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

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

[1] As of 16 January 2018 (not counting withdrawn preliminary references).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

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.

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.

The questionnaire was completed by Małgorzata Wąsek-Wiaderek, professor at the John Paul II Catholic University of Lublin; Chair of Department of Criminal Procedure; until November 2018 - member of the Research and Analysed Office of the Polish Supreme Court, since November 2018 – judge of the Supreme Court (Criminal Chamber). Research methods and experience of judges who were interviewed in the framework of the project are explained in the answer to question 89 of this questionnaire. The research (in particular, analyses of the case-file; some translations, draft answers to some questions) were done by: Adrian Zbiciak (assessor in the District Court in Chełm (VII Criminal Chamber) and PhD student at the Catholic University in Lublin) and Paulina Duda (advocate trainee and PhD student at the Catholic University in Lublin).

The answers to the questionnaire present the law as in force on 1 January 2019.

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 and The Netherlands 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.

Introductory remarks; terminology used in the questionnaire

Service of summons is regulated in Chapter 15 of the Polish Code of Criminal Procedure (the Act of 6 June 1997; consolidated text: Official Journal of 2017, item 1904, as amended; thereafter referred to as "the CCP").

In accordance with the Polish law on criminal procedure a judgment may be delivered at the hearing (Polish: "rozprawa") or, exceptionally, at the sitting of the court (Polish "posiedzenie sądu"). The hearing takes place in order to conduct evidentiary proceedings in adversarial manner in the presence of the parties to the trial. If there is no need to conduct evidentiary proceedings, in particular due to agreement as to the conviction and a sentence to be imposed (plea bargaining), a judgment may be delivered at the sitting. In such cases no "trial" is conducted in the ordinary meaning of this term. At the sitting, the court may deliver either a convicting judgment (Article 343, Article 343a of the CCP) or a judgment conditionally discontinuing the proceedings. No judgment acquitting a defendant may be delivered at the sitting of the court.

In Poland, every agreement between the public prosecutor and a defendant, concerning the conviction and sentence to be imposed in a judgment, must be accepted by the court and has the form of ordinary judgment of the court, which may be delivered at the sitting of the court. Thus, the public prosecutor does not have a right to impose certain "penalty" on a suspect in order to terminate examination of the case.

A hearing (*rozprawa*) may take place and - in complicated cases - is usually conducted on several dates. For this reason, the regulations of the CCP concerning a summons distinguish between "the first date of a hearing" (i.e. the first date of a hearing conducted on several dates) and "the hearing". The latter term comprises also the date of the hearing after its adjournment. It should be underlined, that the hearing may be adjourned for up to 35 days or for a longer period. Under the CCP, a break between the dates of the hearing lasting no longer than 35 days is called " an adjournment", while longer breaks are referred to as "deferrals". This distinction is very important since these parties to the proceedings, who have a right but not the obligation to participate in the hearing, are not summoned to the adjourned hearing while they must be summoned to the deferred hearing (Article 402 § 1 of the CCP). Moreover, sometimes the CCP uses the term "the first hearing" which stands for the hearing conducted for the first time, not the hearing conducted after the judgment is quashed by an appellate court and the case remitted for re-consideration (i.e. this re-consideration will not take place at "the first hearing").

It is also important to stress that in 2015 and 2016 the Polish law on criminal procedure has been changed significantly. On 1st July 2015 the new, more contradictory model of criminal proceedings was introduced into the CCP (the Act of 27 of September 2013, with binding force as from 1st July 2015, published in Official Journal of 2013, item 1247, thereafter referred to as "the 2015 amendment"). However, in 2016 the new model was abolished by the new governing majority in the Parliament (by the Act of 11th March 2016 with binding force as from 15th April 2016, published in Official Journal of 2016, item 437; thereafter referred to as "the 2016 amendment").

Ways of serving summons

The Polish law provides for three basic ways of serving a summons and delivering other correspondence to the accused:

1) serving a summons upon the addressee in person;
2) indirect service;

3) substitute service.

The above methods are not interchangeable – there is a specific hierarchy of methods of serving a summons. Article 132 § 1 of the CCP clearly states that all correspondence should be served upon the addressee in person. Thus, the intermediate (indirect) service procedure should be used only if direct service is not possible, etc.[4]

Ad. 1) Personal service

According to Article 132 § 1 of the CCP, a summons shall be served upon the addressee in person. This is the basic method of summoning. Serving of a summons in this way, i.e. directly to the addressee's hands may take place in the addressee's home, in the court room or in the addressee's workplace. The receipt of a summons shall be confirmed by the addressee's own signature. This receipt is then the evidence of summoning. The service of a summons upon the addressee by fax or e-mail is also considered to be a direct summoning. Article 132 § 3 of the CCP states that in such cases a proof of data transimssion is treated as confirmation of delivery. However, this manner of summoning may be used only if the addressee provides the organs conducting the proceedings with the fax number or e-mail address.

Should the direct service of summons upon the addressee not be possible, Article 132 § 2 of the CCP provides for indirect service.

It should be pointed out that pursuant to Art. 132 § 4 of the CCP, the provision allowing service of a summons by e-mail or fax shall not apply with reference to service on a defendant of the notification about the fist date of the hearing and to the service of the notification concerning the dates of those sittings of the court at which the court may render a judgment.

Ad 2) Indirect service

If it is impossible to serve a summons directly upon the addressee, Article 132 § 2 of the CCP provides for indirect service. According to this provision, in case of temporary absence of the addressee in his home, the letter is served on the adult member of the household. It should be underlined that indirect service is possible only provided that the absence of the addressee in his/her home is temporary and not permanent. Permanent absence is characterized by breaking the link with the given place understood as home.[5] It is understood that "temorary absence" within the meaning of Article 132 § 2 of the CCP is a period lasting no longer than a few days.[6]

According to the prevailing case-law of the Supreme Court, prior to the 2015 amendment of the CCP service of a summons upon the adult member of the household was not deemed to be effective if the addressee was absent at home due to imprisonment or detention in another case.[7] Such service was not considered as effective even if an adult member of the

[4] See, judgment of the Supreme Court of 23 January 2014, case no. V KK 268/13, Lex no. 1433568; judgment of 31 January 2017, case no. V KK 360/16, OSNKW 2017, no. 6, item 34; judgment of the Supreme Court of 31 January 2017, case no. V KK 360/16, OSNKW 2017, no. 6, item 34. See also: P. Hofmański, S. Zabłocki, *Elementy metodyki pracy sędziego w sprawach karnych*, Warsaw 2011, p. 79-80.

[5] W. Grzeszczyk, *Doręczenie zastępcze w procesie karnym, Prokuratura i Prawo* 1999, no. 4, p. 120.

[6] See, judgment of the Supreme Court of 28 June 2007, case no. III KK 179/07, LEX no. 323667.

[7] Judgement of the Supreme Court of 23 May 2013, case no. III KK 96/13, LEX no. 1315622.

household acknowledged its receipt and did not inform the organ conducting the proceedings about the addressee's imprisonment or detention in another case.[8]

However, as from 1st July 2015 a defendant has a duty to inform an organ conducting the proceedings about every change of his place of residence or stay lasting longer than 7 days also if this change is caused by deprivation of liberty in another case. Moreover, in accordance with Article 261 § 2a of the CCP, the court which decides on detention on remand is obliged to notify the organ conducting the proceedings against a defendant in another case of the imposition of detention on remand, if it has knowledge of the said proceedings. Hence, currently if a defendant neglects the duty of informing a procedural organ about his imprisonment or detention, a service of a summons to the last address indicated by him is effective, unless the procedural organ is aware of a defendant's detention or imprisonment.[9]

The concept of "an adult member of the household" means an adult living at the same address as the addressee of a summons. Therefore, the indirect service will not be effective to an adult person living at another address, even if he/she is related to the addressee.[10] It is not required to obtain the consent of an adult member of the household to leave a summons. However, contrary to the situation where the reception of the correspondence is refused by the addressee, if an adult household member refuses to accept the correspondence, it is not deemed to be served upon the addressee. Lack of consent of an adult member of the household to serve the correspondence on the addressee shall result in application of a substitute delivery procedure.[11]

If it is not possible to serve a summons upon the addressee to the hands of an adult household member, it should be served upon the house administration, the house caretaker or a village administrator. In this case, a summons may be served provided that these persons agree to transfer it to the addressee. In accordance with Article 132 § 2 in conjunction with Article 133 § 2 of the CCP, the fact of serving the correspondence upon the above mentioned entities shall be notified to the addressee by putting a notice about this in his mailbox, on the door of his apartment or in another visible place.[12]

In both cases, i.e. delivery to the hands of an adult household member, as well as in the case of delivery to the home administration, village administrator or the house caretaker, the date of delivery is the date of leaving the letter to the above mentioned entity. However, this way of serving a summons cannot be applied with reference to a summons concerning the first date of the hearing or a sitting of the court at which a judgment may be delivered.

Ad 3) Substitute service

[8] Judgement of the Supreme Court of 22 August 2007 r., case no. III KK 1/07, LEX no. 310195; Judgement of the Supreme Court of 29 January 2014 r., case no. IV KK 425/13, LEX no. 1430395.
[9] Decision of the Supreme Court of 5 December 2017, case no. II KK 407/17, LEX no. 2434436.
[10] Judgement of the Gdańsk Court of Appeal of 20 October 2016 r., case no. II Aka 95/16, LEX no. 2333212.
[11] M. Kurowski, *Komentarz do art. 132 Kodeksu postepowania karnego* [in:] Świecki D. (ed.) *Kodeks postępowania karnego. Komentarz. Tom I*, Warsaw 2018, p. 540; A. Sakowicz, in: *Kodeks postępowania karnego. Komentarz*, ed. A. Sakowicz, Warsaw 2018, p. 402.
[12] M. Kurowski, *Komentarz do art. 132 Kodeksu postepowania karnego* [in:] Świecki D. (ed.) *Kodeks postępowania karnego. Komentarz. Tom I*, Warsaw 2018, p. 541.

The substitute service is to be applied only if the direct or indirect service of a summons is not possible. Thus, in order to apply this way of summoning, it must be established that the addressee is absent in his place of residence and that the indirect summoning as described above, cannot be applied.[13] However, in some cases preference is given to the substitute service instead of indirect service. As will be explained later on, a notification of the first date of the hearing may be served on the accused by the substitute service but not by the indirect service.

The substitute service is regulated in Article 133 of the CCP which states that if it is not possible to serve a summons in the manner indicated in Article 132 of the CCP (i.e. directly or indirectly upon the addressee) a summons sent through the intermediary of a postal operator shall be left at the closest unit of such an operator. A summons served in different manner shall be left at the closest police station or at a competent municipal office. A notification about the service of the correspondence shall be left in the addressee's mail box, on the door of his flat or in another visible place. The notification shall contain information on where and when a summons was left and that it should be picked up within 7 days. In accordance with the rules of counting time-limits in the Polish criminal procedure, the day of leaving the notice shall not be deemed within the mentioned 7-day time-limit. Thus, it starts on the next day.

If a summons is not picked-up within this time-limit, the attempt of a service shall be repeated. Hence, if the addressee is not present again in his home and indirect service is also impossible, the correspondence shall be left again at the closest unit of a postal operator or at the closest police station or a competent municipal office. The deadline for collecting the correspondence is also 7 days, running from the day following the date on which the second attempt of serving a summons took place. **Should the stipulated deadline expire ineffectively, a correspondence is deemed to have been served properly on a person concerned.** This is stated expressis verbis in Article 133 § 2 *in fine* of the CCP.

If during the course of the first or the subsequent 7-day time-limit, the addressee collects the correspondence, it is assumed that the letter is served on him on the day of receipt.[14] Double-check procedure of serving a summons should prevent a situation where, for example due to vacation plans or official duty, the addressee would not be able to take correspondence within 7 days from the date of the first attempt of delivery.[15]

Pursuant to § 7 (1) of the Ordinance of the Minister of Justice of 10th January 2017 (Official Journal of 2018, item 553), the correspondence left at the unit of a postal operator may be collected by the addressee or his legal representative. Summons concerning the date of the first hearing or the date of sitting of the court at which a judgment may be delivered addressed to a defendant may only be collected in person (such correspondence shall be marked by a note: "to the hands of the addressee" - § 2(2) of the Ordinance).

According to Article 133 § 3 of the CCP the correspondence may also be left to a person authorised to collect it in the addressee's place of permanent employment. The law and literature on this subject matter emphasize that this method of summoning can be used only

[13] Kurowski M., *Komentarz do art. 133 Kodeksu postepowania karnego* [in:] Świecki D. (ed.) *Kodeks postępowania karnego. Komentarz. Tom I*, Warsaw 2018, p. 542.
[14] J. Skorupka, *Komentarz do art. 133 Kodeksu postępowania karnego* [in:] Stefański R., Zabłocki S., *Kodeks postępowania karnego.Tom I. Komentarz do art. 1-166*, Warsaw 2017, p. 1191.
[15] Decision of the Supreme Court of 10 September 2008, case no. III KZ 83/08, LEX no. 449043.

when the service mentioned in Article 132 of the CCP (direct or indirect) is not possible.[16] It should be pointed out that the attempt to deliver correspondence in the latter manner is not a condition sine qua non for substitute service provided for in Article 133 § 1 and 2 of the CCP.[17] The term "place of permanent employment" shall be understood as a place where the addressee remains employed under an employment contract for an indefinite period or its equivalent.[18]*A contrario*, delivery is not effective if the addressee is not employed in a given place on the day of serving a summons. The person receiving the correspondence does not need to be authorized to do so by the addressee of a specific letter. It is enough if such person is authorized by the employer.[19] As transpires from Article 133 § 3 of the CCP, effective service does not depend on the consent of the authorised person to receive the correspondence.

Special manners of service

Pursuant to Article 134 § 2 of the CCP, the correspondence to persons deprived of liberty is served through the intermediation of the administration of a relevant penitentiary institution. According to the case-law this is the only method that allows effective delivery of correspondence to a person deprived of liberty. Thus, this is the only way of proper notification of the accused deprived of liberty on the date of the hearing.[20]

Special rules of service (through the intermediation of superiors) apply also to soldiers, police officers and officers of other security agencies.

Service of summons in urgent cases

Pursuant to Article 137 of the CCP, in urgent cases a person may be summoned or notified by telephone or in another manner adequate to the circumstances. A copy of such a notification shall be left in the case-file with the signature of a person who sent the massage. This manner of summoning is a derogation from the rule expressed in Article 131 of the CCP that a summons, notifications or other correspondence for the service of which time limits have begun to run are served by a postal operator or by an employee of the organ conducting the proceedings or, if necessary, by a police officer. Such procedure for serving a summons may take place only in urgent cases, when, due to circumstances not dependent on the organ conducting the proceedings, there is a need for an immediate notification or summoning of a participant of the proceedings. For example, this way of summoning may apply to notifications concerning the date of the court's sitting regarding the extension of a pre-trial detention, if a motion for its prolongation has been submitted to the court shortly before the deadline for the application of this preventive measure. However, the addressee should receive a notification

[16] J. Skorupka, *Komentarz do art. 133 Kodeksu postępowania karnego* [in:] Stefański R., Zabłocki S., (ed.) *Kodeks postępowania karnego.Tom I. Komentarz do art. 1-166*, Warsaw 2017, p. 1190.
[17] Judgement of the Supreme Court of 31 January 2017, case no. V KK 360/16, LEX no. 2254809.
[18] J. Skorupka, *Komentarz do art. 133 Kodeksu postępowania karnego* [in:] Stefański R., Zabłocki S., *Kodeks postępowania karnego.Tom I. Komentarz do art. 1-166*, Warsaw 2017, p. 1191.
[19] S. Steinborn, *Komentarz do art. 133 Kodeksu postępowania karnego*, in: *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX/el. 2016, para. 7.
[20] Judgement of the Supreme Court of 16 January 2013, ase no. IV KK 140/12, LEX no. 1252721; Judgement of Supreme Court of 13 August 2014, case no. III KK 216/14, LEX no. 1527336,

made by phone or other technological means in advance of the date of the procedural activity so that the person could prepare for same.[21] Article 137 of the CCP indicates only telephone as a communication tool which may be used for quick notification. However, in the case-law also other means of communication were accepted, for example telefax, fax, telegraph, e-mail, radio route, CB radio.[22] This catalogue is not closed and procedural organs may use any method of communication which ensures that the information is delivered to the recipient in the shortest time possible.

Other rules concerning service of correspondence

If a defendant is represented by a defence counsel, decisions, orders and notifications which must be served upon a defendant shall also be served upon his defence counsel unless the law provides otherwise. The obligation to notify a defence counsel will only occur if the power of attorney or authorization for defence was granted before the date of a given procedural activity to which the notification applies.[23]

It should be emphasised that incorrect summoning or service of a summons which violated the above described rules may be deemed effective if the addressee declares that he received a summons or another correspondence (Article 142 of the CCP).

With reference to the notification of the date of a hearing Article 353 § 1 of the CCP states that "At least seven days should elapse between the service of a summons and the date of the main hearing." If the above time-limit is not observed with reference to the accused or his/her defence counsel, the hearing has to be deferred upon their motion submitted before the commencement of the trial (Article 353 § 2 of the CCP). A violation of Article 353 § 1 of the CCP is classified as a relative ground for appeal (for the meaning of this term - see. part 2 of this paper). Thus, it may result in quashing a first instance judgment by an appellate court if the accused managed to prove that this violation might have affected the content of a judgment.[24]

Serving of summons before 1 July 2015

Rules concerning the service of a summons applying before the 2015 amendment were different with reference to two issues:

1) as was mentioned above, if the accused changed the place of residence involuntarily (due to deprivation of liberty in another case) the service of a summons to his former address was not considered as effective. This rule was not based directly upon the CCP but was established in the case-law of the Supreme Court.
2) since, as a rule, the presence of the accused at the hearing was mandatory, no special requirements applied with reference to the notification of the first date of the hearing. Thus, notifications concerning the date of the hearing (the first one as well as the dates of an adjourned or deferred hearing) could be served in all ways available under the

[21] J. Skorupka, *Komentarz do art. 137 Kodeksu postępowania karnego* [in:] Stefański R., Zabłocki S., *Kodeks postępowania karnego.Tom I. Komentarz do art. 1-166*, Warsaw 2017, p. 1196- 1197.
[22] Decision of the Supreme Court of 24 February 2005, case no. V KK 293/04, LEX no. 147239.
[23] Decision of the Court of Appeal in Lublin of 21 March 2012, II AKz 145/12, LEX no. 1210837.
[24] See, *inter alia*, judgment of the Supreme Court of 4 January 2011, case no. SDI 26/10, LEX no. 1223731; judgment of the Regional Court in Ostrołęka of 6 September 2017, case no. II Ka 346/17, LEX no. 2362832.

CCP. The only exception was expressed in Article 377 § 3 of the CCP which required personal service of a summons upon a defendant in order to conduct the hearing in his absence, if this defendant has not yet given explanations before the court.

Serving of summons between 1st July 2015 and 14th April 2016

Under the 2015 amendment, the presence of the accused at the hearing has become optional. For this reason, it was decided by the legislator that special requirements shall apply to serving on the accused a notification concerning the date of the first hearing as well as to serving on him a judgment rendered in his absence. As transpired from Article 132 § 4 of the CCP in force since 1st July 2015 until 14th April 2016, with reference to both a notification of the date of the first hearing and a judgment, the indirect service as well as service by fax or e-mail was excluded. However, Article 132 § 4 of the CCP used the term "the date of the first hearing" which caused doubts as to its scope of application. It was not clear whether it applied only to the first date of the hearing or to all dates of the first hearing (i.e. the hearing conducted for the first time but not the hearing conducted after quashing the judgment). The prevailing opinion of the Authors was that this qualified manner of serving a summons applied only to the first date of the main hearing.[25]

Since 15th April 2016, Article 132 § 4 of the CCP has not applied to serving a judgment on the accused. Moreover, currently this provision concerns "the first date of the hearing" and not "the date of the first hearing". This means that special rules concerning summoning do not apply to notification of the date of a deferred hearing. Since Article 132 § 4 of the CCP clearly refers to the "main hearing", it does not apply to the appellate hearing or the hearing held at the cassation stage of the proceedings.

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)

There are no doubts that a direct service described under (1) results in "a personal service" within the meaning of Dworzecki's judgment. In such a case, a defendant himself or herself receives the summons.

Also the way of serving a summons on the accused with reference to the first date of the hearing or a court's sittings described in Article 132 § 4 of the CCP could be considered equal to "the personal service" although it is classified as "a substitute service" in the literature and in the CCP.
As explained above, a correspondence left in the postal office may be collected only by a defendant in person. Furthermore, a defendant is duly informed in writing about his duty to indicate the address for correspondence and every change of this address, as well as the consequences of neglecting this duty (see, additional arguments under point c) below).

[25] S. Steinborn, *Komentarz do art. 132 kodeksu postępowania karnego,* in: *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, Lex/el. 2016, para 17.

Also with reference to rules concerning service of a summons applied before 1st July 2015, it was considered that a substitute service (leaving a notification in the closest postal office twice for 7 days) is equal to personal service. The accused was duly informed about a duty to indicate the address for correspondence as well as the obligation to inform the procedural organs about every change of his place of residence lasting longer than 7 days. Thus, failure to collect correspondence sent to the address indicated by him/her was assessed as a waiver of a right to participate in the hearing.

- 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)

In the case of the indirect service, as described under 2 above (*inter alia* to the hands of an adult member of the accused's household), it is difficult to "unequivocally establish" that a defendant was aware of the scheduled trial. For example, an adult member of the household may fail to transmit a summons to a defendant due to various reasons (by negligence or on purpose).

Indirect service of other correspondence than a summons to the hearing is less problematic. The procedure of reinstatement of a time-limit may be applied if a defendant proves that failure to observe a time-limit was due to the fact that an adult member of his household failed to pass the correspondence to him. The Supreme Court underlines that such a failure to transmit a judgment served to the hands of an adult member of a defendant's household constitutes a "reason independent from a defendant" and should result in reinstatement of the time-limit for accomplishing a procedural action.[26]

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?

Yes, the CCP provides for two presumptions of serving a summons. The first one in regulated in Article 139 of the CCP which states that if a defendant has changed his place of residence without informing the organ conducting the proceedings of the new address or does not stay at the address indicated to this organ, any correspondence sent to the original address is deemed to have been served. As was mentioned above, the same rule applies in the case of changing the place of residence caused by a defendant's deprivation of liberty. Also in this case the defendant is obliged to inform the organ conducting the proceedings about the change of his place of residence. The presumption expressed in Article 139 § 1 of the CCP shall not apply to correspondence sent to a defendant for the first time after his final acquittal (Art. 139 § 3 of the CCP).

The second presumption applies to a defendant residing abroad. Article 138 of the CCP states that such a defendant is obliged to indicate the address for sending a correspondence to

[26] See, inter alia, decision of the Supreme Court of 26 February 2002, case no. III KZ 85/01, LEX no. 53053.

him in Poland. If he/she fails to do so, a correspondence sent to the last known address in Poland and, if there is no such address, attached to the case-file, is deemed to have been served.

As was mentioned above, prior to the 2015 amendment of the CCP, it was considered that the provision of Article 139 of the CCP applies only to the situation in which a defendant had voluntarily changed his place of residence. Therefore, it did not concern the situation when the addressee's absence resulted from remaining in the penitentiary facility. Therefore, before 1st July 2015 there was no provision that would allow the application of Article 139 § 1 of the CCP towards persons deprived of liberty.[27] Currently Article 139 § 1 of the CCP applies also to the defendants who changed their place of residence due to imprisonment or detention applied in another case. Thus, a letter sent to the "last known" address is deemed to be served properly.

The presumption indicated in Article 139 § 1 of the CCP shall not apply if, due to circumstances not dependent on a defendant, he was unable to inform the organ conducting the proceedings about his absence at the indicated address. In accordance with the case-law of the Supreme Court, the presumption expressed in Article 139 § 1 of the CCP does not violate the defendant's right to defence since, in view of currently available technological solutions, the situation in which the accused neglects his duty to inform about the change of his/her place of residence shall be deemed a conscious waiver of his right to defence.[28]

In order to apply the presumption derived from Article 139 § 1 of the CCP a defendant must be duly informed of the content of this provision. According to Article 16 § 1 of the CCP if the organ conducting the proceedings is obliged to instruct the participants of the proceedings about their rights and duties, the lack of such an instruction or an erroneous instruction can not produce negative consequences to the participants of the proceedings.

The obligation to instruct a defendant of the duty to inform the organ about his/her address for summoning as well as about every change of the place of residence lasting longer than 7 days is provided for in Article 300 § 1 of the CCP. This provision states that prior to the first interrogation a suspect is informed in writing about his rights and duties. *Inter alia*, he is informed about the content of Article 75, 133 § 2, 138 and 139 of the CCP. Article 75 § 1 of the CCP stipulates the duty to inform organs conducting the proceedings about every change of a defendant's place of residence. Article 133 § 2 of the CCP concerns indirect summoning and states that a document is deemed to have been served on a defendant if it was left two times at the postal office closest to the addressee's place of residence (a substitute summoning described above). Finally, Articles 138 and 139 of the CCP provide for the above described presumptions of effective summoning. Moreover, the statment of rights and duties of a suspect, which is handed over to him in writing, clearly explains that the defendant's failure to inform the procedural organs about the change of residence may prevent a defendant from submitting complaints or appeals due to expiry of time-limits which shall run from the date of effective delivery of the correspondence. **Thus, a defendant shall be fully aware of the consequences of his omissions concerning a duty to submit correct information to the court or to other procedural organs.**

[27] M. Kurowski, *Komentarz do art. 139 Kodeksu postepowania karnego* [in:] Świecki D. (ed.) *Kodeks postępowania karnego. Komentarz. Tom I*, Warsaw 2018, p. 552.
[28] Decision of the Supreme Court of 8 October 2014, case no. III KZ 60/14, LEX no. 1511388.

For this reason, it is underlined that taking care of the interests of the accused exceeds the court's responsibilities. Moreover, being aware of the duties stipulated by the law, the accused is obliged to duly fulfil his/her obligations. If the accused has ignored these duties, he/she can not expect that this negligence would release him from the effects of such an attitude.[29]

Announced amendments of the CCP concerning summoning

On 4 December 2018 the Ministry of Justice announced further considerable changes of the CCP. As transpires from footnote 1 to the title of this draft law, it is aimed to implement the 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, as well as the directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

Some amendments concern also Chapter 15 of the CCP. In particular, the proposed regulations introduce service of correspondence to the post office box of an addressee (draft Article 132 § 1a of the CCP) and provide for "the postal authorisation", i.e. the opportunity to authorise another person to receive correspondence. The draft law is available at: https://legislacja.rcl.gov.pl/docs//2/12318806/12554733/12554734/dokument370954.pdf

***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?

In the Polish law on criminal procedure there are no separate "in absentia proceedings" with reference to common criminal offences. Such special procedure may be applied only to fiscal offences (przestępstwa skarbowe), petty fiscal offences (wykroczenia skarbowe) regulated in the Penal Fiscal Code (Polish: Kodeks karny Skarbowy) as well as to petty offences (wykroczenia) provided for in the Code of Petty Offences (Polish: Kodeks Wykroczeń). For this reason the term "in absentia proceedings" is rather associated with proceedings concerning fiscal offences (Polish: "postępowanie w stosunku do nieobecnych") which may be conducted when a defendant is not aware of criminal charges brought against him/her.

Despite a few exceptions, the CCP does not use the term "proceeding *in absentia*". Nevertheless, it does not mean that the judgment cannot be delivered in absentia.

[29] Judgement of the Court of Appeal in Wrocław of 24 June 2015, case no. II AKa 141/15, LEX no. 1782126.

Currently, after the 2015 amendment, Article 374 § 1 of the CCP expresses the principle that presence of the accused during the trial is not mandatory. Therefore, provided that the accused has been properly summoned to the hearing, his/her absence does not prevent the trial and the delivery of a judgment. There are two exceptions from this principle, described below. Thus, for proper understanding of further considerations, it must be underlined that the Polish model of criminal procedure is based on assumption and principle that the presence of the accused during the trial (a hearing or a sitting of the court) is his right, rather than an obligation.

Prior to the 2015 amendment of the CCP, the presence of a defendant at the hearing was mandatory. Only in exceptional circumstances the court could proceed with the hearing in the absence of the accused. However, at that time the CCP provided for a separate, the so-called simplified proceedings which applied on condition that the preparatory proceedings were being held in an inquiry form and concerned less severe cases. In the simplified proceedings when the accused and his defence counsel were absent, the court could conduct *in absentia* proceeding and pronounce judgment *in absentia* (in Polish "wyrok zaoczny"). As a rule, this type of proceedings could not be applied to the accused deprived of liberty (detained on remand or imprisoned in another case). Furthermore, the simplified proceedings could not be conducted with reference to the accused who was subject to mandatory defence indicated in Article 79 § 1 of the CCP.

The simplified proceedings were removed from the CCP by the 2015 amendment with the binding force as of 1st July 2015[30]. However, "in absentia judgments" could still be the basis for issuing the European arrest warrants by the Polish courts. For this reason, the prerequisites for conducting the hearing in the absence of the accused in simplified proceedings are presented below.

In accordance with Article 479 of the CCP the "in absentia judgment" (wyrok zaoczny) could be issued if the accused, who was properly summoned, failed to appear at the hearing and also his defence counsel was not present. "Properly summoned" meant that the accused was served a notification of the date of the hearing in accordance with the law. No special way of notification was required. Thus, also a notification served to the hands of the adult member of the household was effective.[31]

The "in absentia" judgment could be issued only if the accused gave his explanations in the course of the proceedings, at least at the pre-trial stage of these proceedings since, as provided in Article 479 § 2 of the CCP, the explanations (statements) of the accused had to be read at the hearing.[32]

It is worth stressing that "in absentia judgment" could not be delivered if the accused properly summoned to the hearing provided the court with good justification of his absence at the hearing and requested its adjournment. Every "in absentia" judgment had to be served on the accused. There were no special requirements as to the way of service of the "in absentia judgment". Thus, it could be served on the accused also indirectly.

[30] However, due to intertemporary regulation of Article 32 of the 2015 amendment of the CCP, the simplified proceedings initiated before 1 July 2015 could be conducted under the old rules until their termination. Thus, in practice "in absentia judgments" could be issued also after 1 July 2015.
[31] Decision of the Supreme Court of 20 September 2007, case no. I KZP 24/07, OSNKW 2007, no. 11, item 77.
[32] Judgment of the Supreme Court of 10 March 2010, case no. V KK 397/09, OSNwSK 2010, item 512.

The accused was entitled to file an objection against a judgment within seven days from the date of its service. The court was obliged to accept an objection if the accused properly justified his absence at the hearing. Failure to accept an objection was subject to appeal (Article 482 § 2 of the CCP). If an objection to an "in absentia judgment" was allowed by the court, the case was re-examined. However, an "in absentia" judgment could lose its validity only when the accused or his defence counsel appeared at the new hearing (Article 482 § 3 of the CCP).

On 1st July 2015 the CCP was changed significantly. Except the above-mentioned crucial change concerning the presence of the accused at the trial and removal of simplified procedure, the contradictory process was introduced. Despite numerous subsequent changes in the CCP, including the 2016 amendment, the new regulation concerning the presence of a defendant at the trial remained unchanged.

According to Article 374 § 1 of the CCP the accused has the right to participate in the hearing. However, Article 374 § 1 *in fine*, § 2 and § 3 of the CCP provide for two exceptions to this principle:

1) In every case, the presiding judge or the court may decide that the presence of the accused at the hearing is mandatory (Article 374 § 1 of the CCP).
2) The presence of the accused at the hearing is mandatory in cases concerning felonies (Polish: zbrodnie[33], i.e. the most severe offences) but only at the first stage of the hearing, which comprises the following procedural activities: presentation of charges to the accused, instruction of the accused about his rights, receiving the statement of the accused as to whether he pleads guilty and whether he wishes to provide explanations and if so, what explanations (Article 374 § 1a of the CCP). After these procedural activities, the presence of the accused at the hearing, also in the case of felonies, becomes his right, unless the presiding judge or the court decides otherwise, applying Article 374 § 1 of the CCP.

The accused is informed about the content of Article 374 of the CCP when he receives the summons to the hearing (Art. 353 § 4 of the CCP).

Below we will first explain the rules applied to the proceedings conducted without the presence of the accused when his presence is not obligatory. Subsequently, we will present rules concerning the hearing in cases, in which the presence of the accused is obligatory during procedural activities mentioned in Article 385 and 386 of the CCP.

A. Voluntary presence of the accused at the hearing

In cases other than felonies, when the accused, dully summoned, is not present at the hearing in person and the presiding judge or the court does not decide that his presence is mandatory, as well as there is no clear statement of the accused as to his personal will to take part in the proceedings, it is assumed that the accused voluntarily waived his right to participate in the hearing. This does not prevent the case from being examined. The accused is not obliged to inform the court about the will not to participate in the proceeding, although it is possible and it happens in particular when the accused is imprisoned. One can distinguish three groups

[33] Felonies are criminal offences subject to the minimum penalty of imprisonment not less than three years.

of situations in which the court is authorised to conduct the proceedings without the presence of the accused at the hearing.

1. After being informed about the initiation of the judicial proceedings and after receiving a copy of an indictment from the court, the accused informs the court that he/she does not wish to participate in the hearing. In practice, such a situation is really rare. It usually happens when the accused who is placed in the penitentiary facility far away from the court for various reasons does not want to be transported to another penitentiary facility situated nearby the court, where the case is to be examined. This is a very clear situation, because the accused informs the court in advance that he/she has no intention to exercise the right to be present at the hearing. This type of statement is not binding upon the court, so the presiding judge or the court may order the accused to be present at the hearing. Consequently, the accused who is unwilling to participate in the trial may be forced to appear before the court, for example he may be arrested and brought to the court against his will.

2. Having been summoned to the hearing, the accused declares that he/she is unable to appear at the hearing for various reasons, e.g. a trip abroad to work, holiday or sickness, however, he does not ask for adjournment of the hearing. If the accused requests adjournment, the court has to evaluate whether he sufficiently justified his absence. If the justification is sufficient (in the case of sickness – according to Article 117 § 2a of the CCP, the absence must be justified by a certificate issued by a court physician), the date of the hearing will be changed in order to enable the accused, who wants to participate in the trial, to do so. However, if from the declaration of the accused transpires that he does not want to participate in the hearing or the justification for absence does not suffice, the court can hear the case in the absence of the accused, unless it considers his presence mandatory.

3. The accused who was summoned to the hearing fails to appear without providing any information as to the reason of his absence. Then the presiding judge is obliged to check whether the accused has been properly summoned to the hearing by checking a return of receipt confirming that the accused has been informed on the date of the hearing. If the service of the summons was correct, the trial may take place in the absence of the accused, unless the court finds that there is reason to suspect that the absence is due to a natural disaster or other extraordinary obstacles (Article 117 § 2 of the CCP).

It should be underlined once again that currently a summons concerning the first date of the hearing shall be served directly on a defendant. In the case of substitute service, a summons is deemed to have been served properly only if it is collected from the postal office by the defendant in person or not collected at all (such correspondence is deemed to have been served properly – Article 133§2 of the CCP). With reference to the subsequent dates of the hearing (not the first one) all ways of service of a summons, as presented in part I of this chapter, may be applied.

At any time, the presiding judge or the court may change the decision concerning presence of the accused at the hearing and decide that the accused has an obligation to

participate in the proceeding. In such a situation, the accused is summoned to the hearing and, should he/she fail to appear, adequate procedural measures may be taken to ensure his presence in the court room.

When the presence of the accused at the hearing is not considered mandatory and is not mandatory under the law, there is no need to issue any procedural decision on this matter. This results directly from Article 374 § 1 of the CCP. In practice, the presiding judge mentions in the minutes (transcript) of the hearing that the presence of the accused is not considered mandatory and that he was duly notified of the date of the hearing.[34] In the absence of the proof of the notification, or when the service of a summons cannot be considered effective (e.g. in case of mistake in the name or address or sending a notification not to the address given by the suspect during the interview at the preparatory proceeding as a permanent residence address or delivery address), the trial cannot take place, and the court is obliged to set a new date of the hearing. The accused must be properly summoned to this new hearing – despite his optional presence. The same applies when the court is aware *ex officio* that the accused failed to appear in person due to reasons beyond the his/her control, such as a natural disaster.

The proceedings presented above, in which the accused does not exercise his right to be present at the hearing and does not appear in the court, are not distinguished as "in absentia" proceedings by the Polish legislator. This is an ordinary trial in which the accused does not participate because, in principle, there is no such obligation. The assumption is simple – **the accused who knows the date of the trial** and fails to appear in person, does not want to participate in the proceedings, regardless of whether he informed the court about his will *expressis verbis*. Of course, the basic condition for conducting the proceedings in the absence of the accused is correct delivery of a notification about the date of the hearing to the accused.

It is worth stressing, that under the Polish law concerning criminal offences prosecuted *ex officio*[35] it is not possible to conduct judicial proceedings against a defendant who is unaware that criminal charges were brought against him. Without a personal interrogation of a person as a suspect and presenting him/her with the charges directly, an indictment cannot be brought to the court by the public prosecutor. Thus, this means that the Code of Criminal Procedure does not provide for a special *in absentia* proceedings about which the accused could not know before referring the case to the court.

As transpires from Article 22 of the CCP, if the whereabouts of the accused cannot be established, the criminal proceedings shall be suspended. In accordance with § 325 of the Ordinance of the Minister of Justice of 23 December 2015 on the regulation concerning functioning of common courts (Official Journal of 2015, item 2316, as amended) before suspension of the proceedings due to inability to establish the accused' whereabouts and prior to issuing an arrest warrant against him/her, the procedural organs shall exhaust all possible measures aimed at establishing his/her address or his/her place of residence. Similar obligations is stemming from § 213 of the Ordinance of the Minister of Justice of 7 April 2016 on the regulation concerning functioning of the common organisational units of the prosecutor's office (consolidated text: Official Journal of 2018, item 1206, as amended). It is stressed, that the suspension of the proceedings in the above described circumstances is indispensable since the

[34] See, D. Świecki, *Komentarz do art. 374 kodeksu postępowania karnego*, LEX/el. WKP 2018, para. 2.
[35] As was mentioned above different rules apply to fiscal offences.

CCP does not provide for *in absentia* proceedings, i.e. the proceedings against a person unaware of charges brought against him/her.[36]

Article 374 § 1 of the CCP will be applied only if the notification of the date of the hearing has been correctly served to the address indicated by the accused in person during the last procedural step conducted in his/her presence prior to referring the case to the court.

To sum up, if the presence of the accused at the trial is not mandatory, either under Article 374 § 1a of the CCP or due to the decision of the presiding judge or the court, and when the accused was properly notified of the date of the hearing (in person or by presumption of service of the summons – to the last address indicated by him, in the absence of information about its change) and when the accused did not inform the court about the reasons for his absence and failed to explain sufficiently his absence and if he did not request changing the date of the hearing, the trial will be conducted in the absence of the accused and can end with rendering a judgment. This is not a special procedure "*in absentia"*. This is an ordinary procedure, conducted according to the rule of law, during which the accused has the right but not the obligation to participate in the trial.

It should also be stressed that the CCP provides for safeguards protecting the accused from the negative consequences of his absence at the hearing. Thus, if the accused could not appear at the hearing due to reasons independent from him and was not able to inform the court about justification for his absence, he has the opportunity to apply for reinstatement of the time-limit for bringing an appeal against the judgment delivered at the hearing conducted *in absentia*. Pursuant to Article 126 § 1 of the CCP the accused shall only prove that he failed to observe the time-limit for bringing an appeal due to reasons beyond his control, such as sickness, that makes it even impossible to inform the court about it.

In this context it should be clarified that the CCP does not provide for the obligation to serve the judgment delivered at the hearing held in the absence of the accused on him/her. Pursuant to Article 422 § 2a of the CCP, the first instance judgment is served on the accused only if the following three conditions are fulfilled: 1) the accused is deprived of liberty; 2) the accused is not represented by the defence counsel; 3) the accused was not present at the pronouncement of the judgment despite the motion to be brought to the hearing at which the judgment was to be pronounced. Thus, for the defendant who is at liberty, the opportunity to reinstall the time-limit for bringing an appeal against the first instance judgment delivered *in absentia* seems to be the most important procedural safeguard of a fair trial.

B. Mandatory presence of the accused at the hearing on the basis of the court's order

Except for cases concerning felonies, a decision on mandatory presence of the accused at the hearing is taken by the presiding judge or by the court. At the stage of setting the first date of the hearing, the presiding judge may consider that it is not possible to issue a fair judgment without the presence of the accused. Then the presiding judge (the reporting judge who will chair the panel of judges examining this particular case) issues a summons to the

[36] J. Kosonoga, in: *Komentarz do art. 22 Kodeksu postępowania karnego*, ed. R.A. Stefański, S. Zabłocki, Warsaw 2017, LEX/el., WKP 2017, para. 10.

accused for the first date of the trial indicating that his presence is obligatory. The same situation may take place after the first date of the hearing –the presiding judge or the court (at the hearing) may consider presence of the accused mandatory at any time, within the meaning of Article 374 § 1 of the CCP. This also results in the inability to conduct the trial in the absence of the accused.

It should be pointed out that the CCP does not mention any prerequisites for taking a decision as to the mandatory presence of the accused at the hearing. For example, it can be taken in order to conduct specific evidence activities, e.g. confrontation of the accused with witnesses or presentation.[37] This decision can be changed at any time by issuing another decision "on recognition of the defendant's presence as optional and conducting a trial in his absence". If, for example, the court would like to interrogate the accused and for this purpose decided that his presence is mandatory and summoned him for the scheduled date of the hearing but the accused refused to give explanations and to take part in the hearing, then the court may proceed without the accused after changing its previous decision and returning to the general rule of Article 374 § 1 of the CCP.[38]

It should be emphasized that conducting the hearing without the presence of the accused whose presence was mandatory constitutes the so-called **absolute ground for appeal,** referred to in Article 439 § 1 (11) of the CCP. This means that if an appeal would be brought against a first instance judgment, this failure, regardless of the limits of the appeal and the charges raised, would result in reversing the judgment of the court and referral of the case to the court of first instance for re-examination (but only if this is in favor of the accused – Article 439 § 2 of the CCP). If the judgment was not appealed against and the first instance judgment became final, the fact that the case was conducted in the absence of the accused, whose presence was mandatory, is the basis for re-opening the judicial proceedings *ex officio* (Article 542 § 3 of the CCP). The possibility of re-opening the judicial proceedings upon the motion of the accused (Art. 540b of the CCP) is presented in the remaining part of the paper.

C. Mandatory presence at the trial

As was mentioned above, exceptionally the presence of the accused at the trial is mandatory in cases of felonies. The accused must be present at the first stage of the hearing concerning the activities referred to in Article 385 and 386 of the CCP (presentation of charges, instructing the accused about his rights, receiving the statement of the accused whether he pleads guilty and whether he wishes to provide explanations and if so, what explanations). Once the above-mentioned activities have been completed, the presence of the accused at the hearing becomes his/her right, so the absence of the accused will not stop further procedure, unless the presiding judge or the court considers the presence of accused as mandatory.

When the presence of the accused at the hearing is mandatory under the applicable law and he/she fails to appear in person, the CCP still provides for the possibility to conduct the hearing in his/her absence, although exceptionally. So, even in cases concerning felonies under the circumstances indicated in Article 376 and 377 of the CCP, the case may be examined at the hearing without the presence of the accused.

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[37] See, D. Świecki, *Komentarz do art. 374 kodeksu postępowania karnego*, LEX/el. 2018, para. 6.
[38] See, Ponikowski, J. Zagrodnik, in: *Kodeks postępowania karnego. Komentarz,* ed. J. Skorupka, Warsaw 2018, p. 923.

According to Art. 376 § 1 of the CCP, if the accused, whose presence at the trial is mandatory, has already provided explanations and left the courtroom without the presiding judge's permission, the hearing can proceed despite his absence. The court can order the accused to be arrested and brought to trial by force if his presence is found indispensable. The provision of § 1 applies accordingly if the accused who has already provided explanations, having been notified of the date of a deferred or adjourned hearing, fails to appear at the trial without justification. According to Article 376 § 3 of the CCP, should a co-accused justify his absence at a deferred or adjourned trial, the court can conduct the hearing to the extent not directly concerning the absent accused, provided that this does not limit his right to defend himself.

In addition, according to Article 377 § 1 of the CCP, if the accused, by his own fault, renders himself incapable of participating in the hearing or in the sitting of the court in which his participation is mandatory, the court can decide that the proceedings are to be continued in his absence, even if he/she has not yet provided explanations. Before such decision is issued, the court considers medical certificate from the physician who diagnosed the incapacity or examined him in the capacity of an expert. The condition of incapacity to participate in the trial can also be diagnosed by a test not connected with a violation of bodily integrity, made with the use of an appropriate device.

Finally, according to Art. 377 § 3 of the CCP, if the accused, whose presence at the trial is mandatory, being notified of the date of the trial declares that he/she will not participate in the trial, makes it impossible to bring him to the trial or notified personally about the trial (and therefore not due to presumption of delivery provided for in Article 133 § 2 CCP) fails to appear without justification, the court can conduct the proceedings despite his/her absence. The court can, however, decide that the accused shall be arrested and brought to trial by force.

It should be reminded that the cases referred to in Articles 376 and 377 of the CCP apply only to situations in which the presence of the accused is mandatory. In practice, these provisions should apply only to felonies, because the mandatory presence of the accused by the decision of the presiding judge or the court can always be changed, hence, there will be no need to refer to the provisions of Article 376 and 377 of the CCP.

D. Other issues regarding the proceedings in the absence of the defendant

Imprisoned defendant

With reference to a imprisoned defendant, special rules concerning his presence at the hearing apply. According to Article 353 § 3 of the CCP, while being served with a notification of the date of the trial, the accused deprived of liberty, whose presence at the trial is not mandatory, should be instructed on the right to file, within 7 days of the service of such notification, a motion to be brought to the hearing. The motions filed after the expiry of this term shall be examined only if this does not cause the need to change the date of the hearing or sitting of the court (Article 353 § 5 of the CCP).

The issue of the presence of the accused deprived of liberty at the appellate hearing differs. According to Article 451 of the CCP, the defendant has 7 days (from of the receipt of a notification of the acceptance of the appeal) for submitting a motion to be brought to the appellate hearing. As a rule, the motion brought on time shall be accepted. However, when the

accused is represented by a defence counsel, the court may decide not to bring him to the appellate hearing and to consider the attendance of the defence counsel sufficient. If the accused is not represented by a defence counsel and the appellate court decides not to accept his motion, a defence counsel shall be appointed *ex officio* to take part in the appellate hearing. In this case, the presence of a defence counsel at the appellate hearing is mandatory. Thus, conducting the appellate hearing without the presence of a defence counsel results in the absolute ground for appeal defined in Article 439 § 1 (10) of the CCP.[39]

In the constant jurisprudence of the Supreme Court it is underlined that the appellate court may refuse to accept a motion of the accused for bringing him to the appellate hearing only if the appeal concerns exclusively legal issues. Whenever new evidence is to be examined at the appellate hearing or facts of the case are to be established, the motion filed by the accused shall be accepted.[40]

In the proceedings before the first instance court the presence of a defence counsel at the hearing is not considered to be sufficient if the accused requested to be brought to the hearing. Therefore, a motion of the accused deprived of liberty to bring him to the hearing, filed on time, should be accepted. Article 353 § 3 of the CCP is interpreted as meaning that a motion of the accused to bring him to the hearing refers not only to the first date of the hearing but also to the subsequent dates of the hearing. If a motion was not examined before the first date of the hearing, as brought outside the established time-limit, the accused should be brought to the subsequent date of the hearing. Although there is no unified opinion on this issue, we consider that the delayed motion for being brought to the hearing is still valid with reference to the subsequent dates of the hearing.

Issuing a conviction at the sitting of the court (Polish: *posiedzenie*)

At this point, it should be briefly mentioned that rules regarding the presence of the accused at the main hearing apply also to the sittings of the court at which a judgment can be pronounced without a trial. As was stated above, this applies mainly to the plea bargaining procedures, when the court may render a judgment upon the defendant's agreement with the prosecutor regarding the penalty (Art. 335 § 1 and 2 of the CCP) or upon a request of the accused to impose a specific penalty (Article 338a of the CCP), which must be accepted before the court by the public prosecutor. A decision with reference to such motions is taken by the court at the sitting. The court may accept the motion and render a judgment sentencing the accused to the penalty which was agreed upon with the public prosecutor at the pre-trial stage of the proceedings or proposed by the accused. The accused has the right to take part in such a sitting (Article 343 § 5 and Article 343a § 1 CCP), so he must be properly notified about its date. However, his presence is not mandatory, although if the penalty agreed upon within the plea bargaining procedure is modified (e.g. due to the need to add an obligatory penal measure or compensatory measure) the presiding judge or the court can always summon the accused to

[39] Judgment of the Supreme Court of 3 February 2004, case no. V KK 5/04, OSNwSK 2004, item 258.
[40] See, *inter alia*, judgment of the Supreme Court of 13 October 2016, case no. IV KK 175/16, LEX no. 2151439. This line of jurisprudence evolved under the influence of the ECHR judgments against Poland. See, in particular, judgment of the ECHR of 25 March 1998, *Belziuk v. Poland*, case no. 23103/93; judgment of the ECHR of 21 July 2009, *Seliwiak v. Poland*, case no. 3818/04.

appear at such sitting. However, if the court does not consider the presence of the accused mandatory and the accused, properly informed about the date of the sitting, does not appear before the court, the judgment may be issued in his absence and these proceedings are not defined by the CCP as "*in absentia* proceedings".

Moreover, additional possibility of issuing a judgment in the absence of the accused at the sitting – the penal order (Polish: wyrok nakazowy) should be mentioned as well. In this situation the accused (or any other party) is never even notified of the date of the sitting. Only the copy of a judgment (penal order) with a copy of the indictment and instruction on how to appeal against such a judgment is served on the accused. However, by this judgment ("wyrok nakazowy") no penalty of imprisonment may be imposed. It is only possible to order a fine up to 200 daily units or a penalty of limitation of liberty. A penal order is subject to objection (Polish: "sprzeciw"). It may be brought within 7 days from the service of the judgment on the accused and results in the loss of the binding force of the penal order. Then the case is to be examined under general rules (Art. 500-507 of the CCP).

It is worth mentioning that a penalty of limitation of liberty imposed on the accused by "wyrok nakazowy" may be changed into the penalty of imprisonment whose execution may be secured by issuing of an EAW. Thus, the most important guarantee for the accused sentenced in such procedure is the obligation to serve on him a judgment delivered *in absentia* (Article 505 of the CCP).

Issuing a cumulative judgment[41]

A cumulative penalty may be rendered when two or more sentences were imposed on one person and the penalties imposed can be cumulated in accordance with the rules set out in the Polish Criminal Code. A cumulative penalty may also be issued when one person was judged in several proceedings for different offences. The final judgments may be cumulated in one cumulative penalty in a cumulative judgment. The Polish legal system provides for a special procedure of rendering the cumulative judgment, the so called "cumulative judgment procedure" regulated in art. 568a-577 of the CCP. Once the cumulative judgment is rendered, the "single" judgments joined into cumulative penalty cannot be executed any more.

A cumulative judgment is rendered at the hearing. According to Article 573 § 2 of the CCP, personal appearance of the convicted person at such hearing is not mandatory, unless the court decides otherwise. The provision of Article 451 of the CCP should apply accordingly. Thus, the convicted person has the right to participate in the hearing concerning cumulative penalty and if he/she submits a motion to be brought to the hearing from penitentiary facility,

[41] It should be clarified that the term "a cumulative penalty" does not mean the same as "a cumulative judgment". A cumulative penalty may be imposed by an ordinary judgment or by a cumulative judgment. The first case occures when the accused is sentenced for many offences in the framework of one criminal proceedings. After imposing separate penalties for every offence, the court adjudicating the case may join these penalties and impose "a cumulative penalty" (Polish: "kara łączna"). On the other hand a cumulative judgment may be issued upon the motion of the accused, the public prosecutor or *ex officio* if the accused was sentenced in a few separate proceedings to penalties which may be cumulated in accordance with the provisions of the Criminal Code. In order to render a cumulative jdugment the special procedure regulated in Article 568a-577 of the CCP shall be conducted.

as a rule, such motion shall be accepted. However, the court may decide not to bring the convict to the hearing but then it must appoint an *ex officio* defence counsel for him.

Unfortunately, in practice the majority of motions for bringing a convict to the hearing is not accepted. Courts prefer to appoint *ex officio* defence counsels for convicts deprived of liberty. For example, as transpires from the analysis of 512 cases selected from those examined between 2012 and 2013, in 270 cases the courts issued the cumulative judgments. In 62 cases, convicts brought motions for personal appearance at the hearing. Only 14 motions were accepted. In 48 cases courts appointed *ex officio* defence counsels for the applicants.[42]

There were certain doubts as to whether a notification of the date of the hearing in cumulative judgment proceedings shall fulfill the same formal requirements as a notification of the first date of the hearing in the ordinary criminal proceedings (i.e.: service directly to the hands of the convict or – in case of substitute delivery – requirement of collecting the correspondence by the convict himself from the post office or failure to collect correspondence resulting in presumption of delivery). The Supreme Court examined this issue in a decision of 18th October 2017[43] and decided that the special service of a summons provided in Article 132 § 4 of the CCP does not apply to the hearing held in the framework of cumulative judgment proceedings. Thus, a summons to such hearing may be served in every manner provided for by law.

A cumulative judgment procedure may be initiated *ex officio* or upon a motion of a convict or a public prosecutor. In practice most frequently these proceedings are initiated by convicts.

Sitting of the court on ordering the execution of a conditionally suspended sentence

Rules concerning presence of a convict at the sitting of the court concerning the execution of the conditionally suspended sentence of imprisonment are the same as those applied to the hearing in criminal proceedings. However, it should be underlined that in these proceedings the court may decide to reduce the suspended sentence by half if the order of execution is based on optional grounds (Art. 75 § 2a of the Penal Code – in force since 1st July 2015). Thus, the court may order that the convict shall execute only half of the sentence of imprisonment.

The convict has the right and not the obligation to take part in the sitting of the court. Therefore in the event of a correct notification of the convicted person and his failure to appear, there are no obstacles to issue a decision on the execution of a conditionally suspended sentence (Art. 178 § 3 of the Executive Penal Code).

Proceedings in relation to absentees regulated outside the CCP

[42] Marek Kulik, W*yrok Łączny w praktyce sądowej w latach 2012-2013, Prawo w działaniu. Sprawy karne*, 2015, vol. 23, p. 193. Report available at: https://www.iws.org.pl/pliki/files/Marek%20Kulik%2C%20Wyrok%20%C5%82%C4%85czny%20w%20praktyce%20s%C4%85dowej%20w%20latach%202012-2013%20161.pdf (last visited: 9 September 2018).

[43] Decision of the Supreme Court of 18 October 2017, case no. II KK 309/17, not published.

The Polish law provides for a procedure conducted *in absentia* only in the Penal Fiscal Code (hereinafter referred to as PFC), with reference to fiscal offences and administrative fiscal offences, i.e. the criminal acts directed against the financial interest of the State Treasury or the financial interests of the European Union. For these acts a penalty of deprivation of liberty can be imposed, in principle, up to 5 years, also in the proceedings conducted *in absentia*. However, in such proceedings the most frequently imposed sentence is a fine.

The *in absentia* proceedings are regulated in Article 173-177 of the PFC. According to Article 173 § 1 of the PFC, against the perpetrator of a tax offence or fiscal minor offence who resides permanently abroad or in situation when his place of residence or stay in the country cannot be determined, the proceedings can take place in his absence. The provision of §1 does not apply if: 1) the guilt of the perpetrator or the circumstances of the crime raise reasonable doubts; 2) a person accused of a fiscal offence went into hiding only at the judicial stage of the proceedings and also when his/her place of residence or stay in the country was established during judicial proceedings. In the proceedings *in absentia*, the court is obliged to appoint an *ex officio* defence counsel whose participation in the hearing and in the appeal proceedings is mandatory. According to art. 177 of the PFC, if a convicted person is personally put at the court's disposal or the convicted person has been caught, he/she will receive a copy of the final judgment. At the request of the convicted person, submitted in writing within 14 days from the date of receiving the judgment, the court whose sentence has become final, shall immediately set the date of the hearing. If the convict appears at this hearing the judgment issued by the court *in absentia* loses its validity.

The *in absentia* proceedings are also provided for in the Code of Procedure in Misdemeanor Cases (Article 71 § 4). Misdemeanors/minor offenses (regulated in the Code of Minor Offenses) in Polish legal system are defined as petty acts that are not crimes. No penalty of imprisonment is provided for such acts. The court may impose only fines, the limitation of liberty lasting up to a month or a penalty of an arrest up to 30 days. For this reason, minor offenses do not fall within the scope of the European Arrest Warrant.

The concept of proceeding *in absentia* under Article 540b of the CCP

The Polish Code of Criminal Procedure defines indirectly a concept of proceedings *in absentia* only in one provision but it is not a universal definition for the entire CCP. Article 540b § 1 was introduced to the CCP in order to implement the framework decision 2009/299/JHA of 26 February 2009 (the Act of 29th July 2011; Official Journal 2011, No. 191, item 1135). It indicates conditions for re-opening judicial proceedings when the judgment was delivered at the hearing conducted in the absence of the accused. The proceedings may be re-opened at the request of the defendant submitted within one month from the date on which he learnt about the judgment, provided that the case was heard in the absence of the accused who was not notified of the date of the hearing or sitting of the court or was notified about the hearing or sitting of the court but such a notification was not served on him personally and he/she is able to prove that he was not aware of the date and the possibility of a judgment being delivered in his absence.

According to Article 540b § 2 of the CCP the above described right to request re-opening of the proceedings does not apply in cases referred to in Article 133 § 2 of the CCP (service to

the address provided by the accused – correspondence is presumed to be effectively served as a result of double notification that the correspondence was left in the closest postal office – a substitute delivery described above), Article 136 § 1 of the CCP (refusal to accept correspondence) and Article 139 § 1 of the CCP (presumption of delivery in the event of changing the address without informing the court) and also if a defence counsel participated in the hearing or sitting of the court.

Thus, *in absentia* proceedings within the meaning of Article 540b of the CCP are the proceedings in which: 1) the accused did not participate and was not represented by a defence counsel and 2) the accused has not been notified at all about the date of the trial or was notified in a different way than in person (but not pursuant to Article 133 § 2 of the CCP), and 3) the accused proves that he/she did not know about the possibility of delivering a judgment in his absence and did not know about the date of the trial. The term "notified in a different way than in person" does not include service of a summons to the hearing or sitting of the court to the last address indicated by the accused. *A contrario*, when the accused did not receive the correspondence and the notification was returned to the sender after the time specified in Article 133 § 2 of the CCP (two notification left for 7 days at the closest post office) re-opening is not possible since such a situation is treated as a presumption of delivery.

It should be emphasized that in practice, in most cases the fulfillment of the conditions of Article 540b of the CCP would occur only as a result of a mistake of the court. Without the proof that the notification of the date of the hearing or sitting of the court was correct under the CCP the case should not be examined. However, at least one situation is possible which does not have to arise from the mistake of the court. When the trial does not end at the first date of the hearing the accused can be notified of the date of the subsequent hearing in all possible ways described in the CCP (Art. 132 of the CCP). Thus, a summons to such hearing may also be served indirectly upon the adult member of the household of the accused or upon the house administration (contrary to the notification of the first date of the hearing, which must be served only directly on the accused or as a result of procedure defined in Article 133 § 2 of the CCP). In this case, the accused is not personally notified of the date of the hearing. Consequently, his motion for re-opening of the proceedings could be accepted if other conditions indicated in Article 540b § 1 of the CCP are fulfilled as well, i.e. if the accused manages to prove that the adult household member did not provide him with a correspondence containing a notification of the date of the subsequent hearing. However, some experts argue that a proper notification about the first date of the hearing accompanied by information as to the possibility of issuing the judgment *in absentia* excludes the opportunity to request re-opening of the proceedings. According to this view, the notion "date of the hearing" means the first date of the hearing. Thus, if the accused was properly notified of the first date of the hearing, he is not able to prove that he did not know about the date of the hearing.[44]

Since the accused is informed in writing that the hearing may be conducted in his absence and that a judgment may also be delivered in his absence (Art. 338 § 1a of the CCP) it would be very difficult for him/her to prove that he/she was unaware that the judgment may be delivered *in absentia*.[45]

[44] D. Świecki, *Komentarz do art. 540b kodeksu postępowania karnego*, Lex/el. 2018, para. 8.
[45] J. Matras, in: *Kodeks postępowania karnego. Komentarz*, ed. K. Dudka, Warsaw 2018, p. 1270-1271.

On the other hand, Article 540b of the CCP may be applied in order to obtain re-trial with reference to "in absentia" judgment issued in the simplified proceedings if both the summons to the hearing and the judgment were served indirectly on the accused and he was unaware of the proceedings.

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)?

When answering the question, it should be noted once again that in the Polish criminal procedure the presence of the accused at the hearing is not, in general, mandatory. Even in cases in which it is mandatory, Article 376 and 377 of the CCP provides for the opportunity to conduct the hearing without the presence of the accused. However, the "in absentia" proceedings within the meaning of Article 540b of the CCP is not possible unless the notification of the date of the hearing was not served properly on the accused.

In order to answer this question, one shall distinguish between the meaning of "in absentia" proceedings under Article 540b of the CCP and the proceedings conducted in the absence of the accused under the general provisions of the CCP. It should be emphasized that "in absentia proceedings" within the meaning of Article 540b of the CCP may occur as a result of the breach of the law by the court, for example due to lack of proper notification about the date of the hearing or lack of proper notification that the hearing may be conducted in the absence of the accused. Furthermore, re-opening the proceedings under Article 540b of the CCP is possible only if the judgment delivered against the accused is final. Thus, this extraordinary measure may be applied only if the accused was acquainted with the judgment after it became final. For these reasons, a motion submitted under Article 540b of the CCP cannot be effective with reference to the accused who was present at the hearing at which the judgment was pronounced but was absent at the earlier dates of the hearing at which the case was examined.

Since, as a rule, it is up to the accused to decide about participation in the hearing, he/she may choose to appear only at the hearing at which the judgment is to be pronounced. Of course, such proceedings is not "in absentia proceedings". The only situation which should be considered as questionable is when the accused is present at the last hearing at which the judgment was pronounced but was not present at the earlier hearings due to lack of proper notification of the dates of such hearing.

According to Article 419 § 1 of the CCP the judgment may be pronounced in absence of the accused. This provision reads as follows: "the failure of the parties, their defense counsels or attorneys to appear does not prevent the judgment from being pronounced". Then the period for bringing a motion for appeal runs from the date of pronouncement of the judgment. Even if it is exceptionally mandatory that the accused is present at the hearing, he/she does not have to be present at the hearing at which the judgment is pronounced. At this point, it should be pointed that the pronouncement of the judgment in the Polish criminal procedure takes place at the main hearing or the sitting of the court. However, it can be adjourned for up to 14 days (however, it still will be delivered in the framework of "the hearing" or "the sitting" of the court). Only the parties present at the hearing, at which the court proceedings were closed are informed of the adjourned date of the pronouncement of the judgment. The accused who was not present at the

last date of the hearing is not notified of the date of rendering a judgment. Thus, the appearance of the accused at the date of pronouncement of a judgment cannot retrospectively validate the incorrect notification of the dates of previous hearings at which the case was examined. Consequently, the date of the hearing at which only the pronouncement of a judgment takes place certainly is not a hearing on which "the case was examined".

However, according to Article 409 of the CCP until the judgement is pronounced, it is possible to re-open the first instance trial. It is obvious that incorrect notification of the previous dates of the hearing could constitute a valid reason for re-opening the trial in order to allow the accused to submit explanations or to carry out evidence at the request of the accused. However, such re-opening takes place before the delivery of the judgment.

Furthermore, the accused may appeal against the judgment delivered in the proceedings conducted in his absence immediately after its pronouncement. It should be underlined that incorrect notification of the date of the hearing shall result in quashing the judgment by the appellate court. If the presence of the accused at the hearing is mandatory, examination of the case in his absence constitutes the so called "absolute" ground for appeal, i.e. the judgment delivered in such proceedings must be quashed by the appellate court even if the accused did not raise such objections in his appeal complaint. Moreover, if no appeal is brought against such judgment, it can be quashed *ex officio* on the same grounds since conducting the hearing without the presence of the accused whose presence was mandatory is also a prerequisite for re-opening the proceedings *ex officio* by the court (Article 542 § 3 of the CCP).

When the presence of the accused at the hearing was not obligatory, failure to serve on him a notification of the date of the hearing may be raised in his appeal against the judgment. Pursuant to the well-established case-law, examination of the case at the hearing without the presence of the accused who was not duly notified of the date of the hearing constitutes a breach of the right to defence and should result in the re-examination of the case by the first instance court.[46]

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

Again, it should be noted that if the accused, whose presence was optional, was properly notified of the date of the trial, then **his failure to attend the hearing on certain dates is irrelevant for assessing whether the proceedings were conducted *in absentia*** (within the meaning of Article 540b of the CCP).

In practice, in many cases the judgment is issued after several dates of the hearing and the proceedings can last even several years. While the accused shall be properly notified of the

[46] Judgment of the Supreme Court of 18 may 2011, case no. IV KK 119/11, Lex no. 817548; judgment of the Supreme Court of 7 December 2006, case no. V KK 89/06, OSNwSK 2006, item 2389.

first date of the hearing only in person or according to Article 133 § 2 of the CCP, the requirements for effective notification of possible subsequent dates of the hearing are less strict. As already mentioned, the hearing may be adjourned (for up to 35 days) or deferred (for longer periods). Different rules apply to summoning the accused to the adjourned and deferred hearing. The accused should be notified of the new date of the deferred hearing each time, i.e. after every deferral. On the other hand, according to Article 402 § 1 of the CCP, there is no obligation to summon the accused, whose presence at the hearing is optional, to the adjourned hearing. Thus, if the presiding judge orders an adjournment and fixes the date and place of the next hearing, persons present at this hearing, whose presence is mandatory, are obliged to appear next time without summoning. These persons are also summoned to the next hearing if they were not present at the adjourned hearing. Persons authorized to appear (whose presence is not mandatory) do not have to be notified of the new date, even if they did not participate in the hearing which was adjourned.[47]

The CCP does not regulate consequences of the situation when the accused was not personally notified of the first date of the hearing, at which he also failed to appear, but appeared at the subsequent hearing. In accordance with the case law, when the accused was not present at some dates of the hearing due to incorrect notification his presence at the subsequent hearings can be used for retrospective validation of procedural acts conducted at previous hearings in his absence. Thus, the accused should be allowed to make statements concerning all evidence conducted in his absence. He may also request evidence conducted in his absence be conducted again, for example he may request a witness heard in his absence be examined again in his presence. The Supreme Court underlines that if the accused would demand the repetition of any evidence conducted while he was absent not on his fault, such evidence should be repeated in order to enable him to exercise his right to defence, of course if anew examination of evidence is technically possible.[48]

However, even if the accused does not demand repetition of the evidence, taking into account that he is entitled to see the case-file and acquaint himself with the record of the hearing in which he did not participate, it seems – and this is the interpretation of the authors of this paper – that such proceedings cannot be considered as *in absentia* within the meaning of Article 540b of the CCP, no matter what happened at the hearing in which the accused did not participate, if at the subsequent dates of the hearing he was present as a result of proper notification of the dates of the hearing.

Can the defendant be present via telecommunication?

Yes, the possibility is explicitly provided for in Article 377 § 4 of the CCP in relation to the accused who has not yet submitted an explanation before the court and in Article 517b § 2a of the CCP in accelerated proceedings. The second opportunity is not used in practice since accelerated proceedings are conducted very rarely.

Defence by a legal counsellor in the absence of the defendant

[47] See, R. Ponikowski, J. Zagrodnik, in: *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka, Warsaw 2018, p. 1029-1030.
[48] See, *inter alia*, the decision of the Supreme Court of 27 January 2015, case no. V KK 203/14, LEX no. 1650308.

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

Yes, if the accused appointed a defence counsel or *ex officio* defence counsel was appointed for him by the court the entire proceedings can be carried out with the participation only of this defence counsel. Of course, this does not apply to cases in which the presence of the accused at the hearing is mandatory. However, the presence of the defence counsel in the proceedings does not release the court from the duty to notify the accused of the dates of the hearing. Such proceedings cannot be classified as *in absentia* proceedings since due to Article 540b § 2 of the CCP presence of the counsel at a hearing or a sitting of the court excludes the opportunity to request re-opening of the proceedings.

It should be pointed out that pursuant to Article 140 of the CCP, if the law does not provide otherwise, decisions, orders, notifications and their copies which by law must be served upon the parties, are also served upon defence counsels, attorneys and legal representatives.

If so:

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

Apart from the proceedings regulated on the PFC, the accused is always aware of the proceedings against him. As was mentioned above, without a personal interrogation of the suspect by procedural organs, it is not possible to submit to the court any indictment of any offence prosecuted *ex officio*. However, if the accused neglects his duty to inform the procedural organs about the change of his address or does not collect correspondence served to the address indicated by him (unless there are unforeseeable reasons), it is assumed that he voluntarily gives up the right to know the current stage of examination of his case. Thus, he/she may be unaware that the *ex officio* defence counsel was appointed for him, although the accused is always informed about this fact. Pursuant to § 10 of the Ordinance of the Minister of Justice of 27 May 2015 concerning the way of providing the accused with the assistance of an *ex officio* defence counsel (consolidated text: Official Journal of 2017, item 53), the president of the court, the court or the court referendary shall provide the accused with the following information in order to enable him to contact the defence counsel: the name of the defence counsel, his/her address for service of documents, phone number, fax number or e-mail address. On the other hand, the defence counsel shall be informed about the name of the accused, the number of the case, all data enabling him/her to contact the accused (like his/her address, phone number, fax number or e-mail address). Additionally, the defence counsel shall be informed whether the accused is deprived of liberty and, if he/she is detained, the defence counsel shall also be informed about the organ at the disposal of which the accused remains. The above-mentioned information shall be sent to the accused and his defence counsel together with a decision on the appointment of the defence counsel.

As a rule, an *ex officio* defence counsel may be appointed on the motion of the accused who, due to his financial situation, is not able to bear the costs of defence without prejudice to the

necessary maintenance of himself or his family (Article 78 of the CCP). Thus, despite rather exceptional situations of mandatory defence, the accused must be aware that *ex officio* defence counsel was appointed for him since, in principle, it may happen upon his request. In all other cases the accused is informed about the appointment of an *ex officio* defence counsel.

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

This issue has been widely discussed in the previous parts of the paper.

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

There is no such an obligation. There are situations when the defence counsel (even chosen by the accused, not only appointed *ex officio*) has no contact with the accused who avoids contact or, for example, travels somewhere without informing anyone. As was explained above, in principle this does not prevent the case from being examined, except in the case of mandatory presence of the accused– then the court can issue a warrant for his arrest.
According to Article 86 § 1 of the CCP, a defence counsel may undertake procedural acts exclusively in favour of the accused. Moreover, his participation in the proceedings does not preclude the personal participation and activity of the accused (Article 86 § 2 of the CCP).

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

Such a situation is described in the record of the hearing or sitting of the court by using the formula "the accused did not appear (here there is a reference to the correctness of the service of a notification), a defence counsel appeared on his behalf". Thus, if the presence of the accused is not mandatory under the law or due to court's or presiding judge's decision or - in case of mandatory presence - the prerequisites of Article 376 or 377 of the CCP are fulfilled, the hearing may be conducted in the presence of the defence counsel. This is not "in absentia" proceedings which could create the possibility of re-opening the proceedings under Article 540b of the CCP. The CCP also does not use the term of "fiction of presence" of the accused.

- 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?

A defence counsel has the right to appeal on behalf of the accused. In case of an *ex officio* defence counsel it does not matter whether the defendant consented to this. Pursuant to Article 84 § 2 of the CCP an *ex officio* defence counsel is obliged to undertake procedural

activities in favor of the defendant until the final adjudication of the case.[49] However, the accused may withdraw the appeal or the motion for re-opening the proceedings lodged by his defence counsel except in cases of mandatory defence (Article 431§ 2 of the CCP in conjunction with Article 545 § 1 of the CCP).
As transpires from § 56 of the Code of Ethics of Advocates[50], an advocate is required to obtain the consent of the client, in writing if possible, to waive the filing of an appeal. The advocate shall promptly document in the case file the lack of such consent, the inability to obtain it, or the client's refusal to provide it. Pursuant to § 57, if an advocate concludes that filing of an appellate measure in a case conducted by the advocate voluntarily or by appointment is legally or factually unjustified, and the client does not agree with such position, the advocate shall promptly terminate the power of attorney. This applies also to a cassation, a cassation appeal, a constitutional petition, and other procedural measures for amending or setting aside legally final rulings.

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'?

According to Article 84 § 1 of the CCP, establishing a defence counsel or appointing a counsel *ex officio* entitles him to act throughout the proceedings, not excluding actions after the decision becomes final, if it does not contain restrictions. According to Article 84 § 2 of the CCP, a defence counsel appointed *ex officio* has a duty to take procedural steps to the final termination of the proceedings. However, pursuant to Article 84 § 3 of the CCP, the *ex officio* defence counsel may refuse to initiate extraordinary appeal proceedings (i.e. cassation proceedings or re-opening proceedings) if he/she does not see any grounds for filing such a complaint. However, if the cassation appeal or other extraordinary appeal measure is filed, the defence counsel is entitled to participate in the pending proceedings.

The situation after a judgment of conviction has been rendered

8.

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

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

[49] See, A. Bojańczyk, *Czy obrońca z urzędu może odmówić oskarżonemu sporządzenia i wniesienia apelacji, uzasadniając to brakiem podstaw do sporządzenia środka odwoławczego*? Palestra 2013, no. 7-8, p. 243-244.
[50] http://www.nra.pl/dokumenty/2018.01.30_Kodeks_Etyki_Adwokackiej_tekst_ujednolicony.pdf (last visited: 1 December 2018).

The current wording of Article 100 § 3 of the CCP states that the first instance judgment shall be served upon the persons entitled to file an appeal only if the law so provides. There are only two provisions which express the obligation to serve the first instance judgment on the accused *ex officio* :

- Article 505 of the CCP concerning a judgment issued at the sitting of the court in the so-called "penal order proceedings"; as was mentioned above, no penalty of imprisonment may be imposed by the judgment issued in the "penal order proceedings".
- Article 422 § 2a of the CCP, which provides that a judgment shall be served on the accused if the following prerequisites are fulfilled simultaneously: 1) the accused is deprived of liberty; 2) the accused is not assisted by a defence counsel; 3) he is not present at the pronouncement of the judgment and 4) the accused requested to be brought to the date of the hearing at this the judgment was pronounced. As a rule, the accused's motion to be brought to the hearing on the day when the judgment is pronounced shall be accepted by the court. However, a delayed motion for bringing the accused to the court-room may be left unexamined by the court (Article 353 § 3 of the CCP). Thus, it may happen that the accused will not be brought to the court-room even if he wanted to be present at the pronouncement of the judgment.[51] Then, unless he/she is represented by a defence counsel, the judgment shall be served on him.

In all other cases a first instance judgment and its written statement of reasons are served on the accused only upon his motion brought within the time-limit of 7 days from the date on which the judgment was pronounced.

The CCP does not regulate the issue of service of judgments delivered at the sitting of the court. However, the commentators of the CCP argue that Article 422 § 2a of the CCP shall be applied by analogy, also to judgments issued at the sittings of the court.[52]

It is worth stressing, that the above described rules apply only to the judgment of the court. Different rules apply to the written statement of reasons (i.e. written justification) of the judgment which, as a rule, is not elaborated *ex officio* but upon the motion of a party to the proceedings. Thus, the statement of reasons of the judgment is served on the accused upon his motion submitted to the court within the time-limit of seven days starting from the date of pronouncement of the judgment. In situation described in Article 422 § 2a of the CCP the above-mentioned time-limit of seven days starts to run from the date of the service of the judgment upon the accused deprived of liberty.

The interpretation of the law presented above is confirmed by the case-law of the Supreme Court. It is stressed that the absence of the accused who is not deprived of liberty at the hearing at which the judgment was pronounced does not impose on the court an obligation to serve this judgment on the accused or to serve on him a separate instruction as to the time and manner of bringing an appeal against such judgment (such instruction is provided to the parties of the proceedings at the hearing at which the judgment was pronounced).[53] Thus, in

[51] K. Eichstaedt, *Komentarz do art. 422 Kodeksu postepowania karnego* [in:] Świecki D. (ed.) *Kodeks postępowania karnego. Komentarz. Tom I*, Warsaw 2018, p. 1589.
[52] M. Kurowski, *Komentarz do art. 100 Kodeksu postepowania karnego* [in:] Świecki D. (ed.) *Kodeks postępowania karnego. Komentarz. Tom I*, Warsaw 2018, p. 447.
[53] Decision of Supreme Court of 13 March 2017, case no. II KZ 4/17, LEX no. 2242368.

such cases the judgment accompanied by the statement of reasons is served on the accused only upon his motion submitted within 7 days from the date of its pronouncement. Moreover, a motion of the accused for serving a judgment together with the statement of reasons submitted to the court before the pronouncement of the judgment is ineffective.[54]

The motion for serving upon the accused the judgment together with the statement of reasons shall be submitted to the court in writing (Article 422 § 1 of the CCP).

Article 100 § 3 of the CCP does not apply to the proceedings before an appellate court. However, the rules concerning the service of the second instance judgment on the accused are very similar, since Article 422 § 2a of the CCP is applied accordingly on the basis of Article 457 § 2 of the CCP. Consequently, the appellate judgment is served on the accused *ex officio* only if the prerequisites indicated in Article 422 § 2a of the CCP are fulfilled.[55]

In accordance with the standing case-law of the Supreme Court, this provision (Article 422 § 2a of the CCP) will also apply to the accused deprived of liberty who, despite submitting a motion for being brought to the appeal hearing, was not present at that hearing[56] but was represented by an *ex officio* defence counsel. Since an *ex officio* defence counsel is obliged to undertake procedural actions on behalf of the accused until the proceedings are concluded with a final judgment[57], once the second instance judgment is pronounced at the hearing, such defence counsel is no longer obliged to act. Thus, from this moment on the accused is treated as a person not represented by a defence counsel and for this reason the second instance judgment shall be served on him *ex officio*.[58] In other cases, pursuant to Article 457 § 1 of the CCP, service of a judgment along with the statement of reasons takes place at the motion of the party submitted to the court within a time-limit of 7 days from the date of pronouncement of the appellate judgement. This also applies if the court draws up the statement of reasons *ex officio* which is not always the case.

Rules concerning service of judgments upon the accused have changed considerably twice during the last three years. Thus, prior to 1st July 2015 the first instance judgment was served on the accused who fulfilled three conditions: 1) was deprived of liberty; 2) was not represented by a defence counsel, and 3) was not present at the hearing at which the judgment was pronounced (Article 419 § 2 of the CCP in force until 1st July 2015). However, it should be underlined that prior to 1st July 2015 the presence of the accused at the hearing was obligatory. Only exceptionally the court could conduct the hearing in the absence of the accused. At the same time, the accused did not have to be present at the pronouncement of the judgment.

Since 1st July 2015 until 14th April 2016 all judgments pronounced in the absence of the accused had to be served on him. This was a rule introduced by the 2015 amendment together with the change of the model of participation of the accused in the hearing: the accused had a right but not the obligation to be present at the hearing. For this reason, in order to

[54] Decision of Supreme Court of 9 August 2017, case no. II KZ 20/17, LEX no. 2342169.
[55] Decision of Supreme Court of 22 June 2016, case no. III KZ 39/16, LEX no. 2100245.
[56] As was mentioned earlier in the questionnaire, pursuant to Article 451 of the CCP the motion of the accused to be brought to the appeal hearing may exceptionally not be accepted by the appellate court. Then the appellate hearing must be conducted in the presence of the accused' defence counsel.
[57] See Article 84 of the CCP presented above.
[58] See, inter alia, decision of the Supreme Court of 26 June 2007, case no. II KZ 14/07, OSNwSK 2007, item 1440; decision of the Supreme Court of 22 June 2016, case no. III KZ 39/16, OSNKW 2016, no. 12, item 80.

guarantee the right to appeal, the judgment pronounced in the absence of the accused had to be served on him.

The above-mentioned provision was changed by the 2016 amendment with binding force as from 15th April 2016.

After the 2016 amendment it was not clear which system of service of judgments shall apply to proceedings initiated before 15th April 2016. The Supreme Court decided that in cases initiated after 30th June 2015 and pending after 14th April 2016, the rules of service introduced by the 2015 amendments should be used.[59] On the other hand, in proceedings initiated before 1st July 2015 and pending after 14th April 2016, the new provisions of 2016 amendment should apply.[60]

The accused must be informed about the content of Article 422 of the CCP. It is executed in writing at the beginning of the judicial proceedings when the accused is served with the copy of an indictment (Article 338 § 1a of the CCP) and for the second time – when the accused is summoned to the first hearing (Article 353 § 4 of the CCP). In addition, if the accused appears at the hearing, he is also informed orally about the content of Article 422 of the CCP (Art. 386 of the CCP).

The content of Article 100 § 3 of the CCP is referred to the accused only orally, if he appears at the first hearing (Article 386 of the CCP).

An instruction about the content of Art. 100 § 3 of the CCP in the current wording should not be limited only to the reading of the provision. The court is required to inform the accused that, in principle, the time-limit for submitting a motion for the service of the judgment and its written reasons (the statement of reasons) runs from the day of the pronouncement of the judgment. If the accused is deprived of liberty, he should be instructed about the derogation from this rule and the possibility of serving the judgement *ex* officio, provided that all conditions of Article 422 § 2a of the CCP are fulfilled. In such cases it is also necessary to inform the accused that the time-limit for submitting a motion for service of the statement of reasons runs from the date of service of a copy of the judgment.[61] Providing the accused with the correct instruction has a key meaning since, according to Article 16 § 1 of the CCP, the failure to provide instruction by the procedural organ if, in view of circumstances, such instruction was indispensable, cannot result in any adverse consequences for the accused. Moreover, an incomplete instruction cannot cause negative effects for the accused.[62]

The Supreme Court underlines, that participants of the proceedings shall be informed of their rights in such a way that would give them a real opportunity to exercise their rights which is particularly important in a situation of change of legislation significantly affecting the legal situation of the parties.[63] This applies to proceedings before the court of the first instance as well as before the appellate court.[64]

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[59] Decision of Supreme Court of 22 June 2016, case no. III KZ 39/16, LEX no. 2100245.
[60] Resolution of the Supreme Court Resolution of 19 November 2016, case no. I KZP 10/16, OSNKW 2016, no. 12, item 79.
[61] D. Świecki, *Komentarz do art. 386 Kodeksu postepowania karnego* [in:] Świecki D. (ed.) *Kodeks postępowania karnego. Komentarz. Tom I*, Warsaw 2018, p. 1410-1411.
[62] J. Kosonoga, *Komentarz do art. 100 Kodeksu postępowania karnego* [in:] Stefański R., Zabłocki S. (eds.), *Kodeks postępowania karnego.Tom I. Komentarz do art. 1-166*, Warsaw 2017, p. 233.
[63] Decision of Supreme Court of 14 December 2017, case no. III KZ 56/17, LEX no. 2427121.
[64] Decision of Supreme Court of 27 April 2017, case no. IV KZ 5/17, LEX no. 2281273.

With reference to the question how the defendant is notified of the possible recourses against the judgment (such as appeal or opposition) the following should be explained:

In accordance with Article 100 § 8 of the CCP, after the pronouncement of a decision or while serving a decision to the parties of the proceedings they shall be informed of their rights, time-limit and manner of submitting an appeal or about the fact that the decision cannot be appealed. Thus, such information is provided in writing or orally. In writing, when the judgment or decision is served on the accused; orally – if the law does not provide for the obligation to serve the judgment on the accused.

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

The fact that the hearing was conducted in the absence of the accused whose presence was not mandatory cannot be subject of any complaint in accordance with the law, unless the accused was not properly summoned to the hearing or justified his absence. As was stated above, in principle, the participation in the hearing is the right but not the obligation of the accused. Hence, the judgment issued in the judicial proceedings conducted in the absence of the accused may be contested as contrary to the law only in the following circumstances:

1. the presence of the accused at the hearing was not mandatory and the accused was absent at the hearing, as he was not properly notified of the date of the hearing although the law provided for the obligation to inform the accused of the date of the hearing.
2. the presence of the accused at the hearing was not mandatory and the accused was absent at the hearing, as the court wrongly assessed that the reasons for non-appearance and for the motion to adjourn the hearing provided by the accused were not adequate or there were reasons to suspect that the absence is due to a natural disaster or other extraordinary obstacles but the court neglected these reasons;
3. the presence of the accused at the hearing was mandatory but the court neglected this fact or wrongly assessed his presence as not mandatory and conducted the hearing in his absence;
4. the presence of the accused at the hearing was mandatory and the court conducted the hearing in his absence because the court wrongly assessed that the prerequisites of Article 376 or 377 of the CCP were fulfilled in the case.

All the above-mentioned situations may be raised in the appeal against the first instance judgment as breaches of the law. However, situations 3 and 4 constitute “the absolute” grounds for appeal. This means that irrespective of the charges raised in the appeal, a judgment issued in such proceedings must be quashed by the appellate court *ex officio* and the case remitted for reconsideration (Article 439 § 1 point 11 of the CCP). If violations of the law indicated in Article 439 § 1 point 11 of the CCP were neglected by the appeal court and the first instance judgment became final (legally valid), then Article 439 § 1 point 11 of the CCP may be invoked as an absolute ground for a cassation appeal (Article 523 § 1 of the CCP). Cassation appeal is an extraordinary appeal measure which may be lodged by the parties to the proceedings against

a final and binding judgment of the appellate court ending the proceedings. A cassation appeal brought by a party to the proceedings may rely on violations of the law listed in Article 439 of the CCP (the so-called absolute grounds of appeal) or other flagrant infringements of the law if they might have had a material impact on the content of the judgment. A cassation of a defendant may not be filed exclusively for the reason that the penalty is disproportionate to the gravity of an offence. The cassation appeals are examined exclusively by the Supreme Court.

The fact that the hearing was conducted in the absence of the accused whose presence was mandatory may also be a ground for re-opening the proceedings *ex officio* (Article 542 § 3 of the CCP).[65] Article 542 § 3 of the CCP provides that the judicial proceedings shall be re-opened if one of the violations specified in Article 439 § 1 of the CCP is revealed. In such a case, the court shall initiate the proceedings *ex officio,* i.e. without a motion of a party. However, the case-law confirms that the accused or another party to the proceedings may also bring a motion to the court indicating a violation of the law which may result in re-opening the proceedings *ex officio*. It is possible due to the wording of Article 9 § 2 of the CCP which states that the parties may request also these procedural actions which the court may or is obliged to undertake *ex officio*.

It should be underlined that an absolute ground for appeal under Article 439 § 1 point 11 of the CCP does not occur if the accused was absent only at the hearing at which a judgment was pronounced. As was mentioned above, Article 419 § 1 of the CCP states that failure of the parties, their defence counsels or attorneys to appear does not prevent the judgment from being rendered. Thus, the participation of the accused at this hearing is not mandatory.[66]

The situations described under points 1 and 2 above shall be assessed in a different manner. As already mentioned in this paper, such situations are classified as breaches of the right to defence (procedural errors). These are the so called "relative grounds" for appeal. This means that a procedural error may result in quashing the first instance judgment only if such error might have impact on the content of the judgment. Furthermore, the accused must invoke this breach of the law in his appeal in order to have the judgment quashed. Otherwise it will not be taken into account by the appellate court *ex officio*. The Supreme Court stated that it should be presumed that such error (lack of proper notification of the accused of the date of the hearing; wrong assessment whether the absence of the accused was justified by sufficient reasons) has an influence on the outcome of the case, so the proceedings before the first instance court shall be repeated.[67] As transpires from the well-established jurisprudence, conducting the hearing without the presence of the accused who was not properly summoned to this hearing constitutes

[65] J. Zagrodnik, *Metodyka pracy obrońcy i pełnomocnika w sprawach karnych i karnych skarbowych*, Warsaw 2016, p. 429.
[66] D. Świecki, *Komentarz do art. 429 Kodeksu postepowania karnego* [in:] Świecki D. (ed.) *Kodeks postępowania karnego. Komentarz. Tom II*, Warsaw 2018, p. 202-203.
[67] See, *inter alia*, judgment of the Supreme Court of 26 October 2016, case no. II KK 255/16, LEX no. 2141219; judgment of the Supreme Court of 14 June 2018, case no. III KK 291/18, LEX no. 2511908.

also "a flagrant infringement of the law" within the meaning of Article 523 § 1 of the CCP[68]. So, it may be invoked as a ground of a cassation appeal.[69]

Furthermore, the situations described in points 1 and 2 above may be challenged by another extraordinary appeal measure: a motion for re-opening of the proceedings submitted under Article 540b of the CCP.

In accordance with this provision, judicial proceedings concluded with a final and binding judgment may be re-opened upon the motion of the accused if the case was examined in the absence of the accused who was not served a notification of the date of the sitting or hearing of the court or such notification was not served on him personally and he is able to prove that he was not aware of the date and the possibility of a judgment being delivered in his absence. This provision does not apply when the notification of the date of the hearing or sitting of the court was served on the accused in the following ways:

1) the accused was not present at the address indicated to the procedural organs and consequently the notification was left at the post office closest to the address indicated by him two time, every time for 7 days, but the accused did not take this notification; Article 133 § 2 *in fine* of the CCP states that such notification is deemed to have been served;

2) the accused refused to accept and confirm the receipt of the notification; pursuant to Article 136 of the CCP if the addressee refuses to accept correspondence or refuses or is unable to acknowledge its reception, the person serving the document makes an appropriate note on the returnable receipt; the document is deemed to have been served;

3) the notification was sent to the address at which the accused is not present due to the change of place of residence of the accused, which the procedural organ should be informed about by the accused; pursuant to Article 139 § 1 of the CCP, any correspondence sent to the original address is deemed to have been served.

The motion for re-opening of the proceedings under Article 540b of the CCP cannot be effective also if the accused was represented by the defence counsel who participated in the hearing or sitting of the court.

The motion for re-opening of the proceedings may be brought within the time-limit of one month from the day on which the accused learned about the judgment issued against him. Pursuant to Article 123 of the CCP, this time-limit runs from the day after the day, when accused learned about the judgment. This is the so called "final time-limit" which means that a motion submitted after its expiry is ineffective, however it may be reinstated if failure to observe it occurred due to reasons independent from the accused (Article 126 § 1 of the CCP). With reference to a motion submitted out of time the president of the court shall issue an order refusing its examination. This order may be appealed. Unlike a motion for re-opening the proceedings, the application for reinstatement of a time-limit does not have to be prepared and signed by a defence counsel.

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[68] In accordance with Article 523 § 1 of the CCP, a cassation appeal may be brought due to violations listed in Article 439 § 1 of the CCP or „other flagrant infringements of the law if they might have a material impact on the content of the judgment".

[69] See, *inter alia*, judgment of the Supreme Court of 6 September 1996, case no. II KKN 71/96, OSNKW 1997, no. 1-2, item 14; judgment of the Supreme Court of 11 March 2015, case no. V KK 33/15, LEX no. 1653778; judgment of the Supreme Court of 7 July 2016, case no. V KK 187/16, LEX no. 2067792.

The current wording of Article 540b of the CCP was introduced by the 2016 amendment.

The motion for re-opening the judicial proceedings must be prepared and signed by a defence counsel (Article 545 § 2 of the CCP). If such motion is brought by the accused himself, it is considered as having formal defects. Thus, the accused shall be summoned to remove such defect within seven days (Article 120 of the CCP). If the accused is not able to cover the costs of a defence counsel, he may apply that *ex officio* defence counsel be appointed to him in order to prepare a motion for re-opening of the proceedings (Article 78 § 1a of the CCP). If the defect of the motion is not removed within the time-limit of seven days, the motion is deemed ineffective.[70]

In the motion for re-opening of the proceedings the accused should indicate that he was not properly informed about the date of the hearing or sitting of the court. It is also necessary to prove that he/she did not know about the date of the sitting or the hearing and the possibility of issuing a judgment in his absence. This lack of knowledge may be caused by incorrect instruction or the lack of service of a written instruction on the accused. A motion for re-opening of the proceedings may concern the whole and the part of the judgment.[71]

As transpires from Article 544 of the CCP, courts of three levels of jurisdiction may be competent to examine a motion for re-opening of the proceedings: regional courts, appellate courts or the Supreme Court. If a final judgment was issued by a district court a motion shall be examined by the competent regional court. Next, respectively, if the final judgment was issued by a regional court – a motion shall be examined by the competent appellate court. Finally a motion concerning final judgment issued by an appellate court shall be examined by the Supreme Court.

A motion for re-opening of the proceedings shall be examined at the sitting of the court conducted without the participation of the parties, unless the court or the president of the court decides otherwise (Article 544 § 3 of the CCP). The court or the president of the court may decide otherwise if there is a need to verify the factual circumstances of the case, for example, to carry out a specific evidence (Article 546 of the CCP).[72]

It needs to be emphasized that **re-opening of the proceedings under Article 540a of the CCP is not mandatory**. Thus, even if all prerequisites for re-opening indicated in this provision are fulfilled, the court may refuse the motion for re-opening if it considers that absence of the accused could not significantly influence the course of the proceedings, procedural guarantees of the parties and the outcome of the case.[73] Probably for this reason the measure defined in Article 540b of the CCP is not mentioned in the EAWs issued by the Polish authorities in part D as an effective measure of retrial.

If the motion for re-opening the proceedings is accepted, the court shall quash the judgment and remit the case to the competent court for re-examination. In other cases, the court shall dismiss a motion. The accused is entitled to appeal against the order by which his motion is dismissed unless it was issued by the appellate court or by the Supreme Court.

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[70] Decision of Supreme Court of 20 November 2013, case no. III Ko 56/13, LEX no. 1393829.
[71] D. Świecki, *Czynności procesowe obrońcy i pełnomocnika w sprawach karnych,* Warsaw 2010, p. 626 -627.
[72] J. Skorupka, *Komentarz do art. 100 Kodeksu postępowania karnego* [in:] Stefański R., Zabłocki S., [eds.] *Kodeks postępowania karnego.Tom I. Komentarz do art. 1-166*, Warsaw 2017, p. 1075.
[73] Decision of the Court of Appeal in Katowice of 12 July 2016, case no. II AKz 306/16, LEX no. 2139315.

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)?

See answer to para. 8.c.

The Polish law does not provide for explicit waiver of the right to appeal against the first instance judgment. The presumption that the accused is not going to appeal can be derived only from the fact that he does not request the statement of reasons of the judgment or, after receiving a copy of the judgment and the statement of reasons, he does not bring an appeal within the prescribed time-limit of 14 days. The adoption of such a presumption is possible even if the judgment was rendered in the absence of the accused. If the judgment has become final, the only possible way to challenge it is a cassation appeal or a motion for re-opening the proceedings, *inter alia*, under art. 540 b of the CCP.

Possible recourses against an *in absentia* judgment of conviction

9.

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

As was explained above, conducting the proceedings in the absence of the accused may be classified as "procedural error" under certain conditions which were presented in part. 8.c. of the paper. This procedural error may be classified as "absolute ground of appeal" if the presence of the accused at the hearing was mandatory. Article 439 § 1 point 11 of the CCP states that "Regardless of the limits of the appeal, of the objections raised and impact of an error on the contents of the judgment, the appellate court shall quash the appealed judgment if: […] the case was heard in the absence of the accused whose presence was mandatory."
This absolute ground of appeal may be invoked in an ordinary appeal against the first instance judgment and in a cassation appeal. Furthermore, the same infringement of the law (Article 439 § 1 point 11 of the CCP) may cause re-opening of the proceedings *ex officio* under Article 542 § 3 of the CCP. Finding this absolute ground of appeal always results in quashing the judgment, unless this would be against the interest of the accused. Thus, the judgment acquitting the accused cannot be quashed due to the infringement indicated in Article 439 § 1 point 11 of the CCP.

On the other hand, if the presence of the accused at the hearing was not mandatory, conducting the hearing in his absence may also constitute a breach of the law under certain circumstances described in para. 8.c. of this paper. Such infringement is classified as "a relative ground of appeal". It may be invoked in the appeal against the judgment. Furthermore, it may also provide a ground for lodging a cassation appeal, since such infringement is classified as flagrant breach of the law.

As was mentioned above, failure to notify the accused of the hearing may also be a reason for re-opening of the proceedings under Article 540b of the CCP.

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

An ordinary appeal (i.e. appeal against the first instance judgment which is not final and legally binding) results in examination of the case within the limits of the appeal, both as to the facts of the case and the law applied by the first instance court. In addition, the appellate court is obliged to analyse the case outside the scope of the appeal and objections raised in the appeal with reference to: 1) the so-called absolute grounds of appeal (described above – Article 439 § 1 of the CCP), 2) legal qualification of the charges brought against the accused (Article 455 of the CCP[74]) and 3) whether the judgment was not "manifestly unjust" within the meaning of (Article 440 of the CCP[75]).

If infringements indicated in article 439 § 1 of the CCP have occurred in the course of the proceedings the judgment shall be quashed and the case sent for re-consideration. In situations defined in Article 440 of the CCP or Article 455 of the CCP, the judgment may be quashed or changed by the appellate court.

As was stated above, examination of the case in the absence of the accused when his presence at the hearing is not mandatory may constitute a relative ground for appeal, when the accused 1) was not properly summoned to the hearing or 2) was duly summoned but requested adjournment of the hearing and properly justified his absence or was not present due to circumstances beyond his/her control, like natural disasters or other extraordinary obstacles, which should be known to the court. As indicated in para. 8.c. of this paper, this relative ground for appeal usually results in quashing the judgment by the appellate court. It may be also a ground for a cassation appeal as "flagrant infringement of the law" which results in quashing the judgment and remitting the case for reconsideration.

Re-examination of the case by the first instance court means that the trial should be repeated. However, if the accused was not present only at a part of the trial (for example at a few out of plenty dates of the hearing), the court examining the case for the second time is obliged to repeat only these evidence activities which were conducted at the hearing at which the accused was absent.

- 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);

[74] Article 455 of the CCP reads as follows: "Without changing factual findings, the appellate court shall correct an errouneous legal qualification regardless of the scope of the appeal and objections raised. A legal qualification may be corrected to the accused disadvantage only if the appeal was filed against him."
[75] Article 440 of the CCP provides that the judgment which is found to be manifestly unjust should be change to the accused' advantage or quashed in the cricumstances indicated in Article 437 § 2 second sentence of the CCP. It shoud be done by the appellate court regardless of the limits of appeal and objections raised in the appeal.

In principle, the appellate court is allowed to examine the case only within the limits of the appeal and objections indicated in the appeal. They may concern both the law and facts of the case. The court may consider the case in wider scope in the circumstances indicated in Article 439 § 1 of the CCP, Article 440 and Article 455 of the CCP (for details – see the answers above).
The appellate court may also conduct its own evidence and may established facts of the case. Only if there is a need to repeat the entire evidence proceedings, the judgment has to be quashed and the case remitted for re-consideration by the first instance court (Article 437 § 2 of the CCP). Furthermore, the appellate court is bound by "*ne peius*" principle. This means that the appellate court may not find guilty the accused who was acquitted in the first instance or the accused with regard to whom the proceedings in the first instance were discontinued or conditionally discontinued (article 454 § 1 of the CCP). The appellate court is also prohibited to increase penalty of imprisonment by imposing a penalty of life imprisonment (Article 454 § 2 of the CCP). In both cases the judgment must be quashed and the case remitted for reconsideration to the first instance court.
The first instance court to which the case is referred for re-examination is bound by opinions and instructions of the appellate court concerning further proceedings (Article 442 § 3 of the CCP). This provision applies accordingly in case of re-opening the proceedings under Article 540b of the CCP.

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

With reference to conditions of an appeal and re-opening the proceedings - see para. 8.c.
The time-frame for appeal measures is the following:

- an ordinary appeal against the first instance judgment which is not final shall be brought within 14 days from the date of notification on the accused of the judgment together with the statement of reasons.
- a cassation appeal shall be brought to the Supreme Court within 30 days from the service of the judgment and statement of reasons thereof.
- the motion for re-opening of the proceedings under Article 540b of the CCP shall be brought within one month from the day on which the accused learned of the judgment issued against him.

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;

Yes.
As was explained above, the motion for re-opening the proceedings under Article 540b of the CCP may be submitted if the case was heard in the absence of the accused who was not served a notification of the date of the hearing or such a notification was not served on him personally and he/she is able to prove that he was not aware of the date of the hearing and the possibility of judgment being rendered in his absence. However, pursuant to Article 540a of the CCP, the above provision does not apply if:

1) the accused was not present at the address indicated to the procedural organs and consequently the notification was left at the post office closest to the address indicated by him two times, every time for 7 days, but the accused did not take this notification; Article 133 § 2 *in fine* of the CCP states that such notification is deemed to have been served;
2) the accused refused to accept and confirm the receipt of notification; pursuant to Article 136 of the CCP if the addressee refuses to accept correspondence or refuses or is unable to acknowledge its reception, the person serving the document makes an appropriate note on the returnable receipt; the document is deemed to have been served;
3) the notification was sent to the address at which the accused was not present due to the change of residence, which was not communicated to the procedural organ; pursuant to Article 139 § 1 of the CCP, any correspondence sent to the original address is deemed to have been served.

Furthermore, as already stated in this paper, only the notification of the first date of the hearing must be served directly on the accused (personally on him or by substitute service resulting in the presumption of delivery under Article 133 § 2 of the CCP). If the law requires the notification of the date of the subsequent hearing (which is not the case with reference to adjourned date of the hearing) the notification may be served in every manner provided for by the law, including to the hands of the adult member of the household of the accused. Consequently, if the accused was notified properly of the date of the subsequent hearing (for example the date of a deferred hearing) but this notification did not reach him since it was not transmitted to him by the adult member of the household and at the same time he was notified properly about the first date of the hearing, he will rather not be able to request re-opening the proceedings under Article 540a of the CCP. This is because it would be very difficult to prove that he did not know about the hearing and the possibility of rendering the judgment in his absence.

As stated above, different measure may be applied when the court conducted the proceedings in the absence of the accused whose presence was mandatory in accordance with the law. Then, conducting the hearing in the absence of the accused (whose presence is mandatory) is still possible in exceptional circumstances listed in Article 376 of the CCP (if the accused has already provided explanations) and Article 377 of the CCP. Pursuant to Article 377 § 3 of the CCP, the hearing may be conducted in the absence of the accused who fails to appear even if he has not yet provided explanation. However, this is only possible if the accused was notified of the date of the hearing "personally". In accordance with the constant case-law, the notion "personally" means that the accused personally confirmed the receipt of the notification or that the accused was informed about the date of the hearing personally in the courtroom, which was confirmed in the record of the hearing.[76]

Summarising, if the accused, whose presence at the hearing was mandatory, was notified of the date of this hearing personally and failed to appear, the Polish law provides for conducting

[76] See, inter alia, judgment of the Supreme Court of 20 July 2011, case no. V KK 218/11, LEX no. 897784; the judgment of the Supreme Court of 3 February 2012, case no. V KK 438/11, OSNKW 2012, no. 5, item 51.

the proceedings in his absence. However, if in the above described circumstances, the notification of the date of the hearing was not served directly on the accused, conducting the hearing in the absence of the accused constitutes an absolute ground for appeal. Such proceedings may be re-opened *ex officio* under Article 542 § 3 of the CCP. As was underlined above, the accused may also request re-opening of the proceedings based on the absolute grounds for appeal listed in Article 439 § 1 of the CCP (Article 542 § 3 of the CCP). His/her motion shall be based on Article 9 § 2 of the CCP.

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

The motion for re-opening the proceedings under Article 540b of the CCP cannot be effective if the accused was represented by the defence counsel who participated in the hearing or the sitting of the court.

However, if the law provides for mandatory presence of the accused at the hearing, conducting the hearing in his absence, except in circumstances indicated in Article 376 or 377 of the CCP, constitutes the absolute ground for appeal. Thus, in these cases the presence of a defence counsel at the hearing does not validate the infringement of the law indicated in Article 439 § 1 point 11 of the CCP.

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

As already explained, in principle the first instance judgment is not served on the accused *ex officio* but upon his motion. The only exception concerning ordinary proceedings is regulated in Article 422 § 2a of the CCP. There are no special rules concerning serving a judgment and the statement of the reasons thereof. Thus, the general rules concerning serving a correspondence apply.

It is worth stressing, that this issue was regulated differently prior to the 2016 amendment of the CCP. From 1st July 2015 until 14th April 2016, every judgment pronounced in the absence of the accused was served on him. Moreover, if the judgment was delivered at the sitting of the court, it had to be served on the accused directly or by substitute service regulated in Article 133 § 2 of the CCP. Hence, such a judgment could not be served on the accused indirectly to the hands of the adult member of the household of the accused or other person indicated in Article 132 § 2 of the CCP.

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;

No. As was mentioned above, the time-limit starts to run from the moment on which the accused learned of the judgment.

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

Yes, see remarks concerning Article 540b of the CCP.

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

No.

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?

Pursuant to Article 535 of the CCP, the Supreme Court shall examine a cassation at the hearing and, in cases provided for by law, at the sitting of the court without participation of the parties. A cassation which is manifestly ill-founded or manifestly well-founded and brought to the advantage of the accused, may be examined at the sitting of the court without the presence of the parties. If a cassation is examined at the hearing of the Supreme Court, the presence of the accused is not mandatory. Thus, if the accused was notified of the date of the hearing, his absence does not prevent the Supreme Court from examining a cassation. The accused who is deprived of liberty shall be brought to the hearing only if the President of the Supreme Court considers his presence necessary.

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

No. With one exception the Supreme Court cannot change the final judgment. So, if it finds a cassation well-founded, it must quash the judgment and remit the case for reconsideration to the first instance court, or, depending on the circumstances, to the appellate court. The only exception to this rule applies if the Supreme Court finds the conviction manifestly unjust. Then the Supreme Court may acquit the accused (Article 537 § 2 of the CCP).

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

Transposition of Directive 2016/343

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

No. the Directive 2016/343 was not transposed into the Polish law. However, on 4 December 2018 the Ministry of Justice announced considerable changes of the CCP. As transpires from footnote 1 to the title of this draft law, it is aimed to implement the 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, as well as the directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.
The draft law is currently subject to public consultations.

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

No changes until now (see, answer to question 11).

National legislation

13. Please provide:

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

- an English translation thereof.[77]

Polish text of the relevant provisions concerning service of summons

2.2. Transposition of the FD's

Explanation

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

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

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

Whereas part 2.1 concerns *national criminal procedure law*, part 2.2 concerns *national law transposing Art. 4a FD 2009/299/JHA*. Although at first blush there may seem to be some overlap of questions in parts 2.1 and 2.2, the questions in parts 2.1 and 2.2. have quite distinct purposes. An example. The topic of absence at the trial, but presence at the pronouncement of the judgement is dealt with in both sections: question 4 and question 61. Question 4 tries to establish how absence at the trial but presence at the pronouncement of the judgment is considered from the perspective of your Member State's national criminal procedure law. Does absence at the trial but presence at the pronouncement of the judgment make the proceedings *in absentia* proceedings according to the national criminal procedure law of your Member State or not? Question 61 tries to establish how absence at the trial but presence at the pronouncement of the judgment should be viewed from the perspective of the national law

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

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.]

A. General questions

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

Yes. Article 5 (1) of the FD 2002/584/JHA was implemented into Article 607u of the CCP (in force until 13 November 2011. This provision read as follows:

"Where the European arrest warrant has been issued for the purpose of executing a sentence or security measure rendered in absentia and if the requested person has not been summoned to participate in the proceedings or otherwise informed about the date and place of the hearing or the sitting of the court, surrender is possible only if the issuing judicial authority provides the requested person with the assurance that he will have an opportunity to apply for a retrial of the case in the issuing state after surrender."

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

The FD was transposed into the Polish law by the Act of 29 July 2011 (Journal of Laws of 2011, no. 191, item 1135) which entered into force on 14 November 2011.

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

In 2011 when the FD was implemented into the CCP, there was no case law of the Court of Justice concerning Article 2 FD 2009/299/JHA.
It should be underlined that in 2011 the model of participation of the accused in the hearing was different than currently. As was explained above, as a rule the presence of the accused at the hearing in ordinary proceedings was mandatory. Only exceptionally the court could conduct the hearing without the presence of the accused. This was possible only in the circumstances described in Article 376 and 377 of the CCP. Furthermore, the court could proceed in absence of the accused at the sittings in the so called consensual proceedings when the sentence was agreed upon by the accused and the public prosecutor at the pre-trial stage of the proceedings. In addition, at that time the CCP provided for the simplified proceedings (removed from the CCP as from 1 July 2015) in which the judgment could be rendered *in absentia* (the so called "in absentia" judgment (Polish: "wyrok zaoczny" – Article 479 § 1 of the CCP). In all the above mentioned cases the court could conduct the proceedings despite the absence of the accused

only if he was duly summoned to a hearing or a sitting of the court. For this reason the legislator decided to implement Article 2 FD 2009/299/JHA by providing a new ground for re-opening of the proceedings which were conducted in absentia although the accused had not been properly summoned to the hearing or properly served with the judgment rendered in absentia (in simplified proceedings an "in absentia judgment" had to be served on the accused – Article 482 § 1 of the CCP in force until 1 July 2015).

The act implementing Article 2 of the FD 2009/299/JHA introduced a new ground for re-opening of the proceedings upon the motion of the accused. The new Article 540b of the CCP read as follows:
§1. Judicial proceedings concluded with a final judgment may be re-opened upon the motion of the accused, submitted within a month from the day on which the accused learns of the judgment issued against him, if:

1) the hearing was held in the absence of the accused who was not served a notification of the date of the hearing or sitting of the court, or such a notification was not served on him personally and he is able to prove that he was not aware of the date and the possibility of the judgment being delivered in his absence;
2) a decision referred to in Article 100 § 2 and 3[78], issued in the absence of the accused, or the judgment issued in accordance with Article 479 § 1[79], were not served on the accused or were not served on him personally and the accused is able to prove that he was not aware of its content and of his right to appeal against such a judgment and the time-limit and the manner of submitting an appeal.

§ 2. The provision of § 1 does not apply in cases referred to in Article 136 § 1 and Article 139 § 1 and also if the defence counsel has participated in the hearing or the sitting of the court.

Article 136 § 1 of the CCP provides that a document is deemed to have been served if the addressee refuses to accept correspondence. Pursuant to Article 139 § 1 of the CCP (in force at that time) if the accused changed his place of residence without informing the court of the new address or did not reside at the address indicated by him, any correspondence sent to the original address was deemed to have been served. As explained above, until 1 July 2015 the change of the place of residence caused by deprivation of liberty (for example detention on remand) was not considered as voluntary. Thus, the accused was not obliged to inform the court about such change of residence.

It is very difficult to assess whether the national law implementing FD deviated from it.
First of all the purpose of FD was not to harmonise the national law concerning in absentia proceedings or rules on serving summons in national criminal proceedings (see, recital 14 of the FD). For this reason the Polish legislator decided that no changes are necessary in the above mentioned scope. The only amendment introduced into the CCP with the aim to lower the risk of refusing execution of the EAW's issued by Polish judicial authorities was the above mentioned Article 540b of the CCP. However, it should be underlined that this is the optional ground for re-opening of the proceedings. The court is not obliged but only "may" re-open the proceedings. As transpires from the interviews with judges, they do not consider Article 540b of the CCP as a ground for re-trial under Article 4a (1) (d) of the FD 2002/584/JHA.

On the other hand, the Polish law at that time fulfilled the conditions indicated in Article 4a (1) (a-c) FD 2002/584/JHA. First of all in ordinary proceedings the presence of the accused at the

[78] This includes the judgments rendered at the sitting of the court in the absence of the accused, within the framework of the consensual proceedings.
[79] As was mentioned above, this is an "in absentia" judgment issued in the simplified proceedings.

hearing was mandatory. Thus, the court could conduct the trial only if the accused appeared at the hearing. Exceptions to this rule expressed in Articles 376 and 377 of the CCP were based on the concept of waiver of the right to participate in the hearing. The court was allowed to conduct the hearing without the presence of the accused only if he had been duly informed of the date of the hearing. In particular, Article 377 of the CCP stated that in order to conduct the trial in the absence of the accused, he had to be informed personally about the date of the hearing. Thus, in the ordinary proceedings the condition of Article 4a (1) (a) FD was fulfilled.
Furthermore, Article 100 § 3 of the CCP provided for the obligation to serve on the accused the judgment issued at the sitting of the court in the framework of consensual proceedings.
Hence, only in case of indirect summoning of the accused to the sitting of the court in consensual proceedings and indirect service of a judgment issued in his absence the accused could not be aware of the judgment rendered against him (for example due to failure to transmit the correspondence to the accused by the adult member of his household). However, it should be underlined that the accused had to be aware of the judicial proceedings conducted against him since he reached an agreement with the public prosecutor concerning the proposed sentence.

In principle only in cases examined in simplified proceedings the accused could not be aware of the judicial proceedings and the judgment rendered against him. This could be a case if the accused was summoned to the hearing indirectly (i.e. a summons was served to the hands of the adult member of the household who did not transmit it to the accused) and also an "in absentia" judgment was served on him in exactly the same way. Then the accused was not aware of the judgment which became final and binding after expiry of 7-day time-limit for submitting an objection. With reference to such cases Article 540b of the CCP offered full re-trial. However, as mentioned above, it was implemented as an optional ground for re-opening of the proceedings. Moreover, for a motion submitted under Article 540b of the CCP to be effective, the accused had to prove that he was unaware of the date of the hearing. Thus, he had to prove that both a summons to the hearing and an "in absentia" judgment were not transmitted to him by an adult member of his household.
On the other hand, also in the simplified proceedings the accused had to be heard at the pre-trial stage of the process. Thus, he had to be aware of criminal proceedings conducted against him.

The wording of Article 540b of the CCP was changed by the 2015 amendment. As from 1 July 2015 the simplified proceedings were removed from the CCP. For this reason, the reference to Article 479 § 1 was removed from Article 540b § 1 of the CCP. Moreover, since 1 July 2015 all judgments pronounced in the absence of the accused had to be served on the accused. This resulted in the change in Article 540b § 1 of the CCP (the words "Article 100 § 2 and 3" were replaced by "Article 100 § 3 and 4"). The last amendment concerned Article 540b § 2 of the CCP regulating exceptions to the possibility of requesting the re-opening of the proceedings. This opportunity was excluded also with reference to cases in which a summons to the hearing was served by substitute service (i.e. was left in the postal office closest to the place of residence of the accused).
The second change of the wording of Article 540b of the CCP was introduced by the 2016 amendment. The current wording of Article 540b of the CCP was quoted above.

The act implementing the FD 2009/299/JHA introduced also two changes in Chapter 65b of the CCP concerning execution of the EAWs.
Article 607r of the CCP was supplemented by § 3 which reads as follows:

"§ 3. Execution of a European arrest warrant issued for the purpose of executing a penalty or measure consisting of deprivation of liberty imposed in the absence of the requested person may be refused, unless:

a) the requested person was summoned to appear in the proceedings or otherwise notified of the time and place of the hearing or sitting of the court and was informed that the failure to appear did not prevent the court from issuing a judgment or if the requested person was represented by a defence counsel who was present at the hearing or sitting of the court.
b) after being served with the judgment together with the instruction about the right, the time and the manner of submitting a motion for re-examination of the case in his presence in the issuing state, the requested person has failed to submit such a motion within the statutory time-limit or declared that he does not object to the judgment.
c) the authority which issued the European arrest warrant assures that immediately after surrender of the requested person to the issuing state, he will be served a copy of the judgment together with the instruction about the right, time-limit and manner of submitting a motion for conducting a new judicial proceedings in the same case in his presence."

The second change in Chapter 65b of the CCP was aimed at implementation of Article 4a (2) of the FD 2002/584/JHA as amended by the FD 2009/299/JHA. The amended Article 607u of the CCP reads as follows:
"If a European arrest warrant was issued for the purpose of executing a penalty or measure consisting of deprivation of liberty rendered in the conditions defined in Article 607r § 3 (c) of the CCP, the requested person shall be instructed of the right to request a copy of the judgment. The information about such a request shall be transmitted immediately to the state which issued the European arrest warrant and, after the judgment is received, it shall be served on the requested person. The submission of the request shall not suspend the execution of the European arrest warrant."

It is clear that the wording of Article 607r § 3 of the CCP is not the same as Article 4a (1) of the FD 2002/584/JHA. First of all, no requirement of personal summoning of the requested person was included into Article 607r § 3 (a) of the CCP. Furthermore, this provision does not require that the requested person be informed of the date of the hearing "in such a manner that it was unequivocally established that he or she was aware of the scheduled trial".

Furthermore, the requirement that the defence counsel participating in the hearing shall be given a mandate by the requested person who "was aware of the scheduled trial" is not embodied into Article 607r § 3 (a) of the CCP. Summarising, the prerequisites of refusal of cooperation and mutual recognition defined in Article 607r § 3 of the CCP are more rigorous than in the FD 2009/299/JHA. However, the protection of the right of the requested person provided in Article 607r § 3 of the CCP is not lower than that offered by the FD. It should be underlined that Article 4a of the FD 2002/584/JHA regulates the optional ground for refusal of execution of the EAWs. Thus, the executing authorities are allowed to surrender a requested person even if the judgment was rendered *in absentia*. To the contrary, these authorities are not allowed to refuse execution of EAWs concerning the judgment rendered *in absentia* if the the European arrest warrants met the requirements of Articla 4a of the FD. Thus, the Polish law which provide for less strict requirements under which the execution of EAWs cannot be refused shall not be assested as contrary to the FD.

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?

Article 4a FD was transposed to the Polish law **as an optional ground for refusal**, as required by the FD 2009/299//JHA. There was no debate on this issue. Also the written reasoning to the draft Act implementing the FD 2009/299/JHA does not contain any explanation with reference to this choice.

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?

I think that this ground for refusal shall be implemented by the Member States. Although this was not the purpose of the FD, it had some impact on the harmonization of the procedural guarantees for persons who were not present at the hearing.

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

Not applicable.

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

As transpires from the reasoning of the decisions on the execution of the EAWs, the Polish courts take into account both mandatory and optional grounds for refusal. Usually this is reflected in the written reasons of the decision on the execution of EAWs by the following sentence: "no optional grounds for refusal defined in Article 607r of the CCP were found in the case." In some decisions courts noted that a requested person was sentenced in absentia and shortly explained why, despite this fact, the surrender is possible. For example, in one of the analysed decisions a court stated that a requested person was sentenced *in absentia* but he was represented in the proceedings by a defence counsel appointed by a requested person and was aware of the opportunity to request the re-trial after surrender.

As transpires from cases examined by the Warsaw Regional Court and the Lublin Regional Court, in practice a requested person is brought to the sitting of the court at which the European arrest warrant is decided. A requested person is asked by the court whether he would like to submit any explanations (statements). Thus, the court may be informed by a requested person that he or she was not aware of the judicial proceedings conducted against him and issuing the judgment. In majority of cases requested persons agreed to surrender or even asked for quick execution of the EAW.

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

In Poland all regional courts are competent to issue the European arrest warrants. The EAWs may be issued *ex officio* (in cases pending before regional courts), upon a motion of the public

prosecutor (at the pre-trial stage of the proceedings) or upon the motion of a court before which the case is pending different than regional court.
Also all regional courts are competent to execute the EWAs.

B. Your Member State as issuing Member State

22.

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

It depends on the regional court. In some regional courts the draft EAWs are filled in by the assistant of a judge. I others - by a court's clerk (specialist) trained in the field of legal cooperation in criminal matters or by a judge himself. I is always done under the supervision of a judge. Thus, technical work may be done by a different person than a judge (the court's clerk), but a judge (the court) must check the content of EAW and sign it.

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

Yes. The Minister of Justice issued the Ordinance of 24 February 2012 concerning the form of the EAW (Journal of Laws 2012, item 266). The official form of the EAW is attached to this Ordinance. It is almost the same as the form of the EAW attached to the FD 2002/584/JHA as amended by the FD 2009/299/JHA.
The above mentioned Ordinance replaced the Ordinance of the Minister of Justice of 20 April 2004 which provided for the old form of the EAW.
Unfortunately, the original points (1, 2, 3, 3.1.a., 3.1.b., 3.2., 3.3., 3.4., and 4) of the EAW's form are not reflected in the Polish EAW's form. The difference does not concern the content of part D of the EAW's form but only numbers. They are reflected in the following way:
Points 1 and 2 of the original EAW's form are not numbered in the Polish EAW's form. Only two boxes are indicated to be ticked.
Point 3 in the original EAW's form is numbered as section 1 of part D of the Polish EAW's form. The content of point 3.1.a. is reflected in section 1.a. of the Polish EAW's form. The content of point 3.1.b. is reflected in section 1.b. of the Polish EAW's form. The content of point 3.2. is reflected in section 1.c. of the Polish EAW's form; point 3.3. – in section 1.d. of the Polish EAW's and point 3.4. – in section 1.e. of the Polish EAW's form. Finally point 4 of the original EAW's form is reflected in section 2 of the Polish EAW's form.

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?

Part 3 is not filled in if a requested person participated in the trial. Then the options under 3 are crossed out and the court shall tick 1 ("Yes, the person appeared in person at the trial resulting in the decision" – the first box in the Polish EAW's form). Sometimes in part 4. (explanations) the court explains what is meant under the notion "participated personally". For example, in one of the EAW's issued by the Warsaw Regional Court it was explained that a requested person was represented by a defence counsel and additionally was personally present in a few dates of the hearing but was absent at the hearing at which the judgment was pronounced.

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

Usually the judicial authority explains the way in which a summons to the hearing or a judgment was served on the requested person. In particular, quite often the substitute service of a summons is explained. The information is provided that a summons was sent twice to the address indicated by a requested person and was not collected by him from the post office on time. It is explained that a correspondence sent in such a way is deemed to be properly served on the accused. It is also explained that at the pre-trial stage of the proceedings every suspect is informed about the consequences of not collecting the correspondence in the proceedings.
Also the details of the participation of the accused in the hearing are provided. For example, it is explained that the requested person participated in a few out of many of the dates of the hearing or that a requested person was not present at the hearing at which the judgment was pronounced. Sometimes it is explained that the judgment was delivered in the consensual proceedings, so the accused was aware of the judicial proceedings and expressed his consent with reference to the content of the judgment.
In case of the EAW's concerning a cumulative judgment it is sometimes explained whether "single" judgments replaced by the cumulative judgment were issued in the presence of the accused. Also information is provided whether the accused was represented by an *ex officio* defence counsel or a defence counsel appointed by him.

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?

As will be explained later on, the right to re-trial under Article 540b of the CCP usually is not indicated in the EAW's form as an effective measure available for surrendered person after surrender to Poland. For this reason, the judge interviewed in the Lublin Regional Court has never been confronted with such a case.

On the other hand, in the Warsaw Regional Court they proceed as follows. Since all EAWs in this Court are issued by the VIII Chamber upon requests of various courts from the Warsaw region, the special form was elaborated in the Chamber VIII for courts which apply for issuing the EAW for the purpose of execution of penalty. This is the Ordinance of the President of the Regional Court in Warsaw of 31 January 2018 "Form of procedural activities in case of the judgment rendered in absentia". In accordance with this Ordinance, every court which applies to the Warsaw Regional Court for issuing the EAWs concerning the judgment rendered in absentia, shall fill in the *Form attached to the Ordinance*. This Form is identical to part D of the EAW's form. In this way the court which is responsible for supervision of the execution of the sentence after surrender by ticking the relevant section in the *Form attached to the Ordinance* undertakes to fulfil the obligations stemming therefrom. If the requesting court is ticking the section concerning obligation to inform the requested person of the right to re-trial, the obligation to provide such information rests on the court which requested issuing the EAW. The Regional Court competent to issue the EAW is not responsible for further procedural actions which shall be taken by the court responsible for supervision of the execution of the penalty after the surrender.

However, in none of the dozens of European Arrest Warrants issued by the Lublin Regional Court, the Warsaw Regional Court and the Zamość Regional Court and examined within the framework of this project was re-trial under Article 540b of the CCP ticked as an option in part D of the EAW's form.

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

As was mentioned above, since usually Article 540b of the CCP is not indicated in the EAWs as a measure of re-trial, surrendered person starts to execute the penalty after surrender. However, if there is a need to apply detention on remand, all general rules apply to such a person. Thus, he is entitled to appeal against detention order (Article 252 of the CCP) and submit a motion for quashing a detention order at any time (Article 254 of the CCP).

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)?

Pursuant to Article 607u of the CCP at the sitting of the court a requested person is informed about the right to request a copy of the judgment. If such a request is submitted by the requested person, the issuing authority is immediately informed about it, usually by fax. After a copy of a judgment is received, it shall be served on the requested person.
As transpires from the practice of the Warsaw Regional Court, in a few cases a person requesting a copy of a judgment was also requesting immediate surrender (the consent to surrender was expressed by the requested person). In accordance with Article 607u of the CCP, the submission of the request does not stop the execution of the EAW. So, in a few cases the requested persons who consented to surrender were surrendered before a copy of a judgment could be served on them.

D. EAW-form

Explanation
All Member States have now implemented FD 2009/299/JHA (Greece being the exception). Art. 2 FD 2009/299/JHA inserts Art. 4a in FD 2002/584/JHA and amends section (d) of the EAW-form. All issuing judicial authorities are obliged to use the EAW-form as amended by FD 2009/299/JHA (Art. 8(1) FD 2002/584/JHA). [One could argue that even Greek issuing judicial authorities are obliged to use the amended EAW-form, because the executing judicial authorities of all other Member States will apply the rules set out in Art. 4a FD 2002/584/JHA.]

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

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

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

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

Yes, see answer to question 22b.

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?

If a relevant information is provided in the old form of EAW, the Polish executing authority does not request the new EAW. If the EAW does not contain the relevant information or in case on any doubts as to the content of the EAW – the executing authority is requesting additional information in accordance with Article 607z of the CCP[80].

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*

[80] Article 607z of the CCP reads as follows:
§1. If information provided by the issuing State is insufficient to decide on the surrender of the requested person, the court requests the judicial authority that issued the European warrant to furnish supplementary information within a specified time-limit.
§ 2. If the time-limit reffered to in § 1 is not observed, the European warrant is examined on the basis of the initially received information.

English translation of the original EAW. In such cases the text of the English translation sometimes deviates from the official English EAW-form;

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

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

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

- what does this declaration entail?
- where was it published? Please provide a copy in English.

No, Poland has not made a declaration under Article 8(2) FD.

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?

This is not a problem in the practice of the Polish courts. One judge stated even that this is an abstract problem. Another judge explained that problems with understanding of the EAW are rather exceptional. However, in case of lack of clarity (he/she remembered only one such case), the new translation of the original EAW was ordered by the Polish court and the issuing authority was informed about the low quality of the translation. Lack of clarity may also be removed by requesting supplementary information under Article 607z of the CCP.

F. Multiple decisions

Explanation

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

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

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

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

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

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

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

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

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

The interviewed judges underlined that in Poland issuing the judgment in absentia is only an optional ground for non-execution of the EAW. So, they act in accordance with the principle of mutual recognition and mutual trust. They assume that the right to a fair trial was guaranteed in criminal proceedings conducted in the issuing Member State. However, in case of any doubts it is possible to ask for supplementary information on this issue under Article 607z of the CCP. Additionally, at the sitting the court may ask the requested person whether he was aware of the proceedings conducted against him in case mentioned in part B of the EAW.

In one case of the Jelenia Góra Regional Court acting as an executing authority (see answer to question 49) asked for additional information concerning participation of the requested person in the proceedings by which the original fine was converted into the penalty of imprisonment. On the basis of the EAW's form it was clear that the requested person was duly summoned to the hearing in the main proceeding in which a fine was imposed on him. However, the Court decided to examine whether prerequisites of Article 4a of the FD were fulfilled with reference to the subsequent proceedings by which a fine was converted into the penalty of imprisonment. Having obtained additional information on this issue from German authorities, the Jelenia Góra Regional Court decided to refuse execution of the EAW since the requested person was not aware of the latter proceedings by which the original penalty was changed into imprisonment.

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?

In Poland every procedural agreement as to the sentence reached between the public prosecutor and the accused has to be accepted by the court in the form of a judgment sentencing the accused. Thus, successful consensual proceedings result in a judgment being pronounced by the court at the sitting. This judgment may be issued *in absentia* or in the presence of the accused. If the accused appears at the sitting of the court, the judgment is rendered in his presence. If he fails to appear although duly summoned – the judgment is rendered in absentia.

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?

In Poland every decision imposing a criminal penalty must be issued by the court.

However, as was mentioned in answer to question 30, sometimes Article 4a of the FD may be applied to a decision by which a non-custodial penalty is converted into a custodial sentence. In particular, in Poland and also in some other jurisdictions if a convict is not paying a fine, it may be converted into a penalty of imprisonment (Article 46 of the Code on Execution of Criminal Penalties; thereafter referred to as "the CECP"). The same applies to a penalty of limitation of liberty which also may be converted into a penalty of imprisonment (Article 65 § 1 of the CECP). In my opinion in such cases Article 4a of the FD shall be applied to the proceedings by which a non-custodial penalty is converted into a custodial sentence. In Poland in both proceedings a convict has a right to participate in a sitting of a court at which a non-custodial penalty is to be converted into a custodial sanction (Article 48 of the CECP with reference to conversion of a fine and, respectively, Article 65 § 3 of the CECP with reference to a conversion of a penalty of limitation of liberty). Thus, a convict shall be duly summoned to such sitting of the court.

This conclusion is particularly justified in cases in which an original penalty was imposed by penal order (Polish: "wyrok nakazowy") which is issued at the sitting of the court without the presence of the accused.

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

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

Yes, see, answer to question 31.

- 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?

Only a judge (the court) may impose a penalty in Poland (of course I do not take here into account the procedure concerning petty offences in which a fine may be imposed by the police officer, for example for petty traffic offences).

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?

It is a common view of the interviewed judges that the trial is not held "in absentia" if the accused was present at least in one date of the hearing conducted by the first instance court. Such answer was provided to the question what is understood as "in absentia" proceedings with reference to the general course of examination of a criminal case. It shall be stressed that the notion "in absentia proceedings" is connected by Polish judges mainly with special proceedings provided for in Articles 173-177 of the Code of Fiscal Offences. Such proceedings may be conducted even if a defendant is not aware thereof. In ordinary criminal cases a defendant is aware of the judicial proceedings conducted against him, concerning offences prosecuted *ex officio*. Thus, if the accused was present at the hearing at which the judgment was pronounced but failed to appeal at the previous dates of the hearing although duly summoned, the trial was not held in absentia. The contrary situation, i.e. the presence of the accused at some hearings but his absence at the hearing at which the judgement was pronounced is also not classified as

"in absentia" proceedings. It is important that the accused was aware of the trial conducted against him. It was explained above that the accused should be informed of the date of the hearing. If the court failed to summon the accused to the hearing and despite this he appeared at the hearing at which the judgment was pronounced, he may request re-examination of the case in his appeal invoking the infringement of the right to defence.

With reference to the law of the EAW's, this opinion is supported by the wording of Article 607r § 3 (a) of the CCP which refers to "participation in the proceedings". Thus, the judgment is not issued in absentia, if the requested person "was summoned to participate in the proceedings or otherwise notified of the time and place of the hearing or sitting of the court." Furthermore, as explained above, Article 540b of the CCP offers an opportunity to request the re-opening of the proceedings "if the case was heard in the absence of the accused" only if he proves that he was unaware of the date of the hearing.

On the other hand the analyses of the EAWs issued by the Regional Court in Lublin, the Regional Court in Warsaw and the Regional Court in Zamość allow to draw the following conclusion.

1) In some cases the presence of the accused at some dates of the hearing but his absence at the hearing at which the judgment was pronounced was classified as "in absentia" trial (section (d)(2) was ticked by the court in the EAW – "no, the person did not appear in person at the trial resulting in the decision"). In the Warsaw Regional Court - 4 cases; in the Lublin Regional Court: 2 cases; in the Zamość Regional Court: 2 cases.

2) In some cases the presence of the accused at the hearing in some dates but his absence at the court date at which the judgment was pronounced was classified as "personal presence" (section (d)(1) was ticked by the court) – in the Warsaw Regional Court: 2 cases; in both cases additional explanation was provided in part. (d)(4) of the EAW.

The number of cases under 1) seems to prevail. Thus, in practice of filling in the EAW's form the term "the trial resulting in the decision" is rather interpreted as meaning the hearing at which the merit of the case was examined.
The analyses of the EAW's issued by the Polish courts allow to draw the conclusion that while acting as issuing authority, the Polish judges take into account the meaning of "in absentia" proceedings as provided in Article 4a of the FD. Thus, absence of a defendant at some dates of the hearing concerning merits of the case is mainly considered as "in absentia" proceedings (see point 1) above). However, in minority of the analysed cases presence of a defendant at some of the dates of the hearing as to the merit was also classified as personal presence (see point 2 above).

G.3 Trial consisting of several hearings

Explanation

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

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

35.

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

No. See answer to question 34.

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

No, see answer to question 34.

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'?

See answer to question 34.

G.4 Personal summons

Explanation

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

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

and

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

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

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

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

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

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

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

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

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

The term "in due time" was not introduced to Article 607r § 3 (a) of the CCP. Thus, the Polish court acting as the executing judicial authority is not obliged to check whether the summons was served on the requested person "in due time" before the hearing.
However, in accordance with the general rules of the Polish criminal procedure the accused should receive the summons at least 7 days before the hearing in order to prepare his defence (Article 353 § 2 and 3 of the CCP discussed in Part 1 of the questionnaire). The interviewed judges stated that for them this time-limit of 7 days applicable in Poland would be a good point of reference for assessing whether the requested person was offered a fair trial in the issuing state. This issue may be invoked by the requested person at the sitting of the court concerning execution of the EAW.
It should be additionally explained the Article 607p § 1 (5) of the CCP provides that the EAW shall not be executed if it would violate human rights of the requested person. This is an mandatory ground for refusal. The interviewed judges stated that they assess the admissibility of surrender having due account to the right to a fair trial of the requested person.

37.

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

As was explained above, Article 607r § 3 (a) of the CCP does not reflect the requirement indicated in Article 4a (1)a(i) FD that it must be "unequivocally established that the accused was aware of the scheduled trial". The interviewed judges stated that they trust the judicial authority of the issuing state. So only if the requested person or his defence counsel contests the receipt of the summons this issue is examined by the court. In case of doubts the executing authority may adjourn the sitting concerning execution of the EAW and ask for additional information under Article 607z of the CCP.

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

Yes, a declaration of the requested person that he actually received the information is sufficient.

G.5 Defence by a legal counsellor

Explanation

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

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

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

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

Given that 'Article 4a(1)(a) and (b) of Framework Decision 2002/584 lays down the circumstances in which the person concerned must be deemed to have waived, *voluntarily* and *unambiguously*, his right to be present at his trial' (*Melloni*, par. 52, emphasis added), ticking point 3.2 under these circumstances does not seem to be in accordance with this provision.

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

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

Article 607r § 3 (a) of the CCP provides that the court may refuse the execution of the EAW unless "the requested person was assisted by a defence counsel who attended the hearing or the sitting." The requirement mentioned in question 38 is not reflected in the wording of this provision.
The interviewed judges said that for them it is enough that the accused knew or must reasonably have expected that a trial would be held.

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

As was mentioned above, Article 607r § 3 (a) of the CCP does not reflect the whole wording of Art. 4a(1)(b) FD. Thus, the Polish courts are obliged to examine only whether the requested person was assisted by a defence counsel in the issuing state and whether a defence counsel participated in the trial. Thus, the question of "giving a mandate to a defence counsel" is analysed only if the requested person contests that he was aware of being represented by the defence counsel in the criminal proceedings conducted in the issuing state. If this is a case, the executing authority may adjourn the sitting concerning execution of the EAW and ask for additional information under Article 607z of the CCP.

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?

See answer to question 39.

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?

Any doubts as to the explanations given in part (d)(4) may be removed in two ways. Frist of all in case of in absentia judgments the requested person in asked at the sitting of the court whether he was aware of the proceedings conducted against him in the issuing state. Furthermore, the executing authority may request additional information under Article 607z of the CCP.
As transpires from the cases analysed for the purpose of this questionnaire, in decisive majority of cases of the EAWs issued with reference to in absentia judgments, the requested persons agreed to surrender and did not rely on Article 607r § 3 of the CCP as a ground for refusal.

In some analysed cases the EAWs' forms were filled incompletely, for example only a part of section D was included into the EAW. For example, it contained only information as to the right to re-trial after surrender. This was sufficient for proper examination of the optional ground for refusal indicated in Article 607s § 3 of the CCP if at the sitting of the court the requested person confirmed that he/she is aware of the right to request a re-trial.

G.6 The decision has been served

Explanation

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

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

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

The condition that the requested person must also have been 'expressly informed' of his right to retrial or an appeal seems to suggest that the requested person must have actually received the information about his right to a retrial or an appeal and seems to confirm that the requested person must also actually have received the decision.

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

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

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

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

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

Article 607r § 3 (b) of the CCP which reflects the content of Article 4a (1) (c) of the FD does not precise the way of serving a judgment on the requested person. Thus, as a rule, the Polish court acting as the executing authority would trust the information given in the EAW's form that the judgment was served on the accused. The interviewed judges underlined that they execute the EAWs in accordance with the principle of mutual trust. However, in case of doubts they may clarify this issue by asking the requested person whether he was served with the judgment and informed about the right to appeal. In addition, they may ask for additional information under Article 607z of the CCP.

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?

See answer to question 42.

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?

See answer to question 42.

G.7 The decision will be served after surrender

Explanation

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

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

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

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

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

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

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

I answer this question from the perspective of the Polish law implementing the FD 2009/299/JHA. The perspective of the Polish courts as issuing authorities was presented in the previous part of the questionnaire. It is only worth stressing that in some EAWs issued by the Lublin Regional Court with reference to "in absentia" judgment rendered in the simplified proceedings it was mentioned in explanations (part (d)(4)) that after surrender the requested person will be informed about the time-limit for submitting an objection against the "in absentia" judgment.
On the other hand, in two EAWs issued by the Zamość Regional Court with reference to a judgment rendered in the simplified proceedings (so called "wyrok zaoczny") and a judgment rendered in penal order procedure (so called "wyrok nakazowy") it was explained in part (d)(4) or in replies to requests for additional information concerning the right to retrial, that requested persons after surrender will be entitled to apply for reinstatement of the time-limit for submitting an objection against the "in absentia" judgment" (in one case – reply to request for additional information submitted by German judicial authorities; in another case – information provided in art (d)(4) of the EAW's form).

The perspective of the executing authority:
Article 607r § 3 (c) of the CCP provides that the requested person shall be served with the copy of the judgment and instructed as to the right to re-trial "immediately after surrender". It is also clearly stated that the right to re-trial means conducting "the new judicial proceedings in the same case."
One interviewed judge stated that in his/her opinion under Article 607r § 3 (c) of the CCP no other conditions should apply than usually provided for the motion for re-trial (i.e. the time-limit, the formal requirement that a motion shall be prepared and submitted by the defence counsel).
Furthermore, the judges underlined that at the sitting concerning execution of the EAW they inform the requested persons about the right to re-trial after surrender. In case of serious doubts as to prerequisites of re-trial, the executing court may ask for additional information under Article 607z of the CCP.
One interviewed judge stated that in one case he/she mentioned *expressis verbis* in the document sent to the issuing judicial authority that the requested person would like to request re-trial after surrender. In a few cases examined by the Warsaw Regional Court the requested person, after being acquainted with the content of the EAWs, clearly declared that he/she is aware of the right to re-trial after surrender. This declaration was recorded in the minutes of the sitting of the court.

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

The court executing the EAW may clarify this issue during the sitting concerning execution of the EAW. The requested person may be asked whether he is aware of the time-limit for submitting the relevant request. In case of doubts, the court may ask for additional information under Article 607z of the CCP.

The interviewed judges underlined once again that rendering the judgment in absentia is only optional ground for refusal of execution of the EAW.

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?

See answer to question 46.

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?

See answer to question 46.

G.8 Proceedings which have taken place at several instances

Explanation

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

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

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

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

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

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

Article 607r § 3 of the CCP does not refer to the specific stage of the proceedings.
All judges interviewed in the framework of the project underlined that Article 607r § 3 of the CCP expresses optional ground for refusal of mutual recognition. Thus, they are not obliged to refuse the execution of the EAW even if the judgment was rendered in absentia and no guarantees provided for in Article 4a (1) of the FD were granted to the accused. However, they are obliged to examine, whether the execution of the EAW would not breach the human rights of the surrendered person (this is the mandatory ground for refusal). So, the issue of the right to a fair trial and to appear at the trial is examined rather under this head. This is consistent with the judgment in Tupikas case (para. 96-97).
Some judges pointed out that they take into consideration mainly the first instance proceedings since they usually concern the merits of the case. All judges underlined the importance of the statements (explanations) provided for by the requested person at the sitting of the court which decides on the execution of the EAW. The requested person may object to surrender, may also raise any objections as to the fairness of the proceedings conducted against him in the issuing state. Such objections are assessed *ad casum* and, in case of doubts, supplementary information may be requested from the issuing state.
In the framework of this project we asked all Regional Courts in Poland for information on the number of EAWs whose execution was refused on the basis of Article 607r § 3 of the CCP. The answers were provided by 44 courts with reference to the time frame 2011-July 2018. Only 3 courts refused altogether 5 EAWs on the basis of Article 607r § 3 of the CCP (the Regional Court in Jelenia Góra – 2 cases with reference to the EAWs issued by German authorities; the Regional Court in Zielona Góra – 1 EAW issued by German authorities; the Regional Court in Koszalin – 2 EAWs issued by French and Greek authorities).
These data confirm that Article 607r § 3 of the CCP is used as a ground for refusal only exceptionally.

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?

As stated above, in order to clarify this issue a request for additional information may be submitted to the issuing authority.

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?

The executing authority could ask for additional information in order to take informed decision on the execution of the EAW, in particular in order to assess the general fairness of the proceedings (see answers to questions 49 and 50).

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

Explanation

In some Member States, after final conviction the nature or the *quantum* of the penalty originally imposed may be modified in later proceedings, *e.g.* proceedings in which one or more sentences handed down previously in respect of the person concerned are commuted into a single sentence.

If these proceedings 'are not a purely formal and arithmetic exercise but entail a margin of discretion in the determination of the level of the sentence, in particular, by taking account of the situation or personality of the person concerned, or of mitigating or aggravating circumstances', they fall within the ambit of Art. 4a (*Zdziaszek*, par. 88).

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

- the decision which finally determined the guilt of the person concerned and also imposed a penalty on him and
- the later decision modifying the *quantum* of the penalty originally imposed (hereafter: a *Zdziaszek*-decision) (*Zdziaszek*, par. 93).

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

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

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

- had not specified whether the competent authority had exercised its discretion in reaching the decision which modifies the *quantum* of the original penalty and/or
- had not applied section (d) to that later decision.

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

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

The interviewed judges stated that part D of the EAW form shall concern the decision/judgment which is to be executed after surrender. Thus, in case of lack of information they would adjourn the sitting of the court and request supplementary information from the issuing authority.

In 3 out of 5 cases in which Polish courts refused the execution of EAW's on the basis of Article 607r § 3 of the CCP (see answer to question 49), the reason for such refusal was that the subsequent proceedings by which the original non-custodial penalty was converted into the penalty of imprisonment, were conducted *in absentia*. In two cases (the EAWs from Germany) fines originally imposed on the requested persons were converted into a penalty of imprisonment. In one case the EAWs concerned a penalty of imprisonment which was originally suspended and afterwards this suspension was revoked in the proceedings conducted in absentia. In all three cases additional information was requested from the issuing authorities concerning proceedings subsequent to the proceedings in which the original sentence was imposed.

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

See answer to question 52.
The procedure of request for supplementary information should be applied. One interviewed judge underlined that in order to decide on the execution of the EAW he must have information whether the right to defence was observed in the criminal proceedings conducted in the issuing state.

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?

As was mentioned above, Article 607p § 1 (5) of the CCP provides that the execution of a EAW shall be denied if it would violate human rights of the requested person.
As was mentioned above, in a few EAWs which were not executed by the Polish Regional Courts on the basis of Article 607r § 3 of the CCP exactly the protection of human rights was at stake. For example, two EAWs issued by German authorities were not executed because they concerned fines imposed *in absentia* which were subsequently converted into the penalty of imprisonment due to failure to pay these fines within the prescribed time frame. A decision on changing the fine into the penalty of imprisonment was not taken by the court in the presence of the accused. Moreover, he was not even informed about such a decision. No promise of re-trial was provided by the German authorities. Having established the above presented circumstances, Polish courts refused execution of the EAWs.

G.10 Margin of discretion of the executing judicial authority

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

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

Yes, because this is only an optional ground for refusal of the execution of the EAW.

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?

It is a common view of the Polish judges that the accused who was provided with the written instruction as to his rights and duties at the pre-trial stage of the proceedings shall collect correspondence sent to him by judicial authorities. It should be underlined that in the Polish criminal procedure the accused is informed also about the consequences of failure to collect the correspondence (see part I of the questionnaire). Failure to collect correspondence properly sent to the address indicated by the accused shall be treated as a waiver of the right to participate actively in the criminal proceedings. This is confirmed by the case-law of the ECHR (see, *inter alia*, Hołowiński v. Poland, decision of 28 November 2006, case no. 36711). A suspect is instructed that failure to inform procedural authorities about the change of residence may have negative consequences for him since the correspondence served to the old address and not collected by the accused should be classified as "properly served on the accused".
In consensual procedures the fact that a suspect reached the agreement with the public prosecutor does not release the court from the obligation to inform the accused about the date of the sitting at which the motion for issuing agreed sentence is to be examined. To the contrary, the sitting cannot be held if the accused was not properly summoned.

Since Article 607r § 3 of the CCP is not very precise, it could be argued that Polish judges apply this provision having due account of their own legal system. This was confirmed by judges during interviews. They partly interpreted Article 607r § 3 of the CCP from the perspective of domestic institutions and domestic law.

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.[81]

Below I quote the Act implementing Article 2 of the FD 2009/299/JHA:

„Art. 2. W ustawie z dnia 6 czerwca 1997 r. - Kodeks postępowania karnego (Dz. U. Nr 89, poz. 555, z późn. zm.) wprowadza się następujące zmiany:
1) po art. 540a dodaje się art. 540b w brzmieniu:
"Art. 540b. § 1. Postępowanie sądowe zakończone prawomocnym orzeczeniem można wznowić na wniosek oskarżonego, złożony w terminie zawitym miesiąca od dnia, w którym dowiedział się o zapadłym wobec niego orzeczeniu, jeżeli:
1) sprawę rozpoznano pod nieobecność oskarżonego, któremu nie doręczono zawiadomienia o terminie posiedzenia lub rozprawy albo doręczono je w inny sposób niż osobiście, gdy

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

wykaże on, że nie wiedział o terminie oraz o możliwości wydania orzeczenia pod jego nieobecność,

2) orzeczenia, o którym mowa w art. 100 § 2 i 3, wydanego pod nieobecność skazanego oraz orzeczenia, o którym mowa w art. 479 § 1, nie doręczono skazanemu albo doręczono w inny sposób niż osobiście, gdy wykaże on, że nie wiedział o jego treści oraz o przysługującym mu prawie, terminie i sposobie wniesienia środka zaskarżenia.

§ 2. Przepisu § 1 nie stosuje się w wypadkach, o których mowa w art. 136 § 1 oraz art. 139 § 1, a także jeżeli w rozprawie lub posiedzeniu uczestniczył obrońca.";

2) w art. 607r dodaje się § 3 w brzmieniu:

"§ 3. Można także odmówić wykonania nakazu europejskiego, wydanego w celu wykonania kary albo środka polegającego na pozbawieniu wolności, orzeczonych pod nieobecność osoby ściganej, chyba że:

a) osobę ściganą wezwano do udziału w postępowaniu lub w inny sposób zawiadomiono o terminie i miejscu rozprawy albo posiedzenia, pouczając, że niestawiennictwo nie stanowi przeszkody dla wydania orzeczenia albo miała ona obrońcę, który był obecny na rozprawie lub posiedzeniu,

b) po doręczeniu osobie ściganej odpisu orzeczenia wraz z pouczeniem o przysługującym jej prawie, terminie i sposobie złożenia w państwie wydania nakazu wniosku o przeprowadzenie z jej udziałem nowego postępowania sądowego w tej samej sprawie, osoba ścigana w ustawowym terminie nie złożyła takiego wniosku albo oświadczyła, że nie kwestionuje orzeczenia,

c) organ, który wydał nakaz europejski, zapewni, że niezwłocznie po przekazaniu osoby ściganej do państwa wydania nakazu, zostanie jej doręczony odpis orzeczenia wraz z pouczeniem o przysługującym jej prawie, terminie i sposobie złożenia wniosku o przeprowadzenie z jej udziałem nowego postępowania sądowego w tej samej sprawie.";

3) art. 607u otrzymuje brzmienie:

"Art. 607u. Jeżeli nakaz europejski został wydany w celu wykonania kary albo środka polegającego na pozbawieniu wolności, orzeczonych w warunkach określonych w art. 607r § 3 lit. c, osobę ściganą należy pouczyć o prawie żądania odpisu orzeczenia. Informację o zgłoszeniu żądania odpisu orzeczenia przekazuje się niezwłocznie państwu wydania nakazu europejskiego, a po otrzymaniu orzeczenia doręcza się go osobie ściganej. Zgłoszenie żądania nie wstrzymuje wykonania nakazu europejskiego.";

Translation concerns only new/changed provision of the CCP[82]:

Article 540b

§1. Judicial proceedings concluded with a final judgment may be re-opened upon the motion of the accused, submitted within the final time-limit of one month form the day on which the accused learns of the judgment issued against him, if:

1) the hearing was held in the absence of the accused who was not served a notification of the date of the hearing or sitting of the court, or such a notification was not served on him personally and he is able to prove that he was not aware of the date and the possibility of the judgment being delivered in his absence;

2) a decision referred to in Article 100 § 2 and 3, issued in the absence of the accused, or the judgment issued in accordance with Article 479 § 1, were not served on the accused or were not served on him personally and the accused is able to prove that he was not aware of its content and of his right to appeal against such a judgment and the time-limit and the manner of submitting an appeal.

[82] Trasnlation was elaborated with the assistance of the publication: Joanna Ewa Adamczyk, The Code of Criminal Procedure. Kodeks postępowania karnego, Warsaw 2014.

§ 2. The provision of § 1 does not apply in cases referred to in Article 136 § 1 and Article 139 § 1 and also if the defence counsel has participated in the hearing or the sitting of the court.

Article 540b of the CCP applicable now has the following wording:

"Article 540b
§1. Judicial proceedings concluded with a final judgment may be re-opened upon the motion of the accused, submitted within the final time-limit of one month form the day on which the accused learns of the judgment issued against him, if the hearing was held in the absence of the accused who was not served a notification of the date of the hearing or sitting of the court, or such a notification was not served on him personally and he is able to prove that he was not aware of the date and the possibility of the judgment being delivered in his absence.
§ 2. The provision of § 1 does not apply in cases referred to in Article 133 § 2, Article 136 § 1 and Article 139 § 1 and also if the defence counsel has participated in the hearing or the sitting of the court."

"Article 607r § 3

Article 607r of the CCP was supplemented by § 3 which reads as follows:
"§ 3. Execution of a European arrest warrant issued for the purpose of executing a penalty or measure consisting of deprivation of liberty imposed in the absence of the requested person may be refused, unless:

a) the requested person was summoned to appear in the proceedings or otherwise notified of the time and place of the hearing or sitting of the court and was informed that the failure to appear did not prevent the court from issuing a judgment or if the requested person was represented by a defence counsel who was present at the hearing or sitting of the court.
b) after being served with the judgment together with the instruction about the right, the time and the manner of submitting a motion for re-examination of the case in his presence in the issuing state, the requested person has failed to submit such a motion within the statutory time-limit or declared that he does not object to the judgment.
c) the authority which issued the European arrest warrant assures that immediately after surrender of the requested person to the issuing state, he will be served a copy of the judgment together with the instruction about the right, time-limit and manner of submitting a motion for conducting a new judicial proceedings in the same case in his presence."

Article 607u:
"If a European arrest warrant was issued for the purpose of executing a penalty or a measure consisting of deprivation of liberty rendered in the conditions defined in Article 607r § 3 (c), the requested person shall be instructed of the right to request a copy of the judgment. The information about such a request shall be transmitted immediately to the state which issued the European arrest warrant and, after the judgment is received, it shall be served on the requested person. The submission of the request shall not suspend the execution of the European arrest warrant."

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.

This part of the questionnaire is elaborated on the basis of 4 interviews with judges from 4 different regional courts (with long experience in dealing with EAWs) and analyses of cases examined by the Regional Court in Lublin, the Warsaw Regional Court and the Regional Court in Zamość.

The answer:
Some judges: No
Some judges: Yes. In this case the court asked for additional information under Article 607z of the CCP.

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.

No.

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.

See also the answer to question 29.
This is not a prerequisite for refusal of the execution of the EAW. As was explained above, the courts usually order additional translation into Polish or ask for additional information.

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

No declaration was submitted.

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

No. The interviewed judges underlined that they cooperate with the same, very experienced translators. So, the quality of translations should be satisfactory.

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.

Yes. See the answer to question 52 (the answer provided on the basis of the decisions refusing execution of the EAWs submitted by two Regional Courts).
The interviewed judges stated that sometimes they had to request additional information concerning cumulative judgments. They asked for clarification which judgment will be subject to execution after surrender.

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.

As a preliminary remark it should be underlined that the analyses of the EAWs issued by the Warsaw Regional Court and the Lublin Regional Court confirm the difficulties in filling in part D of the EAW's form with reference to cumulative judgments.

The analyses concern 68 EAWs issued by the Lublin Regional Court and 52 EAWs issued by the Warsaw Regional Court in 2016-2017 for the purpose of execution of at least one penalty imposed on the requested person in absentia (see question 89). Out of total number of 120 EAWs 14 concerned a cumulative judgment (6 EAWs issued by the Lublin Regional Court and 8 EAW's issued by the Warsaw Regional Court).

In 2016-2017 the Zamość Regional Court issued 32 EAWs for the purpose of execution of at least one penalty imposed on the requested person in absentia. None of these EAWs concerned cumulative judgments.

In all EAW's issued by the Lublin Regional Court part D of the EAW's form was filled in only with reference to the cumulative judgment. That was a reason for requests for additional information in 3 cases (out of 6). Requests concerned "single" judgments which were replaced by the cumulative judgment. The executing authorities usually asked the following questions: 1) whether the requested person was present at the hearing at which "a single" judgment was issued; 2) who collected the summons to the hearing at which "single" judgments were issued;

3) whether the accused was represented by a defence counsel of his own choice or appointed ex officio (with reference to the proceedings in which a cumulative judgment was rendered); 4) who collected the summons to the hearing at which the court issued a cumulative judgment.

On the other hand, the Warsaw Regional Court filled part D of the EAW's form in three different ways. In one case part D of the EAW's form was filled in exclusively with reference to the cumulative judgment. In 4 EAWs part D referred to all judgments ("single" judgments as well as the cumulative judgment). In three cases part D of the EAW's form related only to the cumulative judgment but in section 4 additional explanations were provided with reference to the proceedings in which the "single" judgments were rendered. With reference to 3 (out of 8) EAW's concerning a cumulative judgment the executing authorities asked for additional information. In two cases questions concerned presence of the accused at the hearing at which "single" judgments were rendered. In one case the executing authority asked whether the cumulative judgment was rendered upon the motion of the accused or ex officio. Only in one case (out of 14) execution of the EAW was refused but for reasons not related to the problem analysed in this project.

Additionally, **interviewed judges** reported two difficulties:

1) The executing judicial authorities analysed the admissibility of execution of the EAW with reference to single penalties instead the cumulative penalty imposed by the cumulative judgment. It happened despite the fact that under the Polish law the only penalty which may be executed is the cumulative penalty and not the "single" penalties jointed into the cumulative penalty by the cumulative judgment. Consequently, some executing authorities questioned the fairness of the proceedings in which the "single" penalty was rendered and refused the execution of the EAW with reference to these penalties.
2) The executing authorities ask for information whether part D of the EAW's form concerns the cumulative judgment or "single" judgments which were replaced by the cumulative judgment. Usually such questions were asked by German or UK executing authorities.

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

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

Explanation
See Part 2.2 (G.1).

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

No. In the EAW's form the issuing judicial authority indicates the judgment. It does not matter whether the judgment was issued as a result of the agreement reached by the parties.

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.

See answers to question 52 and 54.

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 with reference to consensual proceedings:
No. Judges underlined that as the issuing authority they indicate the judgment without clarifying that this judgment was rendered in the consensual proceedings. The basis for the EAW is the ordinary judgment.

As transpires from analysed cases, sometimes in part D (section 4) of the EAW's form the Polish issuing authorities indicate that a sentence imposed in a judgment was agreed upon at the pre-trial stage of the proceedings (Article 335 of the CCP) or was proposed by the accused himself (art. 387 of the CCP). This information is provided in order to confirm that the accused was aware of criminal proceedings conducted against him.

Answer with reference to simplified proceedings and an "in absentia judgments" (Polish: wyrok zaoczny)[83]:

Yes. The judges interviewed in the framework of the project indicated that EAWs issued with reference to "in absentia judgments" (Polish: wyroki zaoczne) are quite often not executed by German judicial authorities.

Also the analyses of EAWs issued by the Lublin Regional Court and the Zamość Regional Court confirmed that there are problems with execution of EAWs concerning "in absentia" judgments". For example, in 2017 execution of 3 EAWs issued by the Lublin Regional Court with reference to "in absentia" judgments was refused by the Netherlands judicial authorities. They relied on the lack of guarantee that after surrender the requested person will be granted re-examination of the case in his presence. They also indicated that Polish judicial authorities did not prove (or did not provide sufficient information) that the requested person was aware of the criminal proceedings conducted against him and a judgment rendered against him in absentia.
Similar conclusions may be drawn from the analyses of the EAWs issued by the Zamość Regional Court: execution of one EAW concerning "in absentia" judgment (Polish: "wyrok

[83] As was mentioned above, the simplified proceedings was removed from the CCP on 1 July 2015.

zaoczny") was refused by the judicial authorities of the Netherlands. They stated that the requested person was not informed properly about the trial. In addition, in reply to a request for additional information the Regional Court in Zamość stated that no right to re-trial was guaranteed by the Polish law. Similar reasons were presented as justification for a refusal to execute one EAW by the German judicial authorities.

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.

Interviewed Judges underlined that it is decisive whether the requested person was aware of the trial. The most important is participation in these hearings at which the merit of the case was examined, both in the first instance and at the appellate stage of the proceedings.

As transpires from the analyses of decisions on execution of the EAW's issued for the purpose of execution of judgments rendered in absentia, Polish executing authorities rather check whether the requested person was aware of the criminal proceedings conducted in the issuing state. Since Article 607r § 3 of the CCP provides for an optional ground for refusal, this issue is not analysed in very detailed manner. It is rather taken into account if raised by the requested person at the sitting of the court concerning execution of the EAW.

In majority of EAW's concerning in absentia judgments executed by the Warsaw Regional Court the issuing judicial authorities ticked section 3.4. of the EAW's form (the right to re-trial). For example, in 2017 only 1 EAW's concerning a judgment issued in absentia was examined by the Warsaw Regional Court. It concerned a penalty imposed in absentia by French judicial authorities. These authorities indicated that re-trial will be offered to the requested person after surrender. The same applies to all 3 EAW's concerning judgments issued in absentia and examined by the Warsaw Regional Court in 2016. In all three cases (EAWs issued by Czech, Romanian and Belgian authorities) the right to re-trial was indicated (section 3.4. of the EAW's form was ticked). In 2015 and 2014 no EAW concerning in absentia judgment was executed by the Warsaw Regional Court. In 2013 out of 3 EAWs concerning in absentia judgments executed by the Warsaw Regional Court in 2 EAWs the issuing judicial authorities ticked section 3.4. (the right to re-trial).
So, in majority of cases the meaning of section 2 and 3 of part D of the EAW's form was not analysed at all by the Warsaw Regional Court.

Trial consisting of several hearings

Explanation

See Part 2.2 (G.3)

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

No. It is important that the accused was present at least at one hearing as to the merit and was duly summoned to all hearings. This means that he was aware of the trial conducted against him.

See also the answer to question 68.

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.

Yes, difficulties are reported with reference to this issue.
One interviewed judge pointed out that some executing authorities asked for supplementary information as to whether the requested person was present at the hearing at which the judgment was pronounced. The Polish court answered that the presence of the accused at the hearing at which the judgment is pronounced is not mandatory. Consequently, the absence of the accused at this hearing cannot be assessed as rendering a judgment "in absentia".
In 7 cases (out of 68 all EAWs issued by the Lublin Regional Court in 2016-2017) additional information was requested by the executing judicial authorities as to the participation of the accused in particular dates of the hearing. In none of the above-mentioned cases the execution was refused due to absence of the requested person at a few out of many dates of the hearing.

In 4 cases (out of 52 EAWs issued by the Warsaw Regional Court in 2016-2017 with reference to judgments rendered in absentia[84]) additional information was requested by the executing judicial authorities as to the participation of the accused in particular dates of the hearing. In none of these cases the execution of the EAWs was refused due to absence of the requested person at a few out of many dates of the hearing. Requests for additional information were issued by German and Swedish executing authorities.

It seems that quite frequently additional questions concerned the examination of the case under Article 376 § 2 of the CCP (as in force until 30 June 2015). This provision allowed to conduct the hearing in the absence of the accused who has already provided explanations and left the courtroom without the presiding judge's permission or having been notified of the date of a deferred or adjourned hearing failed to appear at that hearing without justification.

Personal summons

Explanation

[84] However, it should be underlined that files of 5 EAWs issued with reference to in absentia judgments by the Warsaw Regional Court in 2016-2017 was not available for the reserach.

See Part 2.2 (G.4).

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

No problems reported.

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

Yes. As transpires from the analysis of the EAW's issued by the Warsaw Regional Court, this court has difficulties with classifying the substitute service of a summons. In some cases it is classified as "personal service", in other – as service by "other means" (3.1.b.) of section D. The same difficulties are faced by the Lublin Regional Court. Exceptionally the substitute service of a summon (correspondence left twice, every time for 7 days at the post office closest to a defendant's address indicated to the authorities) is classified as "personal service (section 3.1.a. is ticked). As a rule, such service is classified as service by "other means" (section 3.1.b. is ticked). However, the latter classification prevails.
On the other hand, the Zamość Regional Court in all cases classified the substitute service as service "by other means" - (3.1.b.) of section D was ticked.

The perspective of the executing authorities with reference to the Polish EAWs:
Yes. As transpires from the cases concerning the EAWs issued by the Lublin Regional Court, the substitute service of the summons (the accused did not collect the correspondence left two times in the postal office closest to his place of residence) was not classified by the executing authority as service mentioned in (d) 3(1) (b) of the EAW's form. In 4 cases execution of the EAW's issued by the Lublin Regional Court was refused for this reason (2 by the German executing authorities; 2 by the Netherlands executing authorities). In one case reference was made to Dworzecki judgment as a reason for non-execution of the EAW.

Also indirect service of a summons which is classified by the Polish issuing authorities as service "by other means" (section 3.1.b. is ticked) is subject to requests for additional information. Usually the executing authorities ask for explanations how is was established that the requested person has actually received a summons to the hearing. Two EAWs issued by the Lublin Regional Court were not executed due to the fact, that a summons to the hearing or/and a judgment were served to the hands of an adult member of the accused's household (indirect service) and no guarantee of re-trial was provided in the EAWs form.

Interviewed judges stated that usually there are problems with execution of "in absentia" judgments issued in the simplified proceedings when both summons to the hearing and the judgment were served on the requested person by "indirect service". Usually the judicial authorities of Germany and the Netherlands refuse execution of such EAWs.

Only 6 EAWs issued by the Warsaw Regional Court in 2016 and 2017 (concerning execution of judgments rendered in absentia) were not executed (until now). However, in all cases refusal was based on reasons not relevant to this questionnaire.

Defence by a legal counsellor

Explanation
See Part 2.2 (G.5).

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

No.

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.

In some requests for additional information the executing authorities asked whether a defence counsel was appointed *ex officio* or by the accused himself. Additional questions concerned also the activity of a defence counsel in the proceedings, whether a defence counsel represented the requested person during the entire proceedings.

The decision has been served

Explanation
See Part. 2.2 (G.6).

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

No.

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

Yes. A few EAWs issued by the Lublin Regional Court were not executed due to the fact that the "in absentia" judgments issued in the simplified proceedings were served on the accused indirectly, i.e. to the hands of the adult member of the accused's household (see also answers given to the previous questions).

The decision will be served after surrender

Explanation

See Part 2.2 (G.7).

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

No.

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

Polish authorities only exceptionally tick section 3.4. of part (d). However, as reported by judges, sometimes the executing authorities ask whether the requested person would be granted the re-trial. It happens mainly with reference to the EAWs issued in order to execute the "in absentia" judgment rendered in the simplified proceedings (see also answers to the previous questions).

It should be noted that in a few EAWs issued by the Lublin Regional Court section 3.4. of part D of the EAW's form was ticked with reference to "in absentia judgments" issued in the simplified proceedings. It was also indicated that after surrender the requested person will have a right to request a re-trial within the time-limit of 7 days. It is not clear why this section was ticked since an "in absentia" judgment may be subject to objection submitted within the time-limit of 7 days but only if it is not final. The most probable explanation is that the issuing court had in mind the opportunity to request the reinstatement of the time-limit for bringing an objection against an "in absentia" judgment. Under Article 126 § 1 of the CCP, a party may request the reinstatement of the time-limit for bringing an objection within the time-limit of seven days. The latter time-limit runs from the day on which the obstacle to bring an objection ceased to exist.
The same measure was mentioned in two EAWs issued by the Zamość Regional Court. In one EAW issued by this Court and executed by the German judicial authorities, it was explained that the requested person will have a right to request the reinstatement of the time-limit for bringing an objection against the judgment issued in the penal order procedure (Polish: "wyrok nakazowy"). This EAW was not executed by the German judicial authorities.
The same information was provided in another EAW concerning an "in absentia judgment" (Polish: "wyrok zaoczny"). Until now no decision on the execution of this EAW has been taken by the executing authorities.

3.3. Proceedings at several instances

Explanation

See Part 2.2 (G.8).

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

Yes, see answer to question 30 and 49.

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.

Yes. In one case (the EAW issued by the Lublin Regional Court) the executing authority asked about the character of the appellate hearing at which the first instance judgment was upheld. Furthermore, the executing authority requested that part D of the EAW's form be filled in with reference to the judgment issued by the appellate court. The Polish issuing authority explained that the accused did not have to be present at the appellate hearing and that the EAW concerned the first instance judgment which was upheld by the appellate court. This EAW was executed only partly, not with reference to a judgment issued in absentia (reference to Tupikas judgment was made in this case).

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.

Yes. See the answer to questions 52 and 54.

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.

Yes. After Zdziaszek judgment the executing authorities started to request supplementary information as to whether the cumulative judgment was rendered in absentia. They requested that section (d) of the EAW's form be filled in with reference to this judgment.
As reported by one interviewed judge, one executing authority requested information whether the requested person would be granted re-trial after surrender. Having received the information that Article 540b of the CCP provides for the optional ground for re-opening of the proceedings, the executing authority refused execution of the EAW.
Requests for additional information concerned also the way of summoning of the requested person to the hearing at which the cumulative judgment was rendered.

At least two requests for additional information directed to the Warsaw Regional Court concerned also the proceedings in which the court ordered execution of a suspended penalty of imprisonment. These questions concerned summoning of the requested person to the sitting of the court.

3.5. Margin of discretion of the executing judicial authority

Explanation

See Part 2.2. (G.10).

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

The judges underlined that Article 607r § 3 of the CCP provides for the optional ground for refusal. Thus, if the requested person did not raise reasonable objections as to the fairness of the proceedings conducted in the issuing state, the court would act in accordance with the principle of mutual trust and would execute the EAW.

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?

Judges interviewed in the framework of this project in some cases asked for clarification which judgment (out of a few indicated in the EAW) will be executed after surrender. They also requested clarification as to the scope of the right to re-trial after surrender.

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.

I happened only in a few cases during many years of practice of the interviewed judges. They did not remember any case of refusal of execution of the EAW for the reason of lack of information as to the judgment issued in absentia.

However, as transpires from the analyses of files of the EAWs issued by the Lublin Regional Court and the Warsaw Regional Court, repeated requests for additional information were directed to both courts. As was mentioned above, the Warsaw Regional Court received 13 requests for additional information (with reference to EAWs issued in 2016 and 2017); In a few cases requests were repeated. On the other hand. the Lublin Regional Court received 23 requests for additional information (out of 68 cases of EAWs). At least in 7 cases requests for additional information were directed more than once. In two cases in which requests for additional information were directed more than once, the EAWs were not executed.

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

It is stemming from the analyses of cases examined by the Lublin Regional Court, the Warsaw Regional Court and the Zamość Regional Court that the following information is requested most frequently:

1) Information concerning the presence of the requested person at the dates of the main hearing;
2) Information concerning the cumulative judgment (filling in part. D of the EAW's form with reference to the cumulative judgments and also the "single" judgments).
3) Information whether the summons to the hearing and the copy of the judgment were served directly to the accused's hands or to the hands of the adult member of the accused's household;
4) Information whether the defence counsel of the accused was appointed ex officio by the court or by the accused himself.
5) If section 3.1.b of part D of the EAW's form was ticked, the requests for supplementary information usually concerned the question how it could be "unequivocally established" that the accused was aware of the trial and the scheduled hearing. In particular, in some cases the Lublin Regional Court was asked whether any measures of limitation of liberty were imposed on the requested person; whether and in which way the accused was informed about the duty to notify the procedural organs about every change of his place of residence; for how long this duty should applied.
6) If section 3.3. of part D of the EAW's form was ticked, the Lublin Regional Court was asked for supplementary information as to the way in which the requested person was informed about the judgment rendered in his absence; some questions concerned the

way in which the requested person was informed about the right to appeal. In some requests the Court was asked whether the requested person did submit an appeal against the first instance judgment.

7) Some questions concerned the right to re-trial, its scope and the opportunity to examine the merit of the case within the framework of re-opened proceedings.
8) Some executing authorities asked for clarification why the court had issued the EAW with reference to judgments that had been delivered many years earlier.
9) Some requests concerned the question why the requested person had been considered "a fugitive" by the Polish issuing authorities and whether the requested person had been aware of his status as "a fugitive".

The above mentioned requests for supplementary information are usually directed by the executing authorities of the Netherlands, UK, Ireland and Germany.

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.

In one out of two cases decided by the Lublin Regional Court in which the time-limit could not be observed the reason of delay was the prolonged exchange of correspondence concerning the judgment issued in absentia. The EAW concerned the Polish citizen who did not consent to surrender. Finally, the Polish judicial authorities refused execution of the EAW and decided to execute the sentence imposed on the requested person in another Member State. It is worth mentioning that the EAW's for execution of a custodial penalty cannot be executed with reference to the Polish citizen if he does not consent to surrender.

In the second case delayed execution was caused by the need to clarify the citizenship of the requested person and the fact that the first instance decision on execution of the EAW was quashed by the appellate court.

Judges interviewed in the project did not inform about such cases.

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.

I do not have additional comments.

3.9. Methodology

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

1) 4 direct interviews with 5 judges from 4 different Regional Court in Poland (Lublin, Kraków (2 judges answered the questions), Zamość, Warszawa). Four interviewed judges have long lasting experience in execution and issuing of the EAWs (6-10 years); one judge – about 5 years of experience.
2) Analyses of the EAW's executed by the Lublin Regional Court for 2008-2017 (exclusively with reference to the EAW's issued by other Member States for the purpose of the execution of a custodial sentence);
3) Analyses of the EAW's executed by the Warsaw Regional Court for 2010-2017 (exclusively with reference to the EAW's issued by other Member States for the purpose of the execution of a custodial sentence);
4) Analyses of the EAWs issued by the Lublin Regional Court in 2016 and 2017 exclusively for the purpose of the execution of a custodial sentence (altogether: 130 cases: in 2016 – 63 cases; in 2017 – 67 cases; out of the total number of 130 cases 68 cases concerned the judgments issued in absentia: in 2016 – 33; in 2017 – 35).
5) Analyses of the EAWs issued by the Warsaw Regional Court in 2016 and 2017 exclusively for the purpose of the execution of a custodial sentence (altogether 89 cases: in 2016 – 44 cases; in 2017 – 45 cases; out of the total number of 89 cases 52 cases concerned the judgments issued in absentia: in 2016 – 24; in 2017 – 28 (the research was conducted with reference to all 52 cases on the basis of the electronic registry; access to traditional "paper" files was granted in 47 cases – in 5 cases the files were not available for research at the moment – the files were sent to another court or institution).
6) Analyses of the EAWs issued by the Zamość Regional Court in 2016 and 2017 exclusively for the purpose of the execution of a custodial sentence (altogether: 60 cases; out of the total number of 60 cases 32 cases concerned the judgments issued in absentia: in 2016 – 16; in 2017 – 16).
7) Information obtained from 44 Regional Courts in Poland. All Courts were asked for information whether they refused the execution of the EAWs issued for the purpose of the execution of a custodial sentence rendered in absentia on the basis of Article 607r § 3 of the CCP. The question referred to the period 2012-July 2018 and were directed to the Courts on the basis of the Act on access to public information. Only 5 EAW's were refused on the basis of Article 607r § 3 of the CCP.
8) Information obtained from the Ministry of Justice on statistics. Replying to our request for information concerning data indicated in Part IV of the questionnaire, the Ministry

of Justice answered that all data collected by them are published on the official web site of the Ministry. Unfortunately, the only data available there are very general and not relevant to this paper. In particular, they do not provide information which could be relevant to questions of Part IV of the questionnaire.

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):

The data presented below concern the Lublin Regional Court (thereafter referred to as "LRC") and the Warsaw Regional Court (thereafter referred to as "WRC"). Data collected in relation to the Warsaw Regional Court are not available for the whole period 2008-2017. They are presented only with reference to the period 2010-2017. It should be underlined that all statistical information provided below was gathered by: 1) searching the electronic registry of

cases in both regional courts; 2) analyses of the traditional paper case-files. With reference to EAWs issued by the Polish judicial authorities we had to select only 2 years for analyses since the number of EAWs issued every year is very high.

Only partial data are available with reference to the whole state. In the framework of this project I asked the Ministry of Justice for statistics requested in part. 4 of the questionnaire. In reply to my request the Ministry of Justice provided only the general information on the total number of the EAW's issued and executed every year, without reference being made to the EAW's in which the requested person did not consent to surrender. For this reason, I do not mention this data here.

The presented data concern the EAW's executed by the Lublin Regional Court and the Warsaw Regional 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

Lublin Regional Court:
In the period 2008-2017 the LRC examined 166 EAWs. Only 36 EAWs were issued for the purpose of execution of a custodial sentence. 20 EAWs were not executed. In 10 cases the proceedings were discontinued. In one case the EAW was not examined as to the merit.

2017 – 18 EAWs (6 EAWs for execution);
2016 – 18 EAWs (6 EAWs for execution);
2015 – 14 EAWs (1 EAW for execution);
2014 – 14 EAWs (3 EAWs for execution);
2013 – 15 EAWs (2 EAWs for execution);
2012 – 13 EAWs (4 EAWs for execution);
2011 – 22 EAWs (4 EAWs for execution);
2010 – 20 EAWs (5 EAWs for execution);
2009 – 19 EAWs (4 EAWs for execution);
2008 – 13 EAWs (1 EAW for execution).

No consent to surrender was expressed in 61 cases.

Warsaw Regional Court (data concern registration of the case; some of them were examined in the following year): altogether in the Warsaw Regional Court for 2010-2017: 236 EAW's were registered for examination; 54 cases concerned the EAW's issued for the purpose of execution of a custodial sentence.

2017 – 26 EAW's (6 EAWs for execution); 25 examined as to the merits; 1 case – the proceedings were discontinued; in 11 cases- no consent to surrender.

2016 – 26 EAW's (8 EAWs for execution); 24 examined as to the merits; 2 cases – the proceedings were discontinued; 1 case – no consent to surrender; 2 cases – no declaration as to the consent to surrender.

2015 – 28 EAW's (3 EAWs for execution); all examined as to the merits; 9 cases- no consent to surrender; 1 case- lack of declaration as to the consent to surrender.

2014 – 39 EAW's (7 EAWs for execution); 35 cases examined as to the merits; 4 cases- the proceedings were discontinued; 1 case – no consent to surrender.

2013 – 50 EAW's (18 EAWs for execution); all examined as to the merits; 9 cases – no consent to surrender.

2012 – 33 EAW's (8 EAWs for execution); 29 examined as to the merits; 9 cases – no consent to surrender.

2011 – 18 EAW's (2 EAWs for execution); 15 examined as to the merits; 11 cases- no consent to surrender; in 1 case – lack of information as to the consent to surrender.

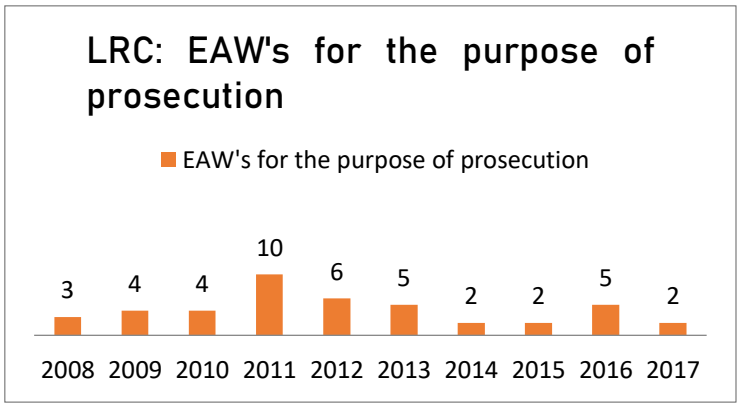
2010 - 16 EAW's (2 EAWs for execution); in 12 cases – no consent for surrender.

No consent to surrender in 63 cases.

- b. out of this total number of EAW cases referred to under a. (in which no consent for surrender was given):
    - the total number of EAW's for the purpose of prosecution

Lublin Regional Court: 43

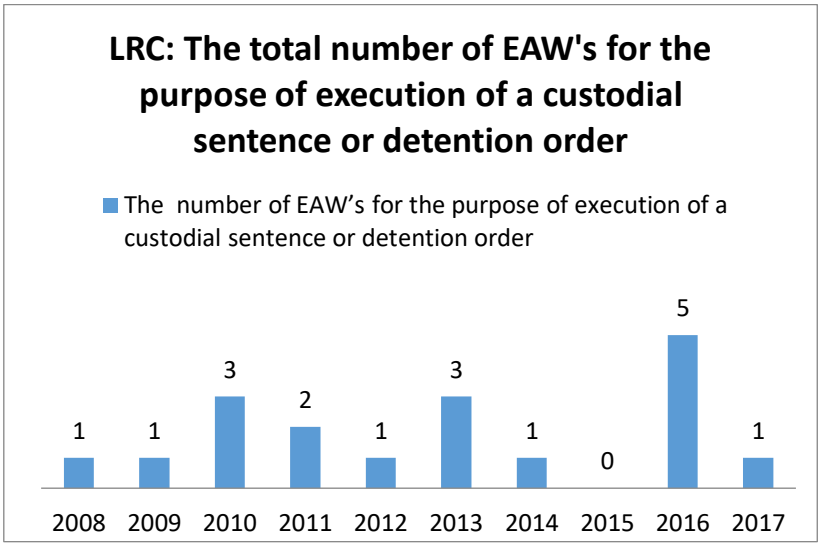
2008 – 3; 2009 – 4; 2010 – 4; 2011 – 10; 2012 – 6; 2013 – 5; 2014 – 2; 2015 – 2; 2016 – 5; 2017 – 2.



Warsaw Regional Court: 52
2017-9; 2016-1; 2015-8; 2014-1; 2013-5; 2012-7; 2011-11; 2010-10

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

Lublin Regional Court: 18
2008 – 1; 2009 – 1; 2010 – 3; 2011 – 2; 2012 – 1; 2013 – 3; 2014 – 1; 2015 – 0; 2016 – 5; 2017 – 1.



Warsaw Regional Court: 11

2017-2; 2016-0; 2015-1; 2014-0; 2013-4; 2012-2; 2011-0; 2010-2.

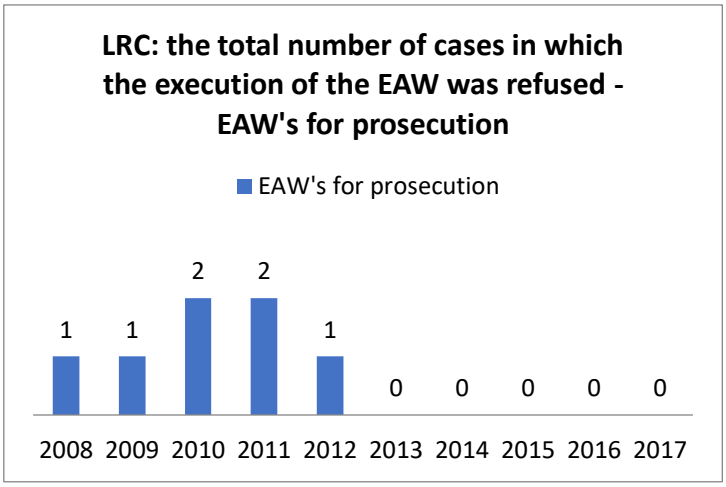
- c. out of the total number of EAW cases referred to under a.: the total number of cases in which either the 60 days time limit or the 90 days time limit could not be observed, broken down into prosecution-EAW's and execution-EAW's

Lublin Regional Court: 2

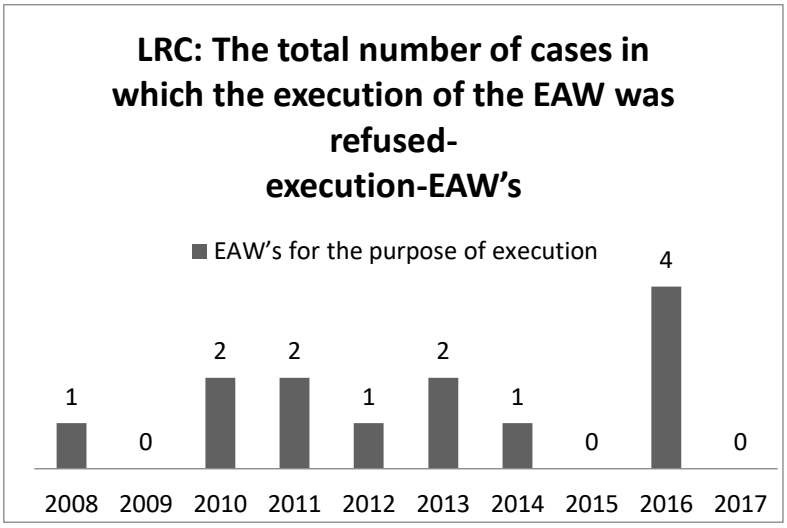
Warsaw Regional Court: no data available; data available with reference to EAWs issued for execution of *in absentia judgments*: no such cases.

- 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

Lublin Regional Court:
EAWs for the purpose of prosecution: total: 7
2008 – 1;
2009 – 1;
2010 – 2;
2011 – 2;
2012 – 1;
2013 – 0;
2014 – 0;
2015 – 0;
2016 – 0;
2017 – 0.



EAW's for the purpose of execution: total 13
2008 – 1;
2009 – 0;
2010 – 2;
2011 – 2;
2012 – 1;
2013 – 2;
2014 – 1;
2015 – 0;
2016 – 4;
2017 – 0.



Warsaw Regional Court (data for 2010-2017):
EAWs for the purpose of prosecution: total 15
2010 – 5;
2011 - 4;
2012 – 1;
2013 – 0;

2014 – 1;
2015 – 2;
2016 – 0;
2017 – 2.

EAWs for the purpose of execution: total 9
2010 – 2;
2011 - 0;
2012 – 1;
2013 – 4;
2014 – 0;
2015 – 1;
2016 – 0;
2017 – 1.

e. of the EAW's for the purpose of execution (b., i.e. 36 cases examined by the Lublin Regional Court and 54 cases examined by the Warsaw Regional Court):

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)

  Lublin Regional Court: 6 (2008-1; 2009-1; 2010-3; 2011-1).

  Warsaw Regional Court (data collected for 2010 and 2011): 1 (2011 – 1; 2010 – 0)

- 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)

  No data collected.

- 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

  No data collected.

- 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.

No data collected

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

  Lublin Regional Court: 0
  Warsaw Regional Court: 0

After transposition of Art. 2 FD 2009/299/JHA by your Member State

- the total number of cases in which the requested person was present in person at the trial resulting in the decision

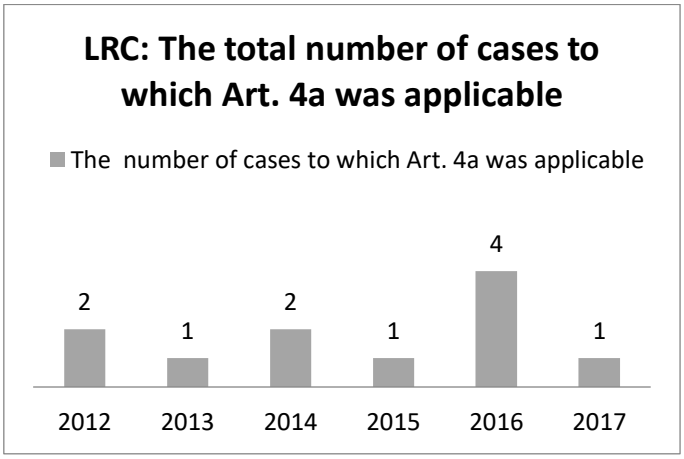
  Data presented below concern all EAWs issued for the purpose of execution of a custodial penalty and decided by the Lublin Regional Court or the Warsaw Regional Court:

  Lublin Regional Court: 11
  (2012-2; 2013-1; 2014-1; 2015-0; 2016-2; 2017-5).

  Warsaw Regional Court: 42
  (2012- 7; 2013 – 15; 2014 – 7; 2015 – 3; 2016 – 5; 2017 – 5).

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

  Lublin Regional Court: 11
  (2012-2; 2013-1; 2014-2; 2015-1; 2016-4; 2017-1).



  Warsaw Regional Court: 8
  (2012 – 1; 2013 – 3; 2014 – 0; 2015 – 0; 2016 – 3; 2017 – 1)

- 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

Lublin Regional Court: 0
Warsaw Regional Court: 0

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

  Lublin Regional Court: 0
  Warsaw Regional Court: 0

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

  Lublin Regional Court: 0
  Warsaw Regional Court: 0

Part 5: conclusions, opinions, et cetera

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

I think that FD 2009/299/JHA enhanced the protection of the right to defence of the requested persons but did not facilitate judicial cooperation. Some Member States implemented Article 2 of the FD as a mandatory ground of refusal of cooperation and started to verify correctness of information provided by the issuing authorities in part D of the EAW's form.
Furthermore, Part D of the EAW's form is not precise. For example, it is not clear whether the summons sent to the address indicated by the accused and not collected by him in due time shall be classified as "directly served on the requested person" or as served in the manner indicated in section 3.1.(b) of part D of the EAW's form. In Poland such correspondence is deemed to be effectively served on the accused. However, in case of such service of a summons there is no evidence that the accused was aware of the date of the scheduled hearing. On the other hand, giving up this form of serving a summons would definitely paralyse the criminal proceedings since by not collecting correspondence properly sent to their addresses the defendants would block examination of the case.

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

Yes, as was explained above, starting from 2012, the number of requests for supplementary information concerning part D of the EAW's form has increased. Some states do not execute EAW's issued for the purpose of execution of "in absentia" judgments delivered in the simplified procedure.

93. Did you see (partial) refusals of *in absentia* EAW's of which you think they were not justified?[85]

Yes, in case of substitute service of the summons to the hearing (to the address indicated by the accused who was duly informed about his duty to report every change of the place of residence) if the accused does not collect the summons. I am convinced that the accused who is not collecting the summons sent to him waives his right to participate in the hearing. Thus, the EAW's issued for the purpose of execution of a custodial penalty imposed on the requested person who effectively waived his right to be present at the hearing, should be executed.

94. Did you see surrenders granted in *in absentia* cases that should have led to a refusal?[86]

No. In Poland this is an optional ground for refusal. So, the courts rely rather on the mandatory ground of refusal based on the risk of violation of human right of the requested person.

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?

In my opinion such requests may have a negative impact on the mutual trust. For example, in the issuing authority ticked section 3.1 (a) of Part D of the EAWs form, the request for supplementary information may suggest the lack of trust that the summons to the hearing was actually served directly on the accused.

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

Since in Poland this is only the optional ground for refusal, the executing authorities shall ask for information which would allow to establish whether the requested person was aware of the judicial proceedings conducted against him in the issuing state and could participate in the hearing. What matters is whether a defendant was duly summoned to the hearing.

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

Yes. For details - see answer to question 86.

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?

See answers to questions indicated in Part 3 of the questionnaire.

[85] 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.

[86] 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.

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

It contains quite general information. Unfortunately, the handbook does not offer useful information as to the manner in which part D of the EAW's form shall be filled in. However, the interviewed judges are aware of the fact that the Handbook is available in Polish.

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)?

For the purpose of this project I did not analyse the practice with reference to the above-mentioned framework decisions. So, I cannot provide the reliable answer to this question.
The above-mentioned framework decision resulted also in amendments of provisions of Chapter 66b of the CCP concerning mutual recognition of financial penalties. The new Article 611fg (10) of the CCP was introduced stating that the court may refuse execution of financial penalty if from the form indicated in Article 611ff § 2 of the CCP it transpires that a penalty was imposed in the absence of the accused, unless:

a) a convict was summoned to appear in the proceedings or otherwise informed of the date and place of the hearing or sitting of the court and was informed that the failure to appear did not prevent the court from issuing a decision or a judgment or if the requested person was represented by a defence counsel who was present at the hearing or sitting of the court.
b) after being served with the judgment or decision together with the instruction about the right, the time and the manner of submitting a motion for re-examination of the case in his presence in the issuing state, the convict has failed to submit such a motion within the statutory time-limit or declared that he does not object to the judgment or the decision.

The same wording was introduced to Article 611fw § (8) of the CCP providing grounds for refusal of execution of decisions concerning confiscation. Also with reference to this form of mutual recognition issuing a judgment in absentia constitutes only optional ground for refusal.

Having regard to the fact that with reference to both execution of judgments imposing financial penalties as well as confiscation this is only an optional ground of refusal, one may assume that this ground does not hamper mutual recognition of these decisions.

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.

In my opinion currently the CCP fulfils the requirements of Directive 2016/343. However, the Ministry of Justice is now working on the amendments to the Code of Criminal Procedure which should accelerate the proceedings (see para. 11 of the questionnaire). The draft amendments of 4 December 2018 enlarge the opportunities of conducting the trial in absentia. In particular, the court will be entitled to conduct the evidentiary proceedings at the hearing despite the absence of the accused who properly justified his non-appearance (the new Article 378a of the CCP). The draft act provides for the right of the accused to request repetition of the evidentiary proceedings conducted in his absent at the subsequent hearing. However, the accused will have to prove that the way of conducting the evidentiary proceedings in his/her

absence violated his/her procedural guarantees, in particular, his/her right to defence. Moreover, if such a motion for repetition of the evidence will not be submitted at the subsequent hearing, the accused will not be entitled to ask for repetition of the evidence at the later stages of the proceedings.