court of Amsterdam, judgment of 21 February 2012, ECLI:NL:RBAMS:2012:BV6450; District Court of Amsterdam, judgment of 24 February 2012, ERCLI:NL:RBAMS:2012:BV7998; District Court of Amsterdam, judgment of 12 June 2015, ECLI:NL:RBAMS:2015:4114; District Court of Amsterdam, judgment of 12 June 2015, ECLI:NL:RBAMS:2015:4115.

[369] CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629.

[370] See, *e.g.*, District Court of Amsterdam, interlocutory judgment of 8 November 2013, ECLI:NL:RBAMS:2013:9883.

[371] CoJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628.

[372] See, *e.g.*, District Court of Amsterdam, judgment of 15 May 2012, ECLI:NL:RBAMS:2012:BW8923; District Court of Amsterdam, judgment of 15 May 2012, ECLI:NL:RBAMS:2012:5467 (not published); District Court of Amsterdam, judgment of 6 June 2014, ECLI:NL:RBAMS:2014:3645; District Court of Amsterdam, judgment of 15 September 2015, ECLI:NL:RBAMS:2015:8533 (not published).

Perspective of the issuing judicial authority

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

Not to the knowledge of the Fugitive Active Search Team.

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?

Answer

In answering this question it is useful to recall that it is the **duty** of the executing judicial authority to request supplementary information (at least once) if it is of the opinion that it does not have sufficient information to enable it to validly decide on the execution of the EAW.[373] There is no margin of discretion concerning abstaining from requesting supplementary information (at least once), whether such requests have a **negative** impact on mutual trust or not.

Requests for supplementary information should not have a negative impact on trust. When issuing an EAW and when deciding on the execution of an EAW in general and when requesting en providing supplementary information in particular, the issuing judicial authority and the executing judicial authority enter into a 'dialogue' which is dominated by the *duty of sincere cooperation* (Art. 4(3) TEU).[374] It would be contrary to the spirit of sincere cooperation to suggest anything other than that either the issuing judicial authority or the executing judicial authority acted sincerely and in good faith.

Moreover, viewed from the perspective of 'mutual trust between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level' one can argue that requesting supplementary information provides the issuing judicial authority with - yet another - opportunity to demonstrate that mutual trust is **justified** indeed. In this way requesting and providing supplementary information can actually **foster** mutual trust.[375]

Of course, being mere mortals, issuing and executing judicial authorities do not always fully act in accordance with the lofty duty of sincere cooperation. In practice, the issuing judicial authority is apt to view a request for supplementary information as a vote of no confidence, whereas the executing judicial authority may be of the opinion that having to ask for supplementary information – in some cases: yet again – does not exactly inspire confidence in the ability of the issuing judicial authority to adequately fill in section (d) of the EAW. Nevertheless, it remains the duty of both issuing and executing judicial authorities to rise above such (petty) considerations.

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

[373] CoJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 103-104.
[374] CoJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions de détention en Hongrie)*, C-220/18 PPU, ECLI:EU:C:2018:589, para 104.
[375] Compare CoJ, judgment of 22 December 2017, *Ardic*, C-571/17 PPU, ECLI:EU:C:2017:1026, paras 90-91.

Answer

Given the duty of sincere cooperation which dominates the 'dialogue' between executing and issuing judicial authorities (see the answer to question 95) and the duty to decide on the execution of the EAW within the time limits provided for in Art. 17 FD 2002/584/JHA and taking into account that Art. 15(2) FD 2002/584/JHA in general should only be applied as an *ultimum remedium*,[376] the executing judicial authority should only ask for information which in its opinion is **absolutely necessary** for a valid decision on the execution of the EAW and which is **directly** relevant to the assessment of the situation at hand in the light of the CoJ's case-law,[377] (and without, of course, calling into question the merits of the *in absentia* judgment.[378])

The executing judicial authority should, therefore, not ask for general information about the legal system of the issuing Member State, but rather for concrete information concerning the proceedings against the requested person, *e.g.*, whether the requested person actually received the information about the date and the place of the trial and, if so, when.

In the same vein, the executing judicial authority should not ask open-ended questions, but rather formulate questions which allow for a 'clear, correct and comprehensive'[379] answer by the issuing judicial authority. To facilitate such answers, the executing judicial authority should:

- identify specific parts of section (d) of the EAW which in its view are unclear, insufficient, contradictory or obviously incorrect[380] and

- indicate what kind of information is needed.

Moreover, the executing judicial authority should not leave its counterpart guessing as to the reason why a certain piece of information is needed. Explaining the reason behind the request for supplementary information with reference to relevant case-law of the CoJ helps the issuing judicial authority in providing that information and may also provide it with an opportunity to clear up any misunderstandings in the initial assessment of the executing judicial authority.

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

Answer

[376] Compare CoJ, judgment of 23 January 2018, *Piotrowski*, C-367/16, ECLI:EU:C:2018:27, para 61.
[377] Compare CoJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Conditions de détention en Hongrie)*, C-220/18 PPU, ECLI:EU:C:2018:589, paras 103-104.
[378] See the European Commission's *Handbook on how to issue and execute a European Arrest Warrant*, C(2017) 6389 final, p. 34.
[379] Compare the European Commission's *Handbook on how to issue and execute a European Arrest Warrant*, C(2017) 6389 final, p. 27: '(…) it is vital that issuing judicial authorities ensure that the information in the EAW is clear, correct and comprehensive'.
[380] Compare the European Commission's *Handbook on how to issue and execute a European Arrest Warrant*, C(2017) 6389 final, p. 34.

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

In particular, British and German authorities are critical of Dutch EAW's. The United Kingdom almost always asks for supplementary information (see the answer to question 86). German authorities are critical in cases in which the person concerned did not appear at the hearing at which the merits of the case were dealt with.

Sometimes executing judicial authorities (in particular authorities from the United Kingdom) request supplementary information by way of a standard questionnaire. In particular, the questions relate to the Dutch legal system in general (see the answer to question 86). The Public Prosecution Service has noticed that British authorities ask the same questions in every case, thereby requiring the Public Prosecution Service to provide the same answers to those questions, *e.g.* the question whether escaping from prison is a criminal offence.

Answering such questionnaires takes up a lot of valuable time. Furthermore, such questionnaires call into question the principle of mutual trust.

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?

Answer

Perspective of the executing judicial authority

Polish EAW's take up a large part of the District Court's case-load. For instance, in 2017 out 179 'execution-cases' 73 cases concerned Polish EAW's. In 49 of these 73 cases the person concerned did not appear at the trial resulting in the decision.

In my experience, Polish *in absentia*-EAW's almost always result in requests for supplementary information, in non-observance of the time limits and in a high proportion of refusals.

A number of problems regularly arise, *e.g.*:

- uncertainty whether the person concerned appeared in person at the trial resulting in the decision or at the pronouncement of the judgment;

- the summons was served on a third party or was sent to the address of the person concerned, point 3.1.b was ticked, but the issuing judicial did not indicate any evidence that person concerned actually received the information about the date and the place of the trial;

- the judgment was served on a third party or was sent to the address of the person concerned, point 3.3 was ticked, but the issuing judicial did not indicate any evidence that person concerned actually received the judgment and the information about the right to a retrial or an appeal;

- a legal counsellor was appointed by the court ex officio, but it could not be established that the person concerned gave his mandate to that counsellor;

- the EAW stated that the person concerned has a right to a retrial or an appeal, but Art. 540b of the Polish Code of Criminal Procedure does not confer an unconditional right to a retrial.

However, it is only fair to say that the high number of refusals in Polish cases is partly the result of Dutch law. After all, Art. 12 Law on Surrender contains a **mandatory** ground for refusal (see the answer to questions 16, 55 and 93).

Perspective of the issuing judicial authority

(Answer based on information provided by the Fugitive Active Search Team of the National Office of the Public Prosecution Service)

The Fugitive Active Search Team can only refer to the examples mentioned in the answer to question 74.

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) (read: C(2017) 6389 final) for judicial practitioners as regards *in absentia* EAW's?

Answer

The *Handbook*'s usability as regards *in absentia* EAW's is very limited. Almost no guidance is given on interpreting and filling in section (d) of the EAW nor on applying Art. 4a. The *Handbook* confines itself to summarizing the structure of Art. 4a, presenting the gist of the *Melloni*-judgment[381] and citing the operative part of the *Dworzecki*-judgment[382] (see p. 45-46).

Instructions on how to fill in section (d) of the EAW would be helpful.

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)?

Answer

The answers are relevant for the other framework decisions mentioned in the question.

The *in absentia* grounds for refusal in FD 2005/214/JHA, FD 2006/783/JHA, FD 2008/909/JHA and FD 2008/947/JHA are modelled on Art. 4a FD 2002/584/JHA. All these grounds for refusal were introduced by one and the same framework decision – FD 2009/299/JHA – and share the same objectives, *viz.* enhancing the procedural rights of persons subject to criminal proceedings, facilitating judicial cooperation in criminal matters

[381] CoJ, judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107.
[382] CoJ, judgment of 26 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346.

and, in particular, improving mutual recognition of judicial decisions (Art. 1 FD 2009/299/JHA).

It stands to reason that the grounds for refusal in FD 2005/214/JHA, FD 2006/783/JHA, FD 2008/909/JHA and FD 2008/947/JHA should be interpreted and applied in the same way as Art. 4a.

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.

Answer

Introduction

Before answering this question, I would first like to address the relevance of the CoJ's case-law on Art. 4a FD 2002/584/JHA for the national rules on service of summons *et cetera*.

As stated before (see the answer to question 2b)), the Supreme Court of the Netherlands is of the opinion that this case-law does not pertain to proceedings in criminal matters and, therefore, not to service of a summons.[383] FD 2002/584/JHA does not seek to harmonize national rules on service of summons *et cetera*.[384] In this regard, one can agree with the Supreme Court: Art. 4a does not exert a **direct** influence on the national rules on service of summons *et cetera*.

However, one can identify two more **indirect** ways in which the CoJ's case-law on Art. 4a is indeed relevant for interpreting and applying national rules on service of summons *et cetera*.

First of all, Dutch EAW's issued for the purpose of executing an *in absentia* judgment of conviction may meet with a refusal of surrender, if application of the national rules on serving a summons or a judgment leads to results which are not in conformity with the requirements of Art. 4a. Such refusals may force the Dutch legislator to amend national legislation in order to facilitate surrender to the Netherlands.

Secondly, as of 1 April 2018 Dutch legislation should conform to Directive 2016/343/EU. This directive *does* harmonize the national rules on service of summons and of an *in absentia* judgment of conviction as well as the national rules on legal recourses against an *in absentia* judgment of conviction (see Art. 1, 8 and 9 Directive 2016/343/EU).

The objectives pursued by Directive 2016/343/EU are to enhance the right to a fair trial,[385] thereby strengthening mutual trust and facilitating mutual recognition of decisions in criminal

[383] Supreme Court, judgment of 30 May 2017, ECLI:NL:HR:2017:976, para 2.3.
[384] CoJ, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:345, para 31 and 44, with reference to recital (4) of the preamble of FD 2009/299/JHA ('(…) This Framework Decision is aimed at refining the definition of such common grounds allowing the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person's right of defence. This Framework Decision is not designed to regulate the forms and methods, including procedural requirements, that are used to achieve the results specified in this Framework Decision, which are a matter for the national laws of the Member States').
[385] Recital (9) of the preamble of Directive 2016/343/EU.

matters.[386] In essence, FD 2009/299/JHA pursues the same objectives: enhancing the procedural rights of persons subject to criminal proceedings, facilitating judicial cooperation in criminal matters and improving mutual recognition of judicial decisions (Art. 1 FD 2009/299/JHA).

It would, therefore, make perfect sense if the CoJ were to interpret the provisions of Directive 2016/343/EU on *in absentia* proceedings in conformity with its case-law on Art. 4a FD 2002/584/JHA, even though the former provisions do not exactly match the latter.[387] Were the CoJ to assign to the provisions of Art. 8 and 9 of Directive 2016/343/EU a **lower** level of protection compared to that of Art. 4a, then neither the objectives of Directive 2016/343/EU nor those of FD 2009/299/JHA would be achieved.

Why should the Netherlands transpose Directive 2016/343/JHA?

Having explained that both Art. 4a FD 2002/584/JHA and the *in absentia* provisions of Directive 2016/343/EU should be interpreted **homogeneously**, and having determined that some Dutch provisions do not conform either to Art. 4a FD 2002/584/JHA or to Directive 2016/343/EU (see, *e.g.*, the answer to questions 2a), 8a) and 9c)), it necessarily follows that the Netherlands should transpose Directive 2016/343/EU as far as its *in absentia* provisions are concerned.

[386] Recital (10) of the preamble of Directive 2016/343/EU.

[387] Compare, *e.g.*, Art. 4a(1)(a)(i) ('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') with Art. 8(2)(a) Directive 2016/343/EU ('the suspect or accused person has been informed, in due time, of the trial (…)').