

*Improving Mutual Recognition of European Arrest Warrants for the Purpose of Executing In Absentia Judgments*

**Case-law Guide**



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## Table of Contents

1. Introduction.....	3
2. Scope of application of the ECHR to proceedings concerning the execution of EAWs – general remarks .....	4
2.1 Applicability to proceedings concerning the execution of EAWs .....	4
2.2 General European standard for <i>in absentia</i> trials .....	4
3. Scope of application of the EU Charter of Fundamental Rights to proceedings concerning execution of EAWs .....	5
4. Fair <i>in absentia</i> criminal proceedings under the ECHR and under EU law .....	6
4.1 Stages of judicial examination of the case relevant for the assessment whether the proceedings were conducted <i>in absentia</i> : .....	6
4.1.1 Under the case-law of the ECtHR .....	6
4.1.2 Under the case-law of the Court of Justice concerning Article 4a(1) of FD 2002/584/JHA .....	11
4.2 The general requirements of “a waiver of the right to take part in the trial” under Article 6 of the ECHR and under Article 4a of FD 2002/584/JHA. ....	18
4.3 Requirements concerning knowledge about the trial and summoning of a defendant 21	
4.3.1 Under the case-law of the ECtHR.....	21
4.3.2 Under the case-law of the Court of Justice concerning Article 4a of FD 2002/584/JHA .....	24
4.4 Representation by a lawyer as a condition of a fair trial conducted <i>in absentia</i> .....	26
4.4.1 Under the case-law of the ECtHR .....	26
4.4.2 Under the case-law of the Court of Justice concerning Article 4a of FD 2002/584/JHA .....	27
4.5 Serving a judgment on a defendant as a condition of fair <i>in absentia</i> proceedings... ..	29
4.5.1 Under the case-law of the ECtHR.....	29
4.5.2 Under the case-law of the Court of Justice concerning Article 4a of FD 2002/584/JHA .....	29
4.6 The right to retrial as a guarantee of fairness of proceedings conducted <i>in absentia</i> . 32	
4.6.1 Under the case-law of the ECtHR .....	32
4.6.2 Under the case-law of the Court of Justice concerning Article 4a of FD 2002/584/JHA .....	34
5. A judgment rendered <i>in absentia</i> as an optional ground for refusal to execute EAWs – admissibility of surrender of a person despite that conditions indicated in Article 4a(1) of FD 2002/584/JHA are not met. ....	37
6. Conclusions: Strasbourg and Luxembourg – difference in standards .....	40
Table of European cases.....	41

## **1. Introduction**

The aim of the Guide is to provide practitioners with easy access to the case-law of the European Court of Human Rights (hereafter: ECtHR) and the Court of Justice of the European Union (hereafter: Court of Justice) concerning *in absentia* trials and the interpretation of Article 4a(1) of FD 2002/584/JHA. The latter provision was drafted with due respect of the requirements of Article 6 of the ECHR and the relevant case-law of the ECtHR. Thus, it reflects the main requirements of a fair trial conducted *in absentia* and determines the structure of the Guide.

Conceived as a tool for issuing and executing authorities, the Guide offers summaries of important judgments and decisions of both European Courts regarding the main concepts used in Article 4a(1) of FD 2002/584/JHA which at the same time form the conditions for fairness of *in absentia* criminal proceedings: the requirements concerning summoning of a defendant; his/her representation by a lawyer; serving a judgment on a defendant and the right to re-trial. While the Manual is elaborated in order to assist judicial authorities in filling in and assessing section (d) of the EAW-form, the Guide provides practitioners who want to know more of the background of the Manual with compendious information about the proper interpretation of Article 4a(1) of FD 2002/584/JHA and European standards of protection of the right to a fair trial.

## 2. Scope of application of the ECHR to proceedings concerning the execution of EAWs – general remarks

### 2.1 Applicability to proceedings concerning the execution of EAWs

According to well-established case-law of the ECtHR, Article 6 of the ECHR does not apply to proceedings concerning extradition, neither under its civil ‘limb’ nor under its criminal ‘limb’: the decision to extradite someone is not a determination of his or her civil rights nor is it a determination of a criminal charge.<sup>1</sup>

That case-law does not distinguish between extradition and the execution of an EAW: the EAW replaces extradition between the Member States of the European Union and has the same objectives as extradition (delivering a person who is suspected or convicted of an offence to another state). Execution of an EAW, therefore, does not enter the field of application of Article 6 of the ECHR either.

The decision *Monedero Angora v. Spain* is leading. A French judicial authority had issued an EAW against Monedero Angora, a Spanish national, for the purpose of executing a custodial sentence. His complaint that in deciding on the execution of the EAW the Spanish courts had violated his right to a fair trial before an independent and impartial court within a reasonable time, was declared inadmissible *ratione materiae*, because the procedure did not concern the determination of a criminal charge.<sup>2</sup>

### 2.2 General European standard for *in absentia* trials

Even though Article 6 of the ECHR is not directly applicable, the case-law of the ECtHR under that provision is relevant for the application of Article 4a(1) of FD 2002/584/JHA.

Because Article 4a(1) “strengthens the procedural rights of persons subject to criminal proceedings, guaranteeing them a high level of protection by ensuring full observance of their rights of defence, flowing from the right to a fair trial, enshrined in Article 6 of the ECHR”, it must be “interpreted and applied in accordance with the requirements of Article 6 of the ECHR and the relevant case-law of the European Court of Human Rights”.<sup>3</sup>

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<sup>1</sup> See, e.g., ECtHR, judgment of 4 February 2005, *Mamatkulov and Askarov v. Turkey* [GC], ECLI:CE:ECHR:2005:0204JUD004682799, § 82.

<sup>2</sup> ECtHR, decision of 7 October 2008, *Monedero Angora v. Spain*, ECLI:CE:ECHR:2008:1007DEC004113805. See also ECtHR, decision of 24 March 2015, *Martuzevičius v. the United Kingdom*, ECLI:CE:ECHR:2015:0324DEC001356613; ECtHR, decision of 25 June 2019, *West v. Hungary*, ECLI:CE:ECHR:2019:0625DEC000538012, § 65.

<sup>3</sup> ECJ, judgment of 22 December 2017, *Samet Ardic*, C-571/17 PPU, ECLI:EU:C:2017:1026, paras. 73-74.

### 3. Scope of application of the EU Charter of Fundamental Rights to proceedings concerning execution of EAWs

Currently, two Union law instruments set general standards for *in absentia* trials: Directive 2016/343/EU and FD 2009/299/JHA. The former instrument harmonises national rules on conducting criminal trials in the absence of the accused.<sup>4</sup> Not all Member States are bound by this directive.<sup>5</sup> The latter instrument only harmonises the ground for refusal to execute an EAW which is issued for the purpose of enforcing a decision rendered following a trial at which the person concerned did not appear in person.

The EU Charter of Fundamental rights is applicable as regards the Member States (and, therefore, their judicial authorities) “only when they are implementing Union law” (Article 51(1) of the Charter).

When the authorities of the Member States apply the provisions of national law adopted to transpose FD 2002/584/JHA, FD 2009/299/JHA or Directive 2016/343/EU,<sup>6</sup> they are implementing Union law. In doing so, they are bound by the Charter, in particular by Article 47 (the right to an effective judicial remedy and the right to a fair trial) and Article 48(2) (the rights of the defence) of the Charter.<sup>7</sup>

Article 4a(1) of FD 2002/584/JHA is compatible with Article 47 and Article 48(2) of the Charter.<sup>8</sup> Directive 2016/343/EU is intended to enhance the right to a fair trial in criminal proceedings as enshrined in Article 47 and Article 48 of the Charter.<sup>9</sup>

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<sup>4</sup> Directive 2016/343/EU 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, *OJ* 2016, L 65, p. 1.

<sup>5</sup> Denmark, Ireland and the United Kingdom are not bound by Directive 2016/343/EU.

<sup>6</sup> Cf. ECJ, judgment of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, C-404/125 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 84.

<sup>7</sup> See, as regards the right to a fair trial, ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, ECLI:EU:C:2018:586:586.

<sup>8</sup> ECJ, judgment of 26 February 2013, *Stefano Melloni v Ministerio Fiscal*, C-399/11, ECLI:EU:C:2013:107, para. 54.

<sup>9</sup> Recital (9) of the preamble in connection with recital (1) thereof.

## 4. Fair *in absentia* criminal proceedings under the ECHR and under EU law

### 4.1 Stages of judicial examination of the case relevant for the assessment whether the proceedings were conducted *in absentia*:

#### 4.1.1 Under the case-law of the ECtHR

##### Determination of the charge

Article 6(1) of the ECHR guarantees everyone the right to a fair trial “(i)n the determination (...) of any criminal charge against him”. The concept of a ‘determination of a criminal charge’ covers the whole proceedings in question (including appeal proceedings) from the moment of the charge to the final decision on the determination of the charge. In case of a conviction, there is no final determination of the charge as long as the sentence (the penalty imposed) is not definitively fixed.<sup>10</sup>

##### Appellate and cassation proceedings

Article 6 of the ECHR does not oblige the Parties to the ECHR to provide for **appellate and cassation proceedings**. Nonetheless, if they do so, those proceedings will also be covered by Article 6 of the ECHR. The ECtHR has held so many times, e.g. in *Kudła v. Poland*:

*122. The Court reiterates that Article 6 § 1 does not compel the States to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is required to ensure that persons amenable to the law shall enjoy before them the fundamental guarantees contained in Article 6 (see, among other authorities, the Delcourt v. Belgium judgment of 17 January 1970, Series A no. 11 pp. 13-15, § 25, and the Brualla Gómez de la Torre v. Spain judgment of 19 December 1997, Reports 1997-VIII, p. 2956, § 37).*

*While the manner in which Article 6 is to be applied in relation to courts of appeal or of cassation depends on the special features of the proceedings in question, there can be no doubt that appellate or cassation proceedings come within the scope of Article 6 (see, mutatis mutandis, the Twalib v. Greece judgment of 9 June 1998, Reports 1998-IV, pp. 1427-28, § 46). (...)<sup>11</sup>*

##### Full jurisdiction on appeal

If on **appeal**, the appellate court has to examine a case **as to the facts and the law** and make a **full** assessment of the issue of guilt or innocence of the defendant, it **must in principle hear** the defendant, as the ECtHR held, e.g., in *Seliwiak v. Poland*<sup>12</sup> and *Hokkeling v. the Netherlands*:

*58. The Court has also held that although proceedings that take place in the accused’s absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself or that he intended to escape trial (see Sejdovic, cited above, §*

<sup>10</sup> ECtHR, judgment of 15 July 1982, *Eckle v. Germany*, ECLI:CE:ECHR:1982:0715JUD000813078, § 77.

<sup>11</sup> ECtHR, judgment of 26 October 2000, *Kudła v. Poland* [GC], ECLI:CE:ECHR:2000:1026JUD003021096, § 122.

<sup>12</sup> ECtHR, judgment of 21 July 2009, *Seliwiak v. Poland*, ECLI:CE:ECHR:2009:0721JUD000381804, § 56.

82, with further references). In particular, where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (see *Hermi v. Italy* [GC], no. 18114/02, § 64, ECHR 2006-XII; see also, as a more recent authority, *Zahirović v. Croatia*, no. 58590/11, § 56, 25 April 2013). Still less can it do so where the appellate court is called upon to examine whether the applicant's sentence should be increased (*Zahirović*, § 57).<sup>13</sup>

### **Jurisdiction limited to questions of law**

However, proceedings involving **questions of law only** – such as **cassation proceedings** – may comply with the requirements of Article 6 ECHR even where the defendant was not given an opportunity of being heard in person by the cassation court. Thus, in *Meftah and Others v. France*, the ECtHR held:

41. (...) The Court has held on a number of occasions that, provided that there has been a public hearing at first instance, the absence of public hearings at second or third instance may be justified by the special features of the proceedings at issue. Thus, proceedings for leave to appeal or proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 even where the appellant was not given an opportunity of being heard in person by the appeal or cassation court (see the following judgments: *Sutter v. Switzerland*, 22 February 1984, Series A no. 74, p. 13, § 30; *Monnell and Morris v. the United Kingdom*, 2 March 1987, Series A no. 115, p. 22, § 58; *Ekbatani v. Sweden*, 26 May 1988, Series A no. 134, p. 14, § 31; *Kamasinski v. Austria*, 19 December 1989, Series A no. 168, pp. 44-45, § 106; and *Bulut v. Austria*, 22 February 1996, Reports 1996-II, p. 358, § 41).

42. The special features of the procedure before the Criminal Division of the Court of Cassation must therefore be taken into account in determining whether the applicants' right to a fair trial was infringed (see *Kamasinski*, cited above, pp. 44-45, § 106). Under French law, the Court of Cassation carries out supervision which is limited to compliance with the law, including jurisdictional and procedural rules, to the exclusion of any examination of the facts in the strict sense, such examination being within the sole province of the courts below. Save for exceptions, the procedure before the Court of Cassation is essentially written, that rule applying also when a party is represented by a member of the Conseil d'Etat and Court of Cassation Bar. Members of the Conseil d'Etat and Court of Cassation Bar do not enjoy an absolute right to make oral observations: any member wishing to do so at the hearing must first contact the President of the Criminal Division in order to inform him or her of the points of law which they intend to raise and to determine by agreement the arrangements under which they will be allowed to do so (see paragraph 31 above).

43. In the present case, the Court notes that the appeals to the Court of Cassation were lodged after the applicants' arguments had been examined by both the trial courts and the courts of appeal, which had had full jurisdiction and, in compliance

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<sup>13</sup> ECtHR, judgment of 14 February 2017, *Hokkeling v. the Netherlands*, ECLI:CE:ECHR:2017:0214JUD003074912, § 58.

*with the rules laid down by Article 6, had held hearings at which the applicants or their lawyer had appeared and presented their case.*

*44. As regards the right for appellants in the Court of Cassation to make oral representations at the hearing, it should be noted that any legal argument at a hearing before the Criminal Division of the Court of Cassation will be particularly technical and concern only points of law (see paragraph 24 above), as no further submissions may be made on the facts beyond the court of appeal stage, unless the case is remitted by the Court of Cassation. Thus, in the Court's view, it would be unduly formalistic to interpret the procedural requirements as meaning that the applicants should have been permitted to make oral representations at the hearing before the Court of Cassation. It is clear that, in addition to entailing a risk of negative repercussions in terms of increased litigation, such an approach would not assist in resolving issues that are essentially in written form and technical, and largely inaccessible to someone without legal training (see *Pham Hoang v. France*, judgment of 25 September 1992, Series A no 243, p. 23, § 40).<sup>14</sup>*

### **Cumulative sentence**

Proceedings in which two or more final sentences are merged into a new sentence (a so called **cumulative** or **aggregate sentence**) fall within the scope of Article 6 ECHR if the determination of the new sentence is not merely an arithmetical exercise, but leaves some **discretion** to the competent authority as to **the level of the new sentence**, as the ECtHR held, *e.g.*, in *Aleksandr Dementyev v. Russia*:

*23. The Court reiterates that, in criminal matters, Article 6 § 1 of the Convention covers the whole of the proceedings in question, including appeal proceedings and the determination of sentence (see, among other authorities, *Eckle v. Germany*, 15 July 1982, §§ 76-77, Series A no. 51, and *T v. the United Kingdom [GC]*, no. 24724/94, § 108, 16 December 1999).*

*24. Turning to the circumstances of the present case, the Court observes that, after two guilty verdicts had been rendered and taken effect in respect of the applicant, it still remained necessary for the domestic judicial authorities to fix the aggregate sentence combining those previously imposed on the applicant in the course of two sets of criminal proceedings against him.*

*25. The Court cannot accept the Government's argument that the determination of the aggregate sentence was a mere "formality" and an "arithmetical" exercise (see, by contrast, *Nurmagomedov*, cited above, § 48, where the domestic court was solely called upon to match the constituent elements of a crime as established in the original conviction with the definitions of offences contained in the new Criminal Code and to replace the old references with the new). When determining the aggregate sentence in respect of the applicant, the domestic judicial authorities were to take into account his character, as well as the mitigating and aggravating circumstances of the crimes committed. It was for the court to decide whether the terms of both sentences were to be added up in full or in part (see paragraph 14 above).*

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<sup>14</sup> ECtHR, judgment of 26 July 2002, *Meftah and Others v. France [GC]*, ECLI:CE:ECHR:2002:0726JUD003291196, § 41-44.



26. Accordingly, the Court considers that the applicant's case should be distinguished from the case of *Nurmagomedov*. In the Court's view, it bears a close resemblance to the case of *Eckle* where the Court held, in the context of determining the length of the criminal proceedings, that there is no "determination ... of any criminal charge", within the meaning of Article 6 of the Convention, as long as the sentence is not definitively fixed (see *Eckle*, cited above, § 77). In the Court's view, the applicant was not in a position to calculate the aggregate term of the sentences on his own. While the conversion of the term of community work into the prison term was indeed an arithmetical exercise, the judicial authorities still had discretion to decide whether the converted sentence would be added in full or in part, regard being had to the particular circumstances of the case. Accordingly, the Court concludes that the applicant's complaint concerning the hearing for determination of his aggregate criminal sentence is compatible *ratione materiae* with the provisions of the Convention. It falls within Article 6 of the Convention under its criminal head.<sup>15</sup>

However, the applicability of Article 6 of the ECHR to such proceedings does not necessarily mean that the person concerned is always entitled to be heard in person. In *Aleksandr Dementyev v. Russia*, the ECtHR held as follows:

43. *The Court observes that under Russian law, defendants have the right to attend hearings concerning aggregate sentences. They may also appoint a lawyer to represent them before the sentencing court (see paragraph 16 above).*

44. *This does not necessarily imply, however, that the presence of the applicant at the sentencing hearing is required by Article 6 § 1 of the Convention, as the requirements of that provision are autonomous in relation to those of national legislation.*

45. *In the instant case, the Court deems it appropriate to proceed on the basis of the following facts. The Regional Court had jurisdiction to rule solely on the conversion of the applicant's sentence to six months' community work into a prison sentence according to an arithmetical formula established by law, whereby three days of community work should be replaced by one day of a prison sentence (see paragraph 15 above). The recalculated and converted sentence was then to be added in full or in part to the thirteen years' imprisonment the applicant was to serve following his other conviction. While it is true that the Regional Court, in carrying out the sentencing exercise, was to take into account, inter alia, the applicant's character and the mitigating and aggravating circumstances of each of the crimes committed, its task was purely to decide what period - ranging from one day to two months - was to be served by the applicant following his conviction for battery.*

46. *Given the limited scope of the issue to be dealt with by the Regional Court and the fact that the applicant was present and represented during both trials and was able to appeal against his convictions, the Court considers that the Regional Court, could - as a matter of fair trial - have properly examined the issue on the basis of*

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<sup>15</sup> ECtHR, judgment of 28 November 2013, *Aleksandr Dementyev v. Russia*, ECLI:CE:ECHR:2013:1128JUD004309505, § 23-26.

*the case-file and the parties' written submissions without a direct assessment of the evidence given by the applicant in person.*<sup>16</sup>

### **Substitution of a sentence**

Given that there is no 'determination of a criminal charge' as long as the sentence is not definitively fixed, Article 6 of the ECHR also applies to proceedings in which **a final penalty is substituted for another penalty**. Thus, the ECtHR held in *Gurguchiani v. Spain*:

*47. La Cour a déjà conclu, au paragraphe 40 ci-dessus, que le remplacement de la peine infligée au requérant par une expulsion et une interdiction de territoire pour une durée de dix ans constituait une peine au sens de l'article 7 de la Convention. Elle rappelle par ailleurs qu'en cas de condamnation il n'a pas été « décidé » du « bien-fondé d'une accusation en matière pénale, au sens de l'article 6 § 1 de la Convention, aussi longtemps que la peine ne se trouve pas déterminée définitivement » (Eckle, précité, § 77).*

*48. Ces éléments suffisent à la Cour pour conclure à l'applicabilité de l'article 6 § 1 à la présente espèce.*<sup>17</sup>

### **Execution of a sentence**

However, one should sharply distinguish proceedings concerning the **determination of a sentence** from proceedings concerning the **execution of a sentence**. Article 6 of the ECHR does not apply to the latter category of proceedings, *e.g.* proceedings concerning a request for provisional release,<sup>18</sup> proceedings concerning a request for temporary prison leave,<sup>19</sup> proceedings concerning the application of amnesty legislation to a final conviction,<sup>20</sup> proceedings concerning placement in a secure prison<sup>21</sup> and proceedings concerning the transfer of the enforcement of a foreign sentence.<sup>22</sup> Such proceedings do not constitute a 'determination of a criminal charge'.

Equally, proceedings concerning the **revocation of a suspended sentence** and proceedings concerning the **revocation of provisional release** do not amount to a 'determination of a criminal charge'. Thus, in *X. v. the Federal Republic of Germany*, the European Commission of Human Rights held as follows:

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<sup>16</sup> *Ibidem*, § 43-46.

<sup>17</sup> ECtHR, judgment of 15 December 2009, *Gurguchiani v. Spain*, ECLI:CE:ECHR:2009:1215JUD001601206. Unofficial translation in English:

*47. The Court already concluded (para. 40 above) that the substitution of the penalty imposed on the applicant by the measure of expulsion and a ban to enter the territory for a duration of ten years constituted a penalty in the sense of Article 7 of the Convention. It recalls that in case of a conviction there is no determination of a criminal charge in the sense of Article 6 §1 of the Convention, as long as the penalty is not definitively fixed (Eckle, cited above, § 77).*

*48. These elements suffice for the Court to conclude that Article 6 §1 is applicable to the case at hand.*

<sup>18</sup> ECtHR, judgment of 25 November 2014, *Vasilescu v. Belgium*, ECLI:CE:ECHR:2014:1125JUD006468212, § 121.

<sup>19</sup> ECtHR, judgment of 3 April 2012, *Boulouis v. Luxembourg* [GC], ECLI:CE:ECHR:2012:0403JUD003757504, § 87.

<sup>20</sup> ECtHR, decision of 13 May 2003, *Montcornet de Caumont v. France*, ECLI:CE:ECHR:2003:0513DEC005929000.

<sup>21</sup> ECtHR, judgment of 17 September 2009, *Enea v. Italy* [GC], ECLI:CE:ECHR:2009:0917JUD007491201, § 97

<sup>22</sup> See, *e.g.*, ECtHR, decision of 23 October 2012, *Ciok v. Poland*, ECLI:CE:ECHR:2012:1023DEC000049810, § 38

*Whereas the Applicant complains, more particularly, that the proceedings under which the Regional Court of Lüneburg revoked the suspension on ... June 1964, were not brought against him within a reasonable time;*

*Whereas the Commission observes in this respect that the Applicant in these proceedings did not have the status of a person charged with a criminal offence but that of a person convicted by a sentence which had become final although its execution had been suspended; whereas a court, when revoking the suspension of a sentence is not determining a civil right or obligation within the meaning of Article 6 (Art. 6) of the Convention, nor a criminal charge brought against the person in question;*

*Whereas the provisions of Article 6 (Art. 6) therefore do not apply to such proceedings; whereas the Commission refers in this respect to its decisions in Applications Nos 864/60 - X v. Austria - Collection of Decisions 9, page 17 and 1336/62 - S v. Austria; whereas it follows that this part of the application must also be rejected as incompatible with the Convention;<sup>23</sup>*

However, imposing **additional** days of custody on account of (disciplinary) offences committed during the execution of a sentence and thus **extending the duration of the sentence**, does constitute a ‘determination of a criminal charge’, as the ECtHR held in *Ezeh and Connors v. the United Kingdom*.<sup>24</sup>

4.1.2 Under the case-law of the Court of Justice concerning Article 4a(1) of FD 2002/584/JHA

### **Trial resulting in the decision: final conviction**

According to the Court of Justice, the decision which Article 4a(1) refers to is the “judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of a European Arrest Warrant”,<sup>25</sup> in other words the final “conviction”<sup>26</sup> or the “final sentencing decision”.<sup>27</sup> Such a final conviction or a final sentencing decision comprises “two distinct but related aspects”: the finding of guilt and the handing down of a sentence.<sup>28</sup>

### **Trial resulting in the decision: appellate proceedings**

Referring to the case-law of the ECtHR, in the *Tupikas* judgment the Court of Justice defined the concept of a ‘trial resulting in the decision’ in the context of successive proceedings leading to successive decisions (first instance – appeal) as “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**

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<sup>23</sup> ECHR, decision of 5 October 1967, *X. v. the Federal Republic of Germany*, ECLI:CE:ECHR:1967:1005DEC000242865. See also ECHR, decision of 6 December 1977, *X. v. Switzerland*, ECLI:CE:ECHR:1977:1206DEC000764876; ECHR, decision of 9 May 1994, *Sampson v. Cyprus*, ECLI:CE:ECHR:1994:0509DEC001977492.

<sup>24</sup> ECtHR, judgment of 9 October 2003, *Ezeh and Connors v. the United Kingdom* [GC], ECLI:CE:ECHR:2003:1009JUD003966598, § 120-130.

<sup>25</sup> ECJ, judgment of 10 August 2017, *Openbaar Ministerie v. Tadas Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para. 74.

<sup>26</sup> *Ibidem*, para. 75.

<sup>27</sup> *Ibidem*, para. 76.

<sup>28</sup> ECJ, judgment of 10 August 2017, *Openbaar Ministerie v. Sławomir Andrzej Zdźaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 77.

**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”:

78. *As is clear from the case-law of the European Court of Human Rights, the term ‘conviction’ within the meaning of the ECHR refers to both a finding of guilt after it has been established in accordance with the law that there has been an offence, and the imposition of a penalty or other measure involving deprivation of liberty (see, to that effect, ECtHR, 21 October 2013, Del Río Prada v. Spain, CE:ECHR:2013:1021JUD004275009, § 123, and the case-law cited).*

79. *Moreover, the European Court of Human Rights has held on several occasions that, where appeal proceedings are provided for, they must comply with the requirements flowing from Article 6 of the ECHR, in particular where the remedy available against the decision given at first instance is a full appeal, the second-instance court having jurisdiction to re-examine the case, by assessing the merits of the accusations in fact and in law, and thus to determine the guilt or innocence of the person concerned on the basis of the evidence presented (see, to that effect, judgments of the ECtHR of 26 May 1988, Ekbatani v. Sweden, CE:ECHR:1988:0526JUD001056383, § 24 and 32; 26 October 2000, Kudła v. Poland, CE:ECHR:1988:0526JUD001056383, § 122; 18 October 2006, Hermi v. Italy, CE:ECHR:2006:1018JUD001811402, § 64 and 65; 25 April 2013, Zahirović v. Croatia, CE:ECHR:2013:0425JUD005859011, § 56; and of 14 February 2017, Hokkeling v. Netherlands, CE:ECHR:2017:0214JUD003074912, § 56 and 58).*

80. *It is also clear from that case-law of the European Court of Human Rights that where two instances are provided for, the fact that the person concerned was actually able to exercise his rights of defence at first instance does not automatically lead to the conclusion that he necessarily enjoyed the guarantees laid down in Article 6 of the ECHR if the appeal proceedings took place in his absence (see, to that effect, judgment of 14 February 2017, Hokkeling v. Netherlands, CE:ECHR:2017:0214JUD003074912, § 57, 58 and 61).*

81. *Consequently, in the event that proceedings have taken place at several instances which have given rise to successive decisions, at least one of which was given in absentia, it is appropriate to understand by ‘trial resulting in the decision’, within the meaning of Article 4a(1) of Framework Decision 2002/584, 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.*

82. *That interpretation is fully in line with the requirements of respect for the rights of the defence which Article 4a of Framework Decision 2002/584 precisely seeks to uphold, as is apparent from paragraphs 58 and 59 of the present judgment.*

83. *It is the judicial decision finally disposing of the case on the merits, in the sense that there are no further avenues of ordinary appeal available, which is decisive for the person concerned, since it directly affects his personal situation with regard to the finding of guilt and, where appropriate, the determination of the custodial sentence to be served.*

84. Accordingly, it is at that procedural stage that the person concerned must be able to fully exercise his rights of defence in order to assert his point of view in an effective manner and thereby to influence the final decision which could lead to the loss of his personal freedom. The outcome of that procedure is irrelevant in that context.

85. In those circumstances, even assuming that the rights of the defence have not been fully respected at first instance, such a breach may validly be remedied in the course of the second-instance proceedings, provided that the latter proceedings provide all the guarantees with respect to the requirements of a fair trial.

86. In other words, when the person concerned appeared before the judge responsible for a fresh assessment of the merits of the case, but not at first instance, the provisions of Article 4a of Framework Decision 2002/584 do not apply. Conversely, the executing judicial authority must carry out the checks provided for in that article when the person concerned was present at first instance, but not in the proceedings concerned with a fresh assessment of the merits of the case.<sup>29</sup>

#### **Trial resulting in the decision: cassation proceedings**

The Court of Justice's criterion, enounced in para. 81 of the *Tupikas* judgment (and cited above), makes it clear that proceedings concerning **questions of law only**, such as **cassation proceedings**, do not come within the ambit of Article 4a(1) of FD 2002/584/JHA.

#### **Trial resulting in the decision: cumulative sentence**

Referring to the case-law of the ECtHR, in the *Zdziaszek* judgment the Court of Justice distinguishes between a **decision modifying the quantum of penalties previously imposed** and a **decision relating to the methods of execution of a sentence**. As to the first category, it follows from the case-law of the ECtHR that Article 6 of the ECHR does not only apply to the finding of guilt but **also to the determination of the sentence**. Therefore, the person concerned has a right to be present at the hearing "because of the significant consequences which it may have on the quantum of the sentence to be imposed". Such significant consequences could arise where the proceedings for determining an overall sentence 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":

83. Secondly, it is necessary to determine whether a decision at a later stage of the proceedings amending one or more of the custodial sentences previously imposed, such as the cumulative sentence at issue in the case in the main proceedings, is covered by Article 4a(1) of the Framework Decision.

84. As is apparent from the case file before the Court, first, such a decision, although taken after one or more decisions sentencing the person concerned to one or more penalties, does not affect the finding of guilt set out in the previous decisions, that conviction therefore being final.

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<sup>29</sup> ECJ, judgment of 10 August 2017, *Openbaar Ministerie v. Tadas Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, paras. 78-86.

85. Next, such a decision modifies the quantum of the penalty or penalties imposed. It is therefore necessary to make a distinction between measures of that type and those relating to the methods of execution of a custodial sentence. It is moreover apparent from the case-law of the European Court of Human Rights that Article 6(1) of the ECHR does not apply to questions concerning the methods for executing a sentence, in particular those relating to provisional release (see, to that effect, ECtHR, 3 April 2012, Boulois v. Luxembourg, CE:ECHR:2012:0403JUD003757504, § 87).

86. Finally, proceedings leading to a decision, such as the judgment handing down a cumulative sentence at issue in the main proceedings, consisting in commuting into a single sentence one or more sentences handed down previously in respect of the person concerned, necessarily results in a more favorable result for that person. Thus, for example, a lighter penalty may be imposed following the entry into force of new legislation which penalises the relevant offence less severely. In addition, following several convictions, each of which involves the imposition of a sentence, the sentences may be combined to obtain a cumulative sentence which is less than the sum of the various sentences resulting from previous separate decisions.

87. In that regard, it is apparent from the case-law of the European Court of Human Rights that the guarantees laid down in Article 6 of the ECHR apply not only to the finding of guilt, but also to the determination of the sentence (see, to that effect, ECtHR, 28 November 2013, Dementyev v. Russia, CE:ECHR:2013:1128JUD004309505, § 23). Thus, compliance with the requirement of a fair trial entails the right of the person concerned to be present at the hearing because of the significant consequences which it may have on the quantum of the sentence to be imposed (see, to that effect, ECtHR, 21 September 1993, Kremzov v. Austria, CE:ECHR:1993:0921JUD001235086, § 67).

88. This is the case with respect to specific proceedings for the determination of an overall sentence where those 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 (see ECtHR, 15 July 1982, Eckle v. Germany, CE:ECHR:1983:0621JUD000813078, § 77, and 28 November 2013, Dementyev v. Russia, CE:ECHR:2013:1128JUD004309505, § 25 and 26).

89. Furthermore, it is irrelevant in that regard whether the court concerned has jurisdiction to increase the sentence previously imposed (see, to that effect, ECtHR, 26 May 1988, Ekbatani v. Sweden, CE:ECHR:1988:0526JUD001056383, § 32, and 18 October 2006, Hermi v. Italy, CE:ECHR:2006:1018JUD001811402, § 65).

90. It follows that proceedings giving rise to a judgment handing down a cumulative sentence, such as that at issue in the main proceedings, leading to a new determination of the level of custodial sentences imposed previously, must be regarded as relevant for the application of Article 4a(1) of Framework Decision 2002/584, where they entail a margin of discretion for the competent authority within the meaning of paragraph 88 of the present judgment and give rise to a decision which finally determines the sentence.

91. *Given that such proceedings determine the quantum of the sentence which the convicted person will ultimately serve, that person must be able to effectively exercise his rights of defence in order to influence favourably the decision to be taken in that regard.*

92. *The fact that the new sentence is hypothetically more favourable to the person concerned is irrelevant since the level of the sentence is not determined in advance but depends on the assessment of the facts of the case by the competent authority and it is precisely the duration of the sentence to be served which is finally handed down which is of decisive importance for the person concerned.*

93. *In the light of the grounds set out above, it must be held that, in a case such as that at issue in the main proceedings, where, following appeal proceedings in which the merits of the case were re-examined, a decision finally determined the guilt of the person concerned and also imposed a custodial sentence on him, the level of which was however amended by a subsequent decision taken by the competent authority after it had exercised its discretion in that matter and which finally determined the sentence, both decisions must be taken into account for the purposes of the application of Article 4a(1) of Framework Decision 2002/584.<sup>30</sup>*

#### **Trial resulting in the decision: decision to revoke the suspension of the execution of a sentence**

Again referring to Strasbourg case-law, in the *Ardic* judgment the Court of Justice reiterates that, whereas a final conviction, including a final determination of the sentence, squarely falls within Article 6 of the ECHR, that provision does not apply to “questions relating to the detailed rules for the execution or application of such a custodial sentence”. However, decisions concerning the latter category do come within the ambit of Article 6 of the ECHR, where, “following a finding of guilt of the person concerned and having imposed a custodial sentence on him, **a new judicial decision modifies either the nature or the quantum of sentence previously imposed**”,<sup>31</sup> e.g. (1) when **a prison sentence is replaced by an expulsion order** or (2) when **the duration of the detention previously imposed is increased**. Therefore, the concept of a ‘decision’ referred to in Article 4a(1) does not cover a “decision relating to the execution or application of a custodial sentence previously imposed, **except where the purpose or effect of that decision is to modify either the nature or quantum of that sentence and the authority which adopted it enjoyed some discretion in that regard**”.<sup>32</sup>

The decisions at issue in the *Ardic* judgment **did not affect the nature or the *quantum* of the custodial sentences imposed by the final judgments of conviction**. In the proceedings, the competent court only had to determine whether non-compliance with certain conditions attached to the suspension of the execution of those custodial sentences justified requiring the person concerned to serve, in part or in full, the custodial sentences originally imposed. In doing so, **the competent court did not dispose of discretion with regard to the level or the nature**

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<sup>30</sup> ECJ, judgment of 10 August 2017, *Openbaar Ministerie v. Sławomir Andrzej Zdźaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras. 83-93.

<sup>31</sup> ECJ, judgment of 22 December 2017, *Samet Ardic*, C-571/17 PPU, ECLI:EU:C:2017:1026, para. 76 (emphasis added).

<sup>32</sup> ECJ, judgment of 10 August 2017, *Openbaar Ministerie v Sławomir Andrzej Zdźaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras. 75-77.

**of the original sentences**, but only with regard to revoking the suspension or not. Therefore, the decisions at issue were not covered by Article 4a(1):

*67. It follows from the above that Article 4a(1) of Framework Decision 2002/584 must be interpreted as meaning that the concept of ‘decision’ referred to therein relates to the judicial decision or decisions concerning the criminal conviction of the interested person, namely the decision or decisions that definitively rule, after an assessment of the case in fact and in law, on the guilt of that person and, where relevant, on the custodial sentence imposed on him.*

*68. In the present case, it must be determined whether a decision to revoke suspension of execution of a custodial sentence previously imposed is of such a nature that it can be equated, for the purposes of applying that provision, to a decision such as that defined in the preceding paragraph.*

*69. In that regard, it should be pointed out that Framework Decision 2002/584 seeks, by the establishment of a simplified and effective system for the surrender of persons convicted or accused of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice, founded on the high level of trust which should exist between the Member States in accordance with the principle of mutual recognition (see, to that effect, judgments of 26 February 2013, Melloni, C-399/11, EU:C:2013:107, paragraphs 36 and 37, and of 5 April 2016, Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraphs 75 and 76).*

*70. To that end, Article 1(2) of the Framework Decision lays down the rule that Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of that Framework Decision. Except in exceptional circumstances, the executing judicial authorities may therefore refuse to execute such a warrant only in the exhaustively listed cases of non-execution provided for by Framework Decision 2002/584 and the execution of the European arrest warrant may be made subject only to one of the conditions listed exhaustively therein. Accordingly, while the execution of the European arrest warrant constitutes the rule, the refusal to execute is intended to be an exception which must be interpreted strictly (see judgment of 10 August 2017, Tupikas, C-270/17 PPU, EU:C:2017:628, paragraph 50 and the case-law cited).*

*71. As regards, more particularly, Article 4a of Framework Decision 2002/584, inserted by Article 2 of Framework Decision 2009/299, this seeks to restrict the possibility of refusing to execute the European arrest warrant by listing, in a precise and uniform manner, the conditions under which the recognition and enforcement of a decision given following a trial in which the person concerned did not appear in person may not be refused (judgment of 10 August 2017, Tupikas, C-270/17 PPU, EU:C:2017:628, paragraph 53 and the case-law cited).*

*72. Under that provision, the executing judicial authority is obliged to execute a European arrest warrant, notwithstanding the absence of the person concerned at the trial resulting in the decision, where one of the situations referred to in Article*



4a(1)(a), (b), (c) or (d) of that Framework Decision is established (judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraph 55).

73. Accordingly, that provision seeks to improve judicial cooperation in criminal matters by harmonising the conditions of execution of European arrest warrants issued for the purposes of executing decisions rendered in absentia, which is likely to facilitate mutual recognition of judicial decisions between Member States. At the same time, that provision strengthens the procedural rights of persons subject to criminal proceedings, guaranteeing them a high level of protection by ensuring full observance of their rights of defence, flowing from the right to a fair trial, enshrined in Article 6 of the ECHR (see, to that effect, judgments of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 51, and of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraphs 58 to 60).

74. To that end, the Court ensures that Article 4a(1) of Framework Decision 2002/584 is interpreted and applied in accordance with the requirements of Article 6 of the ECHR and the relevant case-law of the European Court of Human Rights (see, to that effect, judgments of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraphs 78 to 80, and of 10 August 2017, *Zdziaszek*, C-271/17 PPU, EU:C:2017:629, paragraphs 87 to 89).

75. While the final judicial decision convicting the person concerned, including the decision determining the custodial sentence to be served, falls fully within Article 6 of the ECHR, it is apparent from the case-law of the European Court of Human Rights that that provision does not apply, however, to questions relating to the detailed rules for the execution or application of such a custodial sentence (see, to that effect, ECtHR, 3 April 2012, *Boulois v. Luxembourg*, CE:ECHR:2012:0403JUD003757504, § 87; 25 November 2014, *Vasilescu v. Belgium*, CE:ECHR:2014:1125JUD006468212, § 121, and 2 June 2015, *Pacula v. Belgium*, CE:ECHR:2015:0602DEC006849512, § 47).

76. The position is different only where, following a finding of guilt of the person concerned and having imposed a custodial sentence on him, a new judicial decision modifies either the nature or the quantum of sentence previously imposed, as is the case when a prison sentence is replaced by an expulsion measure (ECtHR, 15 December 2009, *Gurguchiani v. Spain*, CE:ECHR:2009:1215JUD001601206, §§ 40, 47 and 48) or where the duration of the detention previously imposed is increased (ECtHR, 9 October 2003, *Ezeh and Connors v. United Kingdom*, CE:ECHR:2003:1009JUD003966598).

77. In the light of the foregoing, it must therefore be considered that, for the purposes of Article 4a(1) of Framework Decision 2002/584, the concept of 'decision' referred to therein does not cover a decision relating to the execution or application of a custodial sentence previously imposed, except where the purpose or effect of that decision is to modify either the nature or quantum of that sentence and the authority which adopted it enjoyed some discretion in that regard (see, to that effect, judgments of 10 August 2017, *Tupikas*, C-270/17 PPU, EU:C:2017:628, paragraphs 78 to 80, and of 10 August 2017, *Zdziaszek*, C-271/17 PPU, EU:C:2017:629, paragraphs 85, 90 and 96).

78. As regards, in particular, decisions to revoke the suspension of the execution of previously imposed custodial sentences, such as those at issue in the main proceedings, it is apparent from the case file before the Court that, in the present case, those decisions did not affect the nature or the quantum of custodial sentences imposed by final conviction judgments of the person concerned, which form the basis of the European arrest warrant which the German authorities are seeking to execute in the Netherlands.

79. Since the proceedings leading to those revocation decisions were not intended to review the merits of the cases, but only concerned the consequences which, from the point of view of the application of the penalties initially imposed and whose execution had, subsequently, been partially suspended subject to compliance with certain conditions, it was necessary to consider the fact that the convicted person had not complied with those conditions during the probationary period.

80. In that context, under the relevant national rules, the competent court only had to determine if such a circumstance justified requiring the convicted person to serve, in part or in full, the custodial sentences that had been initially imposed and the execution of which, subsequently, had been partially suspended. As the Advocate General pointed out in point 71 of his Opinion, while that court enjoyed a margin of discretion in that regard, that margin did not concern the level or the nature of the sentences imposed on the person concerned, but only whether the suspensions should be revoked or could be maintained, with additional conditions if necessary.

81. Accordingly, the only effect of suspension revocation decisions, such as those in the main proceedings, is that the person concerned must at most serve the remainder of the sentence initially imposed. Where, as in the main proceedings, the suspension is revoked in its entirety, the sentence once again produces all its effects and the determination of the quantum of the sentence still remaining to be served is derived from a purely arithmetic operation, with the number of days already served in custody being simply deducted from the total sentence imposed by the final criminal conviction.

82. In those circumstances, and in the light of what was stated in paragraph 77 of the present judgment, suspension revocation decisions, such as those at issue in the main proceedings, are not covered by Article 4a(1) of Framework Decision 2002/584, since those decisions leave unchanged the sentences imposed by the final conviction decisions with regard to both their nature and level.<sup>33</sup>

#### **4.2 The general requirements of “a waiver of the right to take part in the trial” under Article 6 of the ECHR and under Article 4a of FD 2002/584/JHA.**

Pursuant to the well-established case-law of the ECtHR, the right to participate in the hearing in criminal case is a significant element of the general right to a fair trial guaranteed by Article 6 of the ECHR. The Court underlines that although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article show that a person “charged with a criminal offence” is entitled to take part in the hearing. Moreover, it would be difficult to see how the

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<sup>33</sup> ECJ, judgment of 22 December 2017, *Samet Ardic*, C-571/17 PPU, ECLI:EU:C:2017:1026, paras. 67-82.

applicant could exercise the rights enshrined in Article 6(3) of the ECHR without being present at the hearing.<sup>34</sup>

However, the right to attend the hearing is not an absolute one. This right may be waived by the defendant either expressly or tacitly. In accordance with the general concept of “waiver”, if it is to be effective for the Convention purposes, such a waiver of rights must: 1) be established in an unequivocal manner; 2) be attended by minimum safeguards commensurate with its importance and shall not run counter to any important public interest.<sup>35</sup>

With reference to the right to attend the hearing the requirements of effective waiver are even higher and are defined in the leading case of *Sejdovic v. Italy*. Although there is no requirement that a person charged with a criminal offence be notified of the date of the hearing in person, if this is not the case, the national authorities cannot simply presume that an absent defendant had waived his/her right to appear at the trial. Moreover, an accused should be aware of the consequences of the waiver. As was underlined by the ECtHR:

*“... where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from his status as a “fugitive” [...], which was founded on a presumption with an insufficient factual basis, that he had waived his right to appear at the trial and defend himself”.*<sup>36</sup>

Furthermore, it is stated that:

*“...before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be”.*<sup>37</sup>

Additionally:

*“... a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure [...]. At the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control”.*<sup>38</sup>

In case of an effective waiver of the right to attend the hearing, a trial may be conducted *in absentia* and there is no need to provide the accused with the right to retrial. However, the refusal to reopen proceedings conducted *in absentia*, without any indication that the accused has waived his/her right to be present during the trial, shall be assessed as a “flagrant denial of

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<sup>34</sup> See, ECtHR, judgment of 1 March 2006, *Sejdovic v. Italy* [GC], ECLI:CE:ECHR:2006:0301JUD005658100, para. 81.

<sup>35</sup> ECtHR, judgment of 20 October 2015, *Dvorski v. Croatia*, ECLI:CE:ECHR:2015:1020JUD002570311, para. 100.

<sup>36</sup> ECtHR, judgment of 1 March 2006, *Sejdovic v. Italy* [GC], ECLI:CE:ECHR:2006:0301JUD005658100, para. 87.

<sup>37</sup> ECtHR, judgment of 1 March 2006, *Sejdovic v. Italy* [GC], ECLI:CE:ECHR:2006:0301JUD005658100, para. 87.

<sup>38</sup> ECtHR, judgment of 1 March 2006, *Sejdovic v. Italy* [GC], ECLI:CE:ECHR:2006:0301JUD005658100, para. 88.

justice” rendering the proceedings “manifestly contrary to the provisions of Article 6 or the principles embodied therein”.<sup>39</sup>

The ECtHR recognises the right of the State-Parties to the Convention to take measures which would discourage unjustified absences. However, such measures cannot undermine the fairness of the criminal proceedings. Thus, the waiver of the right to attend the hearing should not deprive the accused of his right to be defended by counsel.<sup>40</sup> The ECtHR stresses the following:

*“[...] the right of everyone charged with a criminal offence to be defended effectively by a lawyer is one of the basic features of a fair trial. An accused does not lose this right merely on account of not attending a court hearing. Even if the legislature must be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance. The legitimate requirement that defendants must attend court hearings can be satisfied by means other than deprivation of the right to be defended (see Van Geyseghem, cited above, § 34; Van Pelt, cited above, § 67; Kari-Pekka Pietiläinen, cited above, § 32; and Neziraj, cited above, § 51).”<sup>41</sup>*

As was stated in Chapter II.2. of this Guide, Article 4a(1) of FD 2002/584/JHA was drafted with due respect of the requirements of Article 6 of the ECHR and the relevant case-law of the ECtHR. This provision reflects the main requirements of a fair trial conducted *in absentia*. Thus, in order to strengthen the procedural rights of persons subject to criminal proceedings, Article 4a(1) of FD 2002/584/JHA provides for an optional ground of refusal of execution of the EAW issued for the purpose of executing a custodial sentence or a detention order issued *in absentia*. Such an EAW shall be executed if it states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:

*“(a) 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;*

*or*

*(b) 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;*

*or*

*(c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and*

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<sup>39</sup> ECtHR, judgment of 24 March 2005, *Stoichkov v. Bulgaria*, ECLI:CE:ECHR:2005:0324JUD000980802, para. 56; ECtHR, judgment of 12 February 2015, *Sanader v. Croatia*, ECLI:CE:ECHR:2015:0212JUD006640812, para. 71).

<sup>40</sup> ECtHR, judgment of 22 September 2009, *Kari-pekka Pietiläinen v. Finland*, ECLI:CE:ECHR:2009:0922JUD001356606, paras. 31-32.

<sup>41</sup> ECtHR, judgment of 9 July 2015, *Tolmachev v. Estonia*, ECLI:CE:ECHR:2015:0709JUD007374813, para. 48.

*which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:*

*(i) expressly stated that he or she does not contest the decision;*

*or*

*(ii) did not request a retrial or appeal within the applicable time frame;*

*or*

*(d) 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.”*

Thus, while deciding on the execution of EAW, the executing authority may assume that a defendant had waived his/her right to participate in the trial if at least one out of the above mentioned three prerequisites is fulfilled. Hence, it is enough that: 1) a defendant was informed in person about the date and place of the trial and was informed that a decision/judgment may be rendered in his absence, or 2) a defendant by other means actually received official information of the scheduled date and place of the trial and was informed that a decision/judgment may be rendered in his/her absence, or 3) a defendant being aware of the date of the trial had given a mandate to a legal counsellor to defend him or her at the trial and he/she was indeed defended by that counsellor at the trial. In addition, the executing judicial authority is not allowed to refuse the execution of EAW if it states that the person concerned either did not ask for a retrial or that s/he will be expressly informed of his/her right to a retrial and will have a right to full retrial or full appeal (both on point of law and facts) after surrender.<sup>42</sup>

In general, the above-mentioned conditions correspond to the requirements of an effective waiver of the right to participate in the trial, as established in the case-law of the ECtHR. However, there are certain differences which make the FD's standard higher than the ECHR's standard. This issue will be discussed in the following chapters of the Guide.

### **4.3 Requirements concerning knowledge about the trial and summoning of a defendant**

#### *4.3.1 Under the case-law of the ECtHR*

As was stated above, the effective waiver of the right to participate in the trial shall be accompanied by safeguards commensurate with the importance of this right and shall not run counter to any important public interest. First of all, a defendant must be aware of the criminal charges brought against him. Being aware of criminal charges, he/she is at the same time aware of the criminal proceedings conducted against him/her. The ECtHR underlines that:

*89. Under the terms of paragraph 3 (a) of Article 6 of the Convention, everyone charged with a criminal offence has the right “to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”. This provision points to the need for special attention to*

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<sup>42</sup> See, ECJ, judgment of 26 February 2013, *Stefano Melloni v. Ministerio Fiscal*, C-399/11, ECLI:EU:C:2013:107, para. 52.

*be paid to the notification of the “accusation” to the defendant. An indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on notice of the factual and legal basis of the charges against him (see Kamasinski v. Austria, 19 December 1989, § 79, Series A no. 168).*

*90. The scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.”<sup>43</sup>*

Hence, no valid waiver of the right to take part in the trial can take place if the defendant did not have knowledge of the criminal proceedings against him/her.<sup>44</sup>

If a suspect left the country before institution of criminal proceedings against him/her, the authorities shall act diligently and make sufficient efforts to trace him/her and to establish his/her whereabouts, so that they might notify him/her of the criminal proceedings. In *Coniac v. Romania* case the ECtHR underlined the following:

*51. The Court observes in this connection that the first question is whether the applicant was officially notified of the criminal proceedings against him. The Court has already held that informing someone that a prosecution is being brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused’s rights; vague and informal knowledge cannot suffice (see Sejdovic, cited above, § 99; Stoyanov v. Bulgaria, no. 39206/07, § 34, 31 January 2012; and Kounov v. Bulgaria, no. 24379/02, § 47, 23 May 2006).”<sup>45</sup>*

The requirements indicated above are not fulfilled if there is no evidence that the applicant was served with a summons at his/her last place of residence or at any other address after institution of criminal proceedings against him/her. In this case (*Coniac v. Romania*) the applicant did not receive any official notification of the institution of criminal proceedings against him or the date of his trial. It appears that each time the police officers went to the applicant’s last place of residence they tried to obtain information about his whereabouts, but they did not leave any summons or documents.<sup>46</sup>

Criminal courts should show due diligence in the efforts to locate the accused and to inform him/her about the criminal proceedings. In the *M.T.B. v. Turkey* case the ECtHR stated that notification about the date of the hearing to the address of the accused’ company, without any efforts to send a summons to his home address was not satisfactory. The ECtHR stressed that

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<sup>43</sup> ECtHR, judgment of 1 March 2006, *Sejdovic v. Italy* [GC], ECLI:CE:ECHR:2006:0301JUD005658100, paras. 89-90; see also: ECtHR, judgment of 24 April 2012, *Haralampiev v. Bulgaria*, ECLI:CE:ECHR:2012:0424JUD002964803, paras. 33-34.

<sup>44</sup> ECtHR, judgment of 12 June 2018, *M.T.B. v. Turkey*, ECLI:CE:ECHR:2018:0612JUD004708106, para. 49; see, recently: ECtHR, judgment of 25 September 2018, *Karemani v. Albania*, ECLI:CE:ECHR:2018:0925JUD004871708, paras. 28-34.

<sup>45</sup> ECtHR, judgment of 6 October 2015, *Coniac v. Romania*, ECLI:CE:ECHR:2015:1006JUD000494107, para. 52.

<sup>46</sup> *Ibidem*, para. 53.

the applicant's home address was available for the national authorities in the context of other criminal proceedings. Moreover, the police were able to locate this place and arrest the applicant at his home address. Having regard to the above described circumstances of the case, the Court stated:

*"[...] the Court is unable to subscribe to the Government's argument that the trial court showed the requisite due diligence in its efforts to locate the applicant (see, mutatis mutandis, Davran v. Turkey, no. 18342/03, § 45, 3 November 2009, and Büyükdag v. Turkey, no. 28340/95, § 67 in fine, 21 December 2000). In such a case, the submission that the national courts served the decision in accordance with the domestic legal provisions, a fact that is disputed between the parties in the present case, is not sufficient of itself to relieve the State of its obligations under Article 6 of the Convention."*<sup>47</sup>

In *Dridi v. Germany* the ECtHR found that in the circumstances of this case serving a summons to appear before the court via public notification (it was displayed on the court's noticeboard for two weeks) was not sufficient to enable the applicant to attend the appeal hearing before the court. The ECtHR stressed that the address of the accused in Spain was known to the court. Furthermore, there had been no unsuccessful attempts to serve court documents on the applicant at that address. The applicant was also not informed about the fact of serving a summons by public notification. Moreover, at the time that the summons was served, the applicant was not represented by his lawyer, whose authorisation had been withdrawn by a court. The applicant's lawyer thus learned of the date of the hearing only the day before it was scheduled, and his application for an adjournment was refused.<sup>48</sup>

To the contrary, if a suspect, being aware of charges, leaves the country acting in violation of the obligation not to leave his/her village, the authorities are entitled to assume that s/he effectively waived his right to participate in the trial.<sup>49</sup>

If a defendant was informed in person about the date and place of the hearing and he/she does not appear at that hearing, one can assume that the right to participate was waived by him/her in an unequivocal manner. However, in case of indirect notification (notification by other means than in person) the ECtHR stresses that:

*"... it cannot be inferred merely from the fact that he has been declared latitante (that is to say, wilfully evading the execution of a warrant issued by a court), relying on a presumption with an insufficient factual basis, that he has waived his right to appear at the trial and defend himself [...]."*<sup>50</sup>

*"However, "at the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control"."*<sup>51</sup>

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<sup>47</sup> ECtHR, judgment of 12 June 2018, *M.T.B. v. Turkey*, ECLI:CE:ECHR:2018:0612JUD004708106, para. 53.

<sup>48</sup> ECtHR, judgment of 26 July 2018, *Dridi v. Germany*, ECLI:CE:ECHR:2018:0726JUD003577811, paras. 31-33.

<sup>49</sup> ECtHR, decision of 4 December 2018, *Andrei Năstase v. Moldova*, ECLI:CE:ECHR:2018:1204DEC007444411.

<sup>50</sup> ECtHR, judgment of 1 March 2006, *Sejdovic v. Italy* [GC], ECLI:CE:ECHR:2006:0301JUD005658100, para. 87.

<sup>51</sup> *Ibidem*, para. 88.

Article 6 of the ECHR does not determine the manner of summoning to the hearing. In particular, this provision does not guarantee the right to obtain a specific form of service of court documents, such as by registered post. Nonetheless:

*“... the Court considers that in the interests of the administration of justice a litigant should be notified of a court hearing in such a way as to not only have knowledge of the date, time and place of the hearing, but also to have enough time to prepare his or her case and to attend the court hearing (see Kolegovy, cited above, § 40, and the cases cited therein, and Aždajić v. Slovenia, no. 71872/12, § 48, 8 October 2015)”.*<sup>52</sup>

The effectiveness of a notification of the date of the hearing must always be assessed in the circumstances of the particular case. Sometimes other documents or information than a confirmation of serving a summons may show that the accused was aware of the criminal proceedings conducted against him. In *Shkalla v. Albania* case the ECtHR stated:

*“70. In previous cases concerning convictions in absentia, the Court has held that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused’s rights; vague and informal knowledge cannot suffice (see T. v. Italy, cited above, § 28, and Somogyi v. Italy, no.67972/01, § 75, ECHR 2004-IV). The Court cannot, however, rule out the possibility that certain established facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to avoid prosecution. This may be the case, for example, where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest (see, among other authorities, Iavarazzo v. Italy (dec.), no. 50489/99, 4 December 2001), or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces.”*<sup>53</sup>

#### 4.3.2 Under the case-law of the Court of Justice concerning Article 4a of FD 2002/584/JHA

The wording of Article 4a(1)(a)(i) of FD 2002/584/JHA was interpreted by the Court of Justice in the framework of preliminary ruling proceedings initiated by the Amsterdam Court in case C-108/16 PPU, *Dworzecki*. The question concerned the meaning of the term “*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*”. In particular, the Amsterdam Court wanted to know whether the summons served at the address of the requested person, on an adult resident of the household who undertook to hand the summons over to the requested person, could be considered as fulfilling the requirements of Article 4a(1)(a)(i), while: 1) it was not clear from the EAW whether and when that resident actually handed the summons over to the requested person, and 2) it could not be inferred from

<sup>52</sup> ECtHR, judgment of 28 August 2018, *Vyacheslav Korchagin v. Russia*, ECLI:CE:ECHR:2018:0828JUD001230716, para. 65.

<sup>53</sup> ECtHR, judgment of 10 May 2011, *Shkalla v. Albania*, ECLI:CE:ECHR:2011:0510JUD002686605, para. 70.



the statement which the requested person made at the hearing before the referring court that he was – in due time – aware of the date and place of the scheduled trial.

The Court of Justice stated that:

*1. Article 4a(1)(a)(i) [...] must be interpreted as meaning that the expressions ‘summoned in person’ and ‘by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial’ in that provision constitute autonomous concepts of EU law and must be interpreted uniformly throughout the European Union.*

*2. Article 4a(1)(a)(i) [...] must be interpreted as meaning that a summons, such as that at issue in the main proceedings, which was not served directly on the person concerned but was handed over, at the latter’s address, to an adult belonging to that household who undertook to pass it on to him, when it cannot be ascertained from the European arrest warrant whether and, if so, when that adult actually passed that summons on to the person concerned, does not in itself satisfy the conditions set out in that provision.”*

The Court of Justice provided the following reasons for the above interpretation.

*42. [...] although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that requirement is not absolute. The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to the gravity of the criminal offence with which the accused is charged and does not run counter to any important public interest. In particular, breach of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor whom he had instructed to defend him (see, to that effect, judgment of 26 February 2013 in Melloni, C-399/11, EU:C:2013:107, paragraph 49).*

*43. The right to a fair trial enjoyed by a person summoned to appear before a criminal court thus requires that he has been informed in such a way as to allow him to organise his defence effectively. [...]*

*44. In that regard, as stated in recital 4 of Framework Decision 2009/299, that framework decision is not designed to regulate, at EU level, the forms and methods that are used by the competent authorities in the context of the surrender procedure, including the procedural requirements applicable according to the law of the Member State concerned.*

*45. The purpose of Article 4a(1)(a)(i) of Framework Decision 2002/584 referred to in paragraph 43 of this judgment is necessarily achieved by a summons ‘in person’, as referred to in the first part of that provision, as such a method of service ensures that the person concerned has himself received the summons and, accordingly, has been informed of the date and place of his trial.*

46. As regards the conditions set out in the second part of that provision, they are designed to achieve the same high level of protection of the person summoned, by ensuring that he has the information relating to the date and place of his trial.

47. Regard being had, in particular, to the wording of Article 4a(1)(a)(i) of Framework Decision 2002/584, which states that it must be unequivocally established that the person concerned ‘was aware of the scheduled trial’, the fact that the summons was handed over to a third party who undertook to pass it on to the person concerned, whether or not that third party belonged to the household of the person concerned, cannot in itself satisfy those requirements. Such a method of service does not allow it to be unequivocally established either that the person concerned ‘actually’ received the information relating to the date and place of his trial or, where appropriate, the precise time when that information was received.

48. Admittedly, as the Commission has observed, it cannot, in principle, be precluded that handing a summons over to a third party satisfies the requirements of Article 4a(1)(a)(i) of Framework Decision 2002/584. In order to achieve the objective referred to in that provision, however, it must be unequivocally established that that third party actually passed the summons on to the person concerned.

49. In that regard, it is for the issuing judicial authority to indicate in the European arrest warrant the evidence on the basis of which it found that the person concerned actually received official information relating to the date and place of his trial. When the executing judicial authority ensures that the conditions set out in Article 4a(1)(a) of Framework Decision 2002/584 are satisfied, it may also rely on other evidence, including circumstances of which it became aware when hearing the person concerned.”

#### **4.4 Representation by a lawyer as a condition of a fair trial conducted *in absentia***

##### *4.4.1 Under the case-law of the ECtHR*

Participation of a defence counsel in a trial constitutes one of the important conditions of fairness concerning criminal proceedings conducted *in absentia*. In accordance with the well-established case-law, a person charged with a criminal offence does not lose his/her right to be defended by a lawyer merely on account of not being present at the trial. Nevertheless, the legislature must be able to discourage unjustified absences, provided that any sanctions used are not disproportionate in the circumstances of the case and the defendant is not deprived of his/her right to be defended by counsel.<sup>54</sup>

In the leading case of *Sejdovic v. Italy* the ECtHR emphasized the following.

“93. It is for the courts to ensure that a trial was fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence is given the opportunity of doing so (see *Van Geyseghem*, cited above, § 33; *Lala*, cited above, § 34; and *Pelladoah*, cited above, § 41).

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<sup>54</sup> ECtHR, judgment of 21 January 1999, *Van Geyseghem v. Belgium*, ECLI:CE:ECHR:1999:0121JUD002610395, para. 34.

94. While it confers on everyone charged with a criminal offence the right to “defend himself in person or through legal assistance ...”, Article 6 § 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being to ascertain whether the method they have chosen is consistent with the requirements of a fair trial (see *Quaranta v. Switzerland*, 24 May 1991, § 30, Series A no. 205). In this connection, it must be remembered that the Convention is designed to “guarantee not rights that are theoretical or illusory but rights that are practical and effective” and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (see *Imbrioscia v. Switzerland*, 24 November 1993, § 38, Series A no. 275, and *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37).

95. Nevertheless, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes or by the accused. It follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether appointed under a legal aid scheme or privately financed (see *Cuscani v. the United Kingdom*, no. 32271/96, § 39, 24 September 2002). The competent national authorities are required under Article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or is sufficiently brought to their attention in some other way (see *Daud v. Portugal*, 21 April 1998, § 38, Reports 1998-II).<sup>55</sup>

A defendant who evaded criminal proceedings by leaving a country is not entitled to a retrial if s/he had employed a lawyer who represented him/her both during the investigation stage and during the court proceedings and with whom s/he kept contact, being thus aware of the progress of the proceedings.<sup>56</sup> In this case the applicant's lawyer acted on his behalf and obtained a reduction of the sentence by the Court of Appeal from ten years to seven years' imprisonment.

#### 4.4.2 Under the case-law of the Court of Justice concerning Article 4a of FD 2002/584/JHA

The execution of an EAW concerning a judgment/decision rendered *in absentia* cannot be refused if the defendant (Article 4a(1)):

“(b) 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.”

In the *Melloni case*, the Court of Justice found that Article 4a(1) of the FD “must be interpreted as precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant issued for the purposes of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State.”

The Court of Justice stated that:

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<sup>55</sup> ECtHR, judgment of 1 March 2006, *Sejdovic v. Italy* [GC], ECLI:CE:ECHR:2006:0301JUD005658100, paras. 93-95.

<sup>56</sup> ECtHR, decision of 4 December 2018, *Andrei Năstase v. Moldova*, ECLI:CE:ECHR:2018:1204DEC007444411.

*“49 [...] The accused may waive that right [the right to appeal in person at the trial] of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so.”*

The above interpretation of Article 4a(1) of FD corresponds to the standard of the ECtHR case-law presented in chapter 3.4.1.

The Court of Justice found Article 4a (1) to be compatible with **the requirements under Articles 47 and 48(2) of the Charter of Fundamental Rights of the European Union for the following reasons:**

*50. This interpretation of Articles 47 and 48(2) of the Charter is in keeping with the scope that has been recognised for the rights guaranteed by Article 6(1) and (3) of the ECHR by the case-law of the European Court of Human Rights (see, inter alia, ECtHR, *Medenica v. Switzerland*, no. 20491/92, § 56 to 59, ECHR 2001-VI; *Sejdovic v. Italy [GC]*, no. 56581/00, § 84, 86 and 98, ECHR 2006-II; and *Haralampiev v. Bulgaria*, no. 29648/03, § 32 and 33, 24 April 2012).*

*51. Furthermore, as indicated by Article 1 of Framework Decision 2009/299, the objective of the harmonisation of the conditions of execution of European arrest warrants issued for the purposes of executing decisions rendered at the end of trials at which the person concerned has not appeared in person, effected by that framework decision, is to enhance the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States.*

*52. Accordingly, 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, with the result that the execution of a European arrest warrant issued for the purposes of executing the sentence of a person convicted in absentia cannot be made subject to the condition that that person may claim the benefit of a retrial at which he is present in the issuing Member State. This is so either where, as referred to in Article 4a(1)(a), the person did not appear in person at the trial despite having been summoned in person or officially informed of the scheduled date and place of the trial or, as referred to in Article 4a(1)(b), the person, being aware of the scheduled trial, deliberately chose to be represented by a legal counsellor instead of appearing in person. Article 4a(1)(c) and (d) refers to circumstances where the executing judicial authority is required to execute the European arrest warrant, even though the person concerned is entitled to a retrial, because the arrest warrant states that the person concerned either did not ask for a retrial or that he will be expressly informed of his right to a retrial.*

*53. In the light of the foregoing, Article 4a(1) of Framework Decision 2002/584 does not disregard either the right to an effective judicial remedy and to a fair trial*

or the rights of the defence guaranteed by Articles 47 and 48(2) of the Charter respectively.

#### 4.5 Serving a judgment on a defendant as a condition of fair in absentia proceedings

##### 4.5.1 Under the case-law of the ECtHR

Article 6 of the ECHR does not provide for specific forms of service of court documents, such as judgments.

However, the way in which a judgment is served on a defendant may raise an issue under the right to access to a court. If a legal recourse to a judgment is declared inadmissible because the defendant did not respect the formalities and/or the time frame for lodging that legal recourse and if the defendant was not informed of those formalities and that time frame at the time of serving the judgment, the right to access to a court will be breached.<sup>57</sup>

The object of informing the defendant of the right to a legal recourse is to enable him/her to exercise that right in accordance with the law of the issuing Member State.<sup>58</sup> When serving a judgment of conviction on the defendant, particularly when at the moment of service s/he is detained or not represented by a legal counsellor, s/he must be informed in a reliable and official manner of the possible recourses against that judgment and the time frame within which to exercise those recourses.<sup>59</sup>

The object of informing the defendant of his/her rights could be achieved by providing him/her with a document which indicates the formalities and the time frame to be respected when exercising the right to legal recourse in such a way that it does not require the interpretation of the applicable legislation or the advice of a legal counsellor.<sup>60</sup>

##### 4.5.2 Under the case-law of the Court of Justice concerning Article 4a of FD 2002/584/JHA

Article 4a(1)(c) of FD 2002/584/JHA has not been subject to interpretation by the Court of Justice, apart from the general remarks made in the *Melloni* case cited above. However, the wording of this provision is quite clear and should not bring considerable difficulties. If a decision/judgment was served on a defendant and, being informed of the right to retrial or an appeal, he/she decided not to contest a decision/judgment, there is no optional ground for refusal to execute such EAW under Article 4a(1) of FD 2002/584/JHA. It seems reasonable to argue that the way of serving a decision/judgment is not decisive for the purpose of this provision. What matters is whether a defendant is actually aware of the content of a decision/judgment and of his/her right to apply for retrial or an appeal. It is worth stressing that Article 4a(1)(c) of FD 2002/584/JHA does not require *expressis verbis* that a decision be served “personally” on a defendant. However, such requirement may be derived from the wording of Article 4a(1)(d) of FD 2002/584/JHA.

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<sup>57</sup> ECtHR, decision of 5 February 2004, *Bogonos v. Russia*, ECLI:CE:ECHR:2004:0205DEC006879801, with regard to providing the person concerned with a copy of the judgment on appeal.

<sup>58</sup> ECtHR, decision of 5 February 2004, *Bogonos v. Russia*, ECLI:CE:ECHR:2004:0205DEC006879801, with regard to providing the person concerned with a copy of the judgment on appeal.

<sup>59</sup> ECtHR, judgment of 1 March 2011, *Faniel v. Belgium*, ECLI:CE:ECHR:2011:0301JUD001189208, § 30. ECtHR, judgment of 29 June 2010, *Hakimi v. Belgium*, ECLI:CE:ECHR:2010:0629JUD000066508, § 36.

<sup>60</sup> ECtHR, judgment of 24 May 2007, *Da Luz Domingues Ferreira v. Belgium*, ECLI:CE:ECHR:2007:0524JUD005004999, § 58.

The general right of a defendant to get access to information is regulated by the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1).

In the *Covaci* case the Court of Justice was faced with the problem whether Articles 2, 3(1)(c) and 6(1) and (3) of Directive 2012/13 (concerning the obligation to provide a defendant with certain information in criminal proceedings) must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, in criminal proceedings, makes it mandatory for an accused person not residing in that Member State to appoint a person authorised to accept service of a penalty order concerning him/her, with the period for lodging an objection against that order running from the service of that order on that authorised person.

The Court of Justice decided as follows:

*“Articles 2, 3(1)(c) and 6(1) and (3) of Directive 2012/13/EU [...] must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which, in criminal proceedings, makes it mandatory for an accused person not residing in that Member State to appoint a person authorised to accept service of a penalty order concerning him, provided that that accused person does in fact have the benefit of the whole of the prescribed period for lodging an objection against that order.”*

And provided the following reasoning for its interpretative decision:

*“60. While it is true that, because of the summary and simplified nature of the proceedings at issue, the service of a penalty order such as that at issue in the main proceedings is effected only after the court has ruled on the merits of the accusation, the fact remains that, in that order, the court rules only provisionally and that the service of that order represents the first opportunity for the accused person to be informed of the accusation against him. That is confirmed, moreover, by the fact that that person is entitled to bring not an appeal against that order before another court, but an objection making him eligible, before the same court, for the ordinary inter partes procedure, in which he can fully exercise his rights of defence, before that court rules again on the merits of the accusation against him.*

*61. Consequently, in accordance with Article 6 of Directive 2012/13, the service of a penalty order must be considered to be a form of communication of the accusation against the person concerned, with the result that it must comply with the requirements set out in that article.*

*62. It is true that, as the Advocate General observed at point 105 of his Opinion, Directive 2012/13 does not regulate the procedures whereby information about the accusation, provided for in Article 6 of that directive, must be provided to that person.*

*63. However, those procedures cannot undermine the objective referred to inter alia in Article 6 of Directive 2012/13, which, as is also apparent from recital 27 in the preamble to that directive, consists in enabling suspects or persons accused of having committed a criminal offence to prepare their defence and in safeguarding the fairness of the proceedings.*

64. *It is apparent from the order for reference that the national legislation at issue in the main proceedings provides that the penalty order is to be served on the person authorised by the accused person and that the latter has a period of two weeks to lodge an objection against that order, with that period running from the service of that order on that authorised person. Upon expiry of that period, the order is to acquire the force of res judicata.*

65. *Though it is not relevant, in order to answer the question asked by the referring court, to rule on the appropriateness of such a limitation period of two weeks, it is important to observe that both the objective of enabling the accused person to prepare his defence and the need to avoid any kind of discrimination between (i) accused persons with a residence within the jurisdiction of the national law concerned and (ii) accused persons whose residence does not fall within that jurisdiction, who alone are required to appoint a person authorised to accept service of judicial decisions, require the whole of that period to be available to the accused person.*

66. *If the period of two weeks at issue in the main proceedings began to run from the time when the accused person actually became aware of the penalty order, that order providing information on the accusation within the meaning of Article 6 of Directive 2012/13, it would be certain that the whole of that period is available to that person.*

67. *By contrast, if, as in the present case, that period begins to run from the service of the penalty order on the person authorised by the accused person, the latter can effectively exercise his right of defence and the trial is fair only if he has the benefit of that period in its entirety, that is to say without the duration of that period being reduced by the time needed by the authorised person to transmit the penalty order to its addressee.”<sup>61</sup>*

The above interpretation of Directive 2012/13 was further developed in *Tranca and Reiter* case concerning service of a penal order on a person authorized by a defendant not residing in the Member State. The Court of Justice stated that:

*“47. [...] Member States must ensure that persons accused or suspects in the context of criminal proceedings, who, in circumstances such as those at issue in the main proceedings, are not notified of the charge against them at the stage of execution of the final decision on conviction, nevertheless retain the right to exercise fully their rights of defence. To that end, once an accused person has actually been informed of a criminal decision concerning him, he must be placed in the same situation as if that decision had been served on him personally and he must, in particular, have the benefit of the whole of the prescribed period for lodging an objection.*

48. *As the referring courts makes clear, although national law provides that a penalty order becomes final on expiry of the period for lodging an objection, which begins to run from service of the order on the agent of the accused person, it also*

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<sup>61</sup> ECJ, judgment of 15 October 2015, *Covaci*, C-216/14, ECLI:EU:C:2015:686.

allows that person to apply to have his position restored to the status quo ante and therefore to benefit accordingly from a period of the same duration to lodge an objection to that order, from the time when the accused person became aware of the penalty order.

49. It is thus for the referring courts to interpret national law, in particular the procedure for a person's position being restored to the status quo ante and the conditions to which the exercise of that procedure is subject, in accordance with the requirements laid down in Article 6 of Directive 2012/13.

50. Having regard to the foregoing considerations, the answer to the questions referred is that Article 2, Article 3(1)(c), and Article 6(1) and (3) of Directive 2012/13 must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which, in criminal proceedings, provides that the accused person who neither resides in that Member State nor has a fixed place of residence in that State or in his Member State of origin is required to appoint an agent for the purposes of service of a penalty order concerning him, and that the period for lodging an objection to that order, before it becomes enforceable, runs from service of that order on that agent.

51. Article 6 of Directive 2012/13, however, requires that, when the penalty order is enforced, as soon as the person concerned has actually become aware of the order, he should be placed in the same situation as if that order had been served on him personally and, in particular, that he have the whole of the prescribed period for lodging an objection, where necessary, benefiting from having his position restored to the status quo ante.

52. It is for the referring court to ensure that the national procedure for the accused person's position being restored to the status quo ante and the conditions to which the exercise of that procedure is subject are applied in a manner consistent with those requirements and that that procedure thus permits the effective exercise of the rights provided for in Article 6."<sup>62</sup>

#### **4.6 The right to retrial as a guarantee of fairness of proceedings conducted *in absentia*.**

##### **4.6.1 Under the case-law of the ECtHR**

As transpires from the case-law of the ECtHR, proceedings conducted *in absentia* are not in and of themselves incompatible with Article 6 of the Convention. However, a denial of justice nevertheless undoubtedly occurs where a person convicted *in absentia* is unable subsequently to obtain a retrial from a court which has heard him/her, where it has not been established that s/he has waived his/her right to appear and to defend him/herself. Thus, in case of an effective waiver of these rights there is no requirement to guarantee the right to retrial. A "retrial" means "a fresh determination of the merits of the charge, in respect of both law and fact".<sup>63</sup>

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<sup>62</sup> ECJ, judgment of 22 March 2017, *Tranca* (C-124/16), *Tanja Reiter* (C-213/16), ECLI:EU:C:2017:228.

<sup>63</sup> ECtHR, judgment of 14 June 2001, *Medenica v. Switzerland*, ECLI:CE:ECHR:2001:0614JUD002049192, para. 55; ECtHR, judgment of 1 March 2006, *Sejdovic v. Italy* [GC], ECLI:CE:ECHR:2006:0301JUD005658100, para. 82.



The issues of “effective waiver” and of minimum safeguards commensurate with such a waiver were at stake in the *M.T.B. v. Turkey* case. The Court underlined the following:

*62. In the instant case, the Court has already found that the trial court failed to show the requisite due diligence in its efforts to locate the applicant. Nevertheless, both the trial court and the Court of Cassation confined their examination to just that point and dismissed the applicant’s application, stating that the decision had been lawfully served on him, that is to say in accordance with the Notifications Act (see, mutatis mutandis, Kounov v. Bulgaria, no. 24379/02, § 52 in fine, 23 May 2006). They did not examine whether the applicant had in fact been notified or had unequivocally waived his right to appear and defend himself. Thus, the applicant’s applications for a fresh factual and legal determination of his case were rejected, in the absence of any indication that he had waived his right to be present during the trial, a situation previously described by the Court in Sejdic (cited above, § 84) as a “flagrant denial of justice”.*<sup>64</sup>

The ECtHR underlines that wide discretion is left to the Contracting States as regards the choice of the means enacted to ensure that their legal systems are in compliance with the requirements of Article 6. However, the Court's task is “to determine whether the result called for by the Convention has been achieved. In particular, the procedural means offered by domestic law and practice must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor sought to escape trial”.<sup>65</sup>

The formal requirements which could be imposed on a defendant seeking to obtain a retrial were summarised in the case of *Sanader v. Croatia*<sup>66</sup>. The ECtHR stated the following.

*70. [...] there can be no question of an accused being obliged to surrender to custody in order to secure the right to be retried in conditions that comply with Article 6 of the Convention, for that would entail making the exercise of the right to a fair hearing conditional on the accused offering up his or her physical liberty as a form of guarantee (see Krombach, cited above, § 87).*

*[...] 74. Furthermore, a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure (see Colozza, cited above, § 30). At the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant a finding that he had been absent for reasons beyond his control (see Medenica, cited above, § 57).*

In *Sanader v. Croatia*, the Court found disproportionate the requirement that an individual tried *in absentia*, who had not had unequivocally waived his/her right to appear in court, had to appear before the domestic authorities and provide an address of residence during the criminal

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<sup>64</sup> ECtHR, judgment of 12 June 2018, *M.T.B. v. Turkey*, ECLI:CE:ECHR:2018:0612JUD004708106, para. 62.

<sup>65</sup> ECtHR, judgment of 12 February 2015, *Sanader v. Croatia*, CLI:CE:ECHR:2015:0212JUD006640812, para. 69; ECtHR, judgment of 14 February 2017, *Hokkeling v. the Netherlands*, ECLI:CE:ECHR:2017:0214JUD003074912, para. 58; ECtHR, judgment of 22 May 2018, *Topi v. Albania*, ECLI:CE:ECHR:2018:0522JUD001481608, paras. 53-54; ECtHR, judgment of 25 September 2018, *Karemani v. Albania*, ECLI:CE:ECHR:2018:0925JUD004871708, paras. 30-32.

<sup>66</sup> ECtHR, judgment of 12 February 2015, *Sanader v. Croatia*, CLI:CE:ECHR:2015:0212JUD006640812, paras. 70-74.

proceedings in order to be able to request a retrial. Such requirement impaired the very essence of the right to retrial.<sup>67</sup> This was particularly so because once the defendant is under the jurisdiction of the domestic authorities, s/he would be deprived of liberty on the basis of the conviction *in absentia*. In this regard, the Court stressed that “there can be no question of an accused being obliged to surrender to custody in order to secure the right to be retried in conditions that comply with Article 6 of the Convention”<sup>68</sup>. It explained, however, that:

*88. This does not, of course, call into question whether, in the fresh proceedings, the applicant’s presence at the trial would have to be secured by ordering his detention on remand or by the application of other measures envisaged under the relevant domestic law (see, inter alia, Khalfaoui, cited above, § 44). However, if applicable, that would need to have a different legal basis – that of a reasonable suspicion of the applicant having committed the crime at issue and the existence of “relevant and sufficient reasons” for his detention (see, amongst many others, Kudła v. Poland [GC], no. 30210/96, § 111, ECHR 2000 XI; and Dragin v. Croatia, no. 75068/12, § 110, 24 July 2014).”*

#### 4.6.2 Under the case-law of the Court of Justice concerning Article 4a of FD 2002/584/JHA

As in the case-law of the ECtHR, under Article 4a(1) of the FD 2002/584/JHA the right to a retrial is also understood as an alternative to an effective waiver of the right to appear at the trial. Thus, if a defendant’s presence at the trial was subject to the guarantees indicated in Article 4a(1)(a)-(c) of FD 2002/584/JHA, the EAW should be executed even if no right to a retrial is offered after surrender.

In the *Melloni* case the Court of Justice examined whether Article 4(a)(1) of FD 2002/584/JHA is compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided in Article 47 of the Charter and from the rights of the defence guaranteed under Article 48(2) of the Charter. The Court of Justice stated:

*“49. Regarding the scope of the right to an effective judicial remedy and to a fair trial provided for in Article 47 of the Charter, and the rights of the defence guaranteed by Article 48(2) thereof, it should be observed that, although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute (see, inter alia, Case C-619/10 Trade Agency [2012] ECR, paragraphs 52 and 55). The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so.*

*50. This interpretation of Articles 47 and 48(2) of the Charter is in keeping with the scope that has been recognised for the rights guaranteed by Article 6(1) and (3) of the ECHR by the case-law of the European Court of Human Rights (see, inter alia,*

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<sup>67</sup> ECtHR, judgment of 12 February 2015, *Sanader v. Croatia*, CLI:CE:ECHR:2015:0212JUD006640812, para. 91.

<sup>68</sup> ECtHR, judgment of 12 February 2015, *Sanader v. Croatia*, CLI:CE:ECHR:2015:0212JUD006640812, para. 87.

*ECtHR, Medenica v. Switzerland*, no. 20491/92, § 56 to 59, ECHR 2001-VI; *Sejdovic v. Italy [GC]*, no. 56581/00, § 84, 86 and 98, ECHR 2006-II; and *Haralampiev v. Bulgaria*, no. 29648/03, § 32 and 33, 24 April 2012).

51. Furthermore, as indicated by Article 1 of Framework Decision 2009/299, the objective of the harmonisation of the conditions of execution of European arrest warrants issued for the purposes of executing decisions rendered at the end of trials at which the person concerned has not appeared in person, effected by that framework decision, is to enhance the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States.

52. Accordingly, 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, with the result that the execution of a European arrest warrant issued for the purposes of executing the sentence of a person convicted in absentia cannot be made subject to the condition that that person may claim the benefit of a retrial at which he is present in the issuing Member State. This is so either where, as referred to in Article 4a(1)(a), the person did not appear in person at the trial despite having been summoned in person or officially informed of the scheduled date and place of the trial or, as referred to in Article 4a(1)(b), the person, being aware of the scheduled trial, deliberately chose to be represented by a legal counsellor instead of appearing in person. Article 4a(1)(c) and (d) refers to circumstances where the executing judicial authority is required to execute the European arrest warrant, even though the person concerned is entitled to a retrial, because the arrest warrant states that the person concerned either did not ask for a retrial or that he will be expressly informed of his right to a retrial.

53. In the light of the foregoing, Article 4a(1) of Framework Decision 2002/584 does not disregard either the right to an effective judicial remedy and to a fair trial or the rights of the defence guaranteed by Articles 47 and 48(2) of the Charter respectively.”<sup>69</sup>

Thus far, the Court of Justice has not had an opportunity to interpret the content of “the right to a retrial or an appeal” used in Article 4a(1)(d) of FD 2002/584/JHA. However, relying on the judgment in *Tupikas* case<sup>70</sup> one may conclude that this notion should be understood in the same way as the right to retrial under Article 6 of the ECHR. Thus, it should include a fresh determination of the merits of the charge, in respect of both law and fact”. Such an interpretation also follows from the clear wording of Article 4a(1)(d) of FD 2002/584/JHA.

Although in the *Tupikas* case the Court of Justice defined the notion of a “trial resulting in the decision”, the meaning of this term may be useful for proper understanding of the notion of “a retrial or an appeal”. The Court of Justice stated as follows:

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<sup>69</sup> ECJ, judgment of 26 February 2013, *Stefano Melloni v. Ministero Fiscal*, C-399/11, ECLI:EU:C:2013:107, paras. 49-53.

<sup>70</sup> ECJ, judgment of 10 August 2017, *Openbaar Ministerie v. Tadas Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628.

“78. As is clear from the case-law of the European Court of Human Rights, the term ‘conviction’ within the meaning of the ECHR refers to both a finding of guilt after it has been established in accordance with the law that there has been an offence, and the imposition of a penalty or other measure involving deprivation of liberty (see, to that effect, ECtHR, 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, § 123, and the case-law cited).

79. Moreover, the European Court of Human Rights has held on several occasions that, where appeal proceedings are provided for, they must comply with the requirements flowing from Article 6 of the ECHR, in particular where the remedy available against the decision given at first instance is a full appeal, the second-instance court having jurisdiction to re-examine the case, by assessing the merits of the accusations in fact and in law, and thus to determine the guilt or innocence of the person concerned on the basis of the evidence presented (see, to that effect, judgments of the ECtHR of 26 May 1988, *Ekbatani v. Sweden*, CE:ECHR:1988:0526JUD001056383, § 24 and 32; 26 October 2000, *Kudła v. Poland*, CE:ECHR:1988:0526JUD001056383, § 122; 18 October 2006, *Hermi v. Italy*, CE:ECHR:2006:1018JUD001811402, § 64 and 65; 25 April 2013, *Zahirović v. Croatia*, CE:ECHR:2013:0425JUD005859011, § 56; and of 14 February 2017, *Hokkeling v. Netherlands*, CE:ECHR:2017:0214JUD003074912, § 56 and 58).

80. It is also clear from that case-law of the European Court of Human Rights that where two instances are provided for, the fact that the person concerned was actually able to exercise his rights of defence at first instance does not automatically lead to the conclusion that he necessarily enjoyed the guarantees laid down in Article 6 of the ECHR if the appeal proceedings took place in his absence (see, to that effect, judgment of 14 February 2017, *Hokkeling v. Netherlands*, CE:ECHR:2017:0214JUD003074912, § 57, 58 and 61).

81. Consequently, in the event that proceedings have taken place at several instances which have given rise to successive decisions, at least one of which was given in absentia, it is appropriate to understand by ‘trial resulting in the decision’, within the meaning of Article 4a(1) of Framework Decision 2002/584, 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.”<sup>71</sup>

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<sup>71</sup> ECtHR, judgment of 12 February 2015, *Sanader v. Croatia*, CLI:CE:ECHR:2015:0212JUD006640812, para. 91.

<sup>71</sup> ECtHR, judgment of 12 February 2015, *Sanader v. Croatia*, CLI:CE:ECHR:2015:0212JUD006640812, para. 87.

<sup>71</sup> ECJ, judgment of 10 August 2017, *Openbaar Ministerie v. Tadas Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, paras. 78-81.

**5. A judgment rendered *in absentia* as an optional ground for refusal to execute EAWs – admissibility of surrender of a person despite that conditions indicated in Article 4a(1) of FD 2002/584/JHA are not met.**

Article 4a(1) of FD 2002/584/JHA provides for an optional ground for refusal of the execution of EAWs. Thus, the executing authorities of the Member States are entitled to surrender a person for the purpose of executing a judgment issued *in absentia* even if none of the conditions indicated in this provision was fulfilled. However, before taking a decision on surrender the executing authorities shall avail themselves of the opportunity to obtain additional information (a procedure provided for in Article 15 (2) of FD 2002/584/JHA). The Court of Justice tackled this issue in two judgments: *Dworzecki* and *Zdziaszek*.

In the *Dworzecki* case the Court stated that:

*“50. Furthermore, as the scenarios described in Article 4a(1)(a)(i) of Framework Decision 2002/584 were conceived as exceptions to an optional ground for non-recognition, the executing judicial authority may in any event, even after having found that they did not cover the situation at issue, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence.*

*51. In the context of such an assessment of the optional ground for non-recognition, the executing judicial authority may thus have regard to the conduct of the person concerned. It is at this stage of the surrender procedure that particular attention might be paid to any manifest lack of diligence on the part of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him.*

*52. Likewise, the executing judicial authority may also take into account the fact [...] that the national law of the issuing Member State in any event affords the person concerned the right to request a retrial, where, as in this instance, service of the summons is deemed to be effected when the summons is handed over to an adult member of the household of the person concerned.*

*53. In any event, the executing judicial authority has the option, pursuant to Article 15(2) of Framework Decision 2002/584, of requesting supplementary information, as a matter of urgency, if it finds that the information communicated by the issuing Member State is insufficient to allow it to decide on surrender.”<sup>72</sup>*

In the *Zdziaszek* case the referring court asked the Court of Justice whether the FD should be interpreted as allowing the executing judicial authority to refuse to execute the EAW for the sole reason that neither the standard form for an EAW annexed to that Framework Decision nor the additional information obtained from the issuing judicial authority pursuant to Article 15(2) of that Framework Decision provide sufficient information to enable it to establish that one of the situations referred to in Article 4a(1)(a) to (d) of the Framework Decision exists.

The Court stated the following.

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<sup>72</sup> ECJ, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, paras. 50-53.

*“101. Having regard to the system established by that provision and as is apparent from its very wording, the executing judicial authority is entitled to refuse to execute a European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person concerned did not appear in person at the trial resulting in the decision, unless the European arrest warrant indicates that the conditions set out in subparagraphs (a), (b), (c) or (d) of that provision are met.*

*102. Thus, where the existence of one of the situations referred to in subparagraphs (a) to (d) is established, the executing judicial authority is under an obligation to carry out the European arrest warrant, notwithstanding the absence of the person concerned at the trial which led to the decision (see, to that effect, today’s judgment, Tupikas, C-270/17 PPU, paragraphs 50, 55 and 95).*

*103. In the event that that authority takes the view that it does not have sufficient information to enable it to validly decide on the surrender of the person concerned, it is incumbent upon it to 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.*

*104. If, at this stage, it still has not obtained the necessary assurances as regards the rights of defence of the person concerned during the relevant proceedings, the executing judicial authority may refuse to execute the European arrest warrant.*

*105. That authority not only cannot tolerate a breach of fundamental rights but, as provided for in Article 15(2) of Framework Decision 2002/584, it must also ensure that the time limits laid down in Article 17 thereof for taking the decision on the European arrest warrant are complied with, with the result that it cannot be required to resort to that Article 15(2) again (see, to that effect judgment of 5 April 2016, Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 97).*

*106. However, it should be pointed out in that context that Article 4a of Framework Decision 2002/584 provides for an optional ground for non-execution of the European arrest warrant and that the cases referred to in Article 4a(1)(a) to (d) were conceived as exceptions to that optional ground for non-recognition (see, to that effect, today’s judgment, Tupikas, C-270/17 PPU, paragraphs 50 and 96).*

*107. Accordingly, the Court has already held that the executing judicial authority may, even after it has found that those cases do not cover the situation of the person who is the subject of the European arrest warrant, 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 (see, to that effect, judgment of 24 May 2016, Dworzecki, C-108/16 PPU, EU:C:2016:346, paragraphs 50 and 51).*

*108. Thus, Framework Decision 2002/584 does not prevent the executing judicial authority from ensuring that the rights of defence of the person concerned are respected by taking due consideration of all the circumstances characterising the case before it, including the information which it may itself obtain.*

*109. In the light of the foregoing, the answer to the second question is that Framework Decision 2002/584 must be interpreted as meaning that, where the person concerned has not appeared in person in the relevant proceeding or, as the case may be, in the relevant proceedings for the application of Article 4a(1) of that Framework Decision and where neither the information contained in the standard form for a European arrest warrant annexed to that Framework Decision nor the information obtained pursuant to Article 15(2) of that Framework Decision provide sufficient evidence to establish the existence of one of the situations referred to in Article 4a(1)(a) to (d) of that Framework Decision 2002/584, the executing judicial authority may refuse to execute the European arrest warrant.*

*110. However, that Framework Decision does not prevent that authority from taking account of all the circumstances characterising the case before it in order to ensure that the rights of the defence of the person concerned are respected during the relevant proceeding or proceedings.”<sup>73</sup>*

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<sup>73</sup> ECJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras. 101-110.

## 6. Conclusions: Strasbourg and Luxembourg – difference in standards

As was stated in Chapter II.2. of the Guide, Article 4a(1) of FD 2002/584/JHA was drafted with due respect for the requirements of Article 6 of the ECHR and the relevant case-law of the ECtHR. However, FD 2002/548 seems to provide for higher requirements with reference to summoning the accused to the hearing. As transpires from the case-law of the ECtHR, an effective waiver of the right to attend the hearing may be established even if a defendant was not informed in person about the date and place of the hearing. Sending a summons to the address indicated by a defendant, even if there is no proof that this summons has been collected by a defendant, could be assessed as satisfactory, if there are other indications that a defendant is actually aware of the trial being conducted against him. Thus, what matters is a defendant's actual awareness of the proceedings conducted against him/her rather than a particular way of summoning.

A different approach was adopted by the Court of Justice in the *Dworzecki* case. The Court of Justice clearly stated that Article 4a(1)(a)(i) of FD 2002/584 must be interpreted as meaning that a summons which was not served directly on the person concerned but was handed over, at the latter's address, to an adult belonging to that household who undertook to pass it on to him, when it cannot be ascertained from the EAW whether and, if so, when that adult actually passed that summons on to the person concerned, does not in itself satisfy the conditions set out in that provision.

The Report "Improving Mutual Recognition of European Arrest Warrants for the Purpose of Executing Judgments Rendered Following a Trial at which the Person Concerned Did Not Appear in Person" offers a comprehensive analysis of the discrepancies between the higher standard of protection which some elements of Article 4a(1) of FD 2002/584/JHA provide and the case-law of the ECtHR on *in absentia* proceedings.<sup>74</sup>

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<sup>74</sup> The Report is accessible at [www.inabsentieaw.eu](http://www.inabsentieaw.eu).



## Table of European cases

### *European Commission of Human Rights*

ECHR, decision of 5 October 1967, *X. v. the Federal Republic of Germany*,  
ECLI:CE:ECHR:1967:1005DEC000242865

ECHR, decision of 6 December 1977, *X. v. Switzerland*,  
ECLI:CE:ECHR:1977:1206DEC000764876

ECHR, decision of 9 May 1994, *Sampson v. Cyprus*,  
ECLI:CE:ECHR:1994:0509DEC001977492

### *European Court of Human Rights*

ECtHR, judgment of 21 January 1999, *Van Geyselghem v. Belgium*,  
ECLI:CE:ECHR:1999:0121JUD002610395

ECtHR, judgment of 15 July 1982, *Eckle v. Germany*,  
ECLI:CE:ECHR:1982:0715JUD000813078

ECtHR, judgment of 26 October 2000, *Kudła v. Poland* [GC],  
ECLI:CE:ECHR:2000:1026JUD003021096

ECtHR, judgment of 14 June 2001, *Medenica v. Switzerland*,  
ECLI:CE:ECHR:2001:0614JUD002049192

ECtHR, judgment of 26 July 2002, *Meftah and Others v. France* [GC],  
ECLI:CE:ECHR:2002:0726JUD003291196

ECtHR, decision of 13 May 2003, *Montcornet de Caumont v. France*,  
ECLI:CE:ECHR:2003:0513DEC005929000

ECtHR, judgment of 9 October 2003, *Ezeh and Connors v. the United Kingdom* [GC],  
ECLI:CE:ECHR:2003:1009JUD003966598

ECtHR, decision of 5 February 2004, *Bogonos v. Russia*,  
ECLI:CE:ECHR:2004:0205DEC006879801

ECtHR, judgment of 4 February 2005, *Mamatkulov and Askarov v. Turkey* [GC],  
ECLI:CE:ECHR:2005:0204JUD004682799

ECtHR, judgment of 24 March 2005, *Stoichkov v. Bulgaria*,  
ECLI:CE:ECHR:2005:0324JUD000980802

ECtHR, judgment of 1 March 2006, *Sejdovic v. Italy* [GC],  
ECLI:CE:ECHR:2006:0301JUD005658100

ECtHR, judgment of 24 May 2007, *Da Luz Domingues Ferreira v. Belgium*,  
ECLI:CE:ECHR:2007:0524JUD005004999

ECtHR, decision of 7 October 2008, *Monedero Angora v. Spain*,  
ECLI:CE:ECHR:2008:1007DEC004113805

ECtHR, judgment of 21 July 2009, *Seliwiak v. Poland*,  
ECLI:CE:ECHR:2009:0721JUD000381804

ECtHR, judgment of 17 September 2009, *Enea v. Italy* [GC],  
ECLI:CE:ECHR:2009:0917JUD007491201

ECtHR, judgment of 22 September 2009, *Kari-pekka Pietiläinen v. Finland*,  
ECLI:CE:ECHR:2009:0922JUD001356606

ECtHR, judgment of 15 December 2009, *Gurguchiani v. Spain*,  
ECLI:CE:ECHR:2009:1215JUD001601206

ECtHR, judgment of 29 June 2010, *Hakimi v. Belgium*,  
ECLI:CE:ECHR:2010:0629JUD000066508

ECtHR, judgment of 1 March 2011, *Faniel v. Belgium*,  
ECLI:CE:ECHR:2011:0301JUD001189208

ECtHR, judgment of 10 May 2011, *Shkalla v. Albania*,  
ECLI:CE:ECHR:2011:0510JUD002686605

ECtHR, judgment of 3 April 2012, *Boulouis v. Luxembourg* [GC],  
ECLI:CE:ECHR:2012:0403JUD003757504

ECtHR, judgment of 24 April 2012, *Haralampiev v. Bulgaria*,  
ECLI:CE:ECHR:2012:0424JUD002964803

ECtHR, decision of 23 October 2012, *Ciok v. Poland*,  
ECLI:CE:ECHR:2012:1023DEC000049810

ECtHR, judgment of 28 November 2013, *Aleksandr Dementyev v. Russia*,  
ECLI:CE:ECHR:2013:1128JUD004309505

ECtHR, judgment of 25 November 2014, *Vasilescu v. Belgium*,  
ECLI:CE:ECHR:2014:1125JUD006468212

ECtHR, judgment of 12 February 2015, *Sanader v. Croatia*,  
ECLI:CE:ECHR:2015:0212JUD006640812

ECtHR, decision of 24 March 2015, *Martuzevičius v. the United Kingdom*,  
ECLI:CE:ECHR:2015:0324DEC001356613

ECtHR, judgment of 9 July 2015, *Tolmachev v. Estonia*,  
ECLI:CE:ECHR:2015:0709JUD007374813

ECtHR, judgment of 6 October 2015, *Coniac v. Romania*,  
ECLI:CE:ECHR:2015:1006JUD000494107

ECtHR, judgment of 20 October 2015, *Dvorski v. Croatia*,  
ECLI:CE:ECHR:2015:1020JUD002570311

ECtHR, judgment of 14 February 2017, *Hokkeling v. the Netherlands*,  
ECLI:CE:ECHR:2017:0214JUD003074912

ECtHR, judgment of 22 May 2018, *Topi v. Albania*,  
ECLI:CE:ECHR:2018:0522JUD001481608

ECtHR, judgment of 12 June 2018, *M.T.B. v. Turkey*,  
ECLI:CE:ECHR:2018:0612JUD004708106

ECtHR, judgment of 26 July 2018, *Dridi v. Germany*,  
ECLI:CE:ECHR:2018:0726JUD003577811

ECtHR, judgment of 28 August 2018, *Vyacheslav Korchagin v. Russia*,  
ECLI:CE:ECHR:2018:0828JUD001230716

ECtHR, judgment of 25 September 2018, *Karemani v. Albania*,  
ECLI:CE:ECHR:2018:0925JUD004871708

ECtHR, decision of 4 December 2018, *Andrei Năstase v. Moldova*,  
ECLI:CE:ECHR:2018:1204DEC007444411

ECtHR, decision of 25 June 2019, *West v. Hungary*,  
ECLI:CE:ECHR:2019:0625DEC000538012

### ***Court of Justice of the European Union***

ECJ, judgment of 26 February 2013, *Stefano Melloni v Ministerio Fiscal*, C-399/11,  
ECLI:EU:C:2013:107

ECJ, judgment of 15 October 2015, *Covaci*, C-216/14, ECLI:EU:C:2015:686

ECJ, judgment of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v  
Generalstaatsanwaltschaft Bremen*, C-404/125 and C-659/15 PPU, ECLI:EU:C:2016:198

ECJ, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346

ECJ, judgment of 22 March 2017, *Tranca* (C-124/16), *Tanja Reiter* (C-213/16),  
ECLI:EU:C:2017:228

ECJ, judgment of 10 August 2017, *Openbaar Ministerie v. Tadas Tupikas*, C-270/17 PPU,  
ECLI:EU:C:2017:628

ECJ, judgment of 10 August 2017, *Openbaar Ministerie v. Sławomir Andrzej Zdiaszek*, C-271/17 PPU, ECLI:EU:C:2017:629

ECJ, judgment of 22 December 2017, *Samet Ardic*, C-571/17 PPU, ECLI:EU:C:2017:1026

ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, ECLI:EU:C:2018:586:586