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

Manual for Filling in and Assessing Section (d) of the EAW

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Table of Contents

1. Introduction

All Member States transposed Art. 4a(1) FD 2002/584/JHA,[1] which contains an optional ground for refusal concerning a decision rendered following a trial at which the requested person did not appear in person. Section (d) of the EAW-form[2] gives expression to the requirements of Art. 4a(1).

This Manual aims at assisting issuing judicial authorities in filling in section (d) of the EAW and assisting executing judicial authorities in assessing section (d) of the EAW. In addition to the Manual, issuing and executing judicial authorities can also consult the Case-law Guide. This guide provides for systematically arranged summaries of relevant rulings of both the Court of Justice and the ECtHR. These rulings form the bedrock upon which the Manual is built.

The Manual is succinct. It is not an academic treatise. If necessary, the Manual refers to other, easily accessible sources (such as the Case-law Guide).

To ensure user friendliness, the structure of paragraph 2 closely follows the structure of Art. 4a(1) and section (d) of the EAW, guiding the user step by step through the process of filling in or assessing section (d).

In order to apply the national transposition of Art. 4a(1) correctly, it is important to understand that this provision contains a number of autonomous concepts of EU law which must be interpreted uniformly throughout the EU and whose definition cannot be left to the discretion of the (authorities of the) Member States. National law transposing Art. 4a(1) must be interpreted and applied in accordance with the autonomous EU meaning of that provision, not from the perspective of national criminal procedural law.

Therefore, where there is case-law of the Court of Justice, the Manual shall explicitly refer to it and shall adopt the Court's criterion. If the Court has ruled that a certain concept is an autonomous concept of EU law, the Manual shall stress the autonomous meaning of that concept.

Regardless of whether a concept is autonomous and regardless of whether the meaning of an autonomous concept is clear, when filling in section (d) of the EAW the issuing judicial authority should always describe in a factual way what happened in the proceedings that led to the decision which is at the basis of the EAW. In other words, it should not use legal terms or designations derived from its national law. Quite apart from the issue of autonomous concepts of EU law, using national legal terminology may cause misunderstandings, because that terminology may not have the same meaning in other Member States.

Art. 4a(1) of Framework Decision 2002/584/JHA seeks to guarantee a high level of protection and to allow the executing judicial authority to surrender the person concerned despite that

[1] This provision was inserted to FD 2002/584/JHA by Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ 2009 L 81, p. 24).

[2] As amended by Framework Decision 2009/299/JHA.

person's failure to attend the trial which led to his conviction, while fully respecting his rights of defence.[3]

If an issuing judicial authority issues an EAW for the purpose of enforcing a decision rendered following a trial at which the person concerned did not appear in person, one may assume that it is of the opinion that in reaching that decision the rights of defence were not breached. Therefore, it should be able to explain why, in its opinion, those rights were not breached. A factual description should enable the executing judicial authority to reach the conclusion that surrendering the requested person would not entail a breach of his rights of defence.

[3] See, *e.g.*, ECJ, judgment of 24 May 2016, *Openbaar Ministerie v. Paweł Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, para. 37.

2. Roadmap to section (d)

2.1 Using the current version of the model-EAW

When issuing an EAW, the issuing judicial authority should use the model-EAW, as amended by FD 2009/299/JHA. The consolidated version of the model-EAW in all official languages of the EU is available on the website of the European Judicial Network.[4]

When providing for a translation, the issuing judicial authority should make sure that the consolidated version of the model-EAW in the official or designated language of the executing Member State[5] is used. Only information which the issuing judicial authority added to the model-EAW should be translated. In this way, one avoids potential discrepancies with regard to the standard text of section (d) of the EAW.

[4] https://www.ejn-crimjust.europa.eu/ejn/libcategories/EN/5/-1/0.

[5] In accordance with Art. 8(2) of FD 2002/584/JHA, the EAW "must be translated into the official language or one of the official languages of the executing Member State". However, any Member State may make a declaration to the effect "that it will accept a translation in one or more other official languages of the Institutions of the European Communities". Such declarations are published on the website of the European Judicial Network: https://www.ejn-crimjust.europa.eu/ejn/libcategories/EN/4/-1/0.

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2.2 Points 1 and 2: did the requested person appear in person at the trial resulting in the decision?

2.2.1 General

According to Art. 4a(1) FD 2002/584/JHA, the executing judicial authority may refuse the execution of the EAW, if the person concerned "did not appear in person" at the "trial resulting in the decision".

To enable the executing judicial authority to establish whether this ground for refusal is applicable, the issuing judicial authority must either tick the box of point 1 ("Yes, the person appeared in person at the trial resulting in the decision") or the box of point 2 ("No, the person did not appear in person at the trial resulting in the decision").

If the person concerned appeared in person at the trial resulting in the decision, Art. 4a(1) is not applicable. The issuing judicial should only tick the box of point 1 of section (d) of the EAW.

If the person concerned did not appear in person at the trial resulting in the decision, Art. 4a(1) is applicable. The issuing judicial authority should tick the box of point 2 of section (d) of the EAW and also tick one of the boxes of points 3.1-3.4 of section (d) of the EAW (but only if applicable).

If none of the boxes of points 3.1-3.4 of section (d) of the EAW is fully applicable, the issuing judicial should not tick any of them. In such a case, the issuing judicial authority could explain under point 4 of section (d) of the EAW why, in its opinion, surrendering the person concerned would nevertheless not entail a breach of his rights of defence.

2.2.2 Non-appearance 'in person'

The Court of Justice has not yet defined the concept of '(not) appearing in person'. However, it seems likely that the concept of '(not) appearing in person' refers to situations in which the person concerned was not physically present. Therefore, representation of an absent defendant by his legal counsellor does not constitute appearance 'in person'. In such a case the issuing judicial authority should tick the box of point 2 of section (d) of the EAW.

2.2.3 'trial resulting in the decision'

2.2.3.1 Introduction

The Court of Justice has not yet defined the concept of a 'trial'. However, it seems likely that the concept of a 'trial' does not refer to the "general prosecution process" (from charge to verdict), but rather to a distinct "event with a scheduled date and place" which resulted in the decision.[6]

In order to establish whether to tick the box of point 1 or point 2, one must first determine which decision is relevant for Art. 4a(1).

[6] Cf. *Cretu v Local Court of Suceava, Romania* [2016] EWHC 353 (Admin) (26 February 2016), para. 34.

The enforceable decision or judgment which is mentioned in section (b)(2) of the EAW, is not necessarily the same as the decision referred to in section (d) of the EAW. The enforceability of a judicial decision is decisive in determining when an EAW may be issued:[7] without an enforceable judicial decision no EAW can be issued. However, for the purposes of Art. 4a(1) and section (d) of the EAW, the final nature of the decision is determinative: the 'trial resulting in the decision' was defined by the Court of Justice as the "proceeding that led to the judicial decision which finally sentenced" the requested person.[8]

> While in some cases the enforceable judicial decision and the judicial decision which finally sentenced the person concerned may coincide, it is up to the national laws of the Member States to regulate whether the final decision actually is the enforceable decision.[9]
>
> Depending on the national law of the issuing Member State, therefore, a final decision in the sense of Art. 4a(1) and section (d) is not necessarily an enforceable decision. Some examples.
> In case of an first instance conviction which was upheld in appeal following an assessment, in fact and in law, of the merits of the case, the law of the issuing Member State may designate the first instance conviction as the enforceable judgment. However, the judgment on appeal, if final, is the decision referred to in Art. 4a(1) and section (d) (see paragraph 2.2.3.2).
> If the execution of a sentence was originally suspended, the decision to revoke that suspension may well be the enforceable decision according to the law of the issuing Member State. However, the judgment finally sentencing the person concerned to the custodial sentence or the detention order is the decision referred to in Art. 4a(1) and section (d) (see also paragraph 2.2.3.3).

2.2.3.2 'trial resulting in the decision': several instances

If the criminal procedure involves several instances (*e.g.* first instance and appeal) and therefore involves successive decisions, according to the Court of Justice the 'trial resulting in the decision' only refers to the "instance which led to the last of those decisions, provided that the court at issue made a final ruling on the guilt of the person concerned and imposed a penalty on him, such as a custodial sentence, following an assessment, in fact and in law, of the incriminating and exculpatory evidence, including, where appropriate, the taking account of the individual situation of the person concerned".[10]

In such cases, only one proceeding and only one decision are relevant for the purpose of section (d) (the proceeding which led to the last of the decisions *etc.*).

Art. 4a(1) will, therefore, not be applicable if the person concerned did not appear in person at the trial that led to the first instance decision but did appear in person at the trial on appeal,

[7] ECJ, judgment of 10 August 2017, *Openbaar Ministerie v. Tadas Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para. 71.
[8] ECJ, judgment of 10 August 2017, *Openbaar Ministerie v. Tadas Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para. 74 (emphasis added).
[9] ECJ, judgment of 10 August 2017, *Openbaar Ministerie v. Tadas Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para. 76.
[10] ECJ, judgment of 10 August 2017, *Openbaar Ministerie v. Tadas Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para. 81 (emphasis added).

provided that the appeal court made a final ruling on his guilt and imposed a penalty on him following a full assessment (*i.e.* both in fact and in law) of the merits of the case (*i.e.* of the evidence and, where appropriate, the personal situation of the person concerned). However, Art. 4a(1) will be applicable if that person appeared in person at the trial that led to the first instance decision but did not appear in person at the trial on appeal, provided that the appeal court made a final ruling on his guilt and imposed a penalty on him following a full assessment of the merits of the case.

Proceedings concerning question of law only (such as cassation proceedings) are not relevant for the purpose of section (d). After all, in such proceedings an "assessment, in fact and in law, of the (…) evidence" does not take place.

Appeal proceedings concerning the sentence only are dealt with in paragraph 2.2.3.3.

2.2.3.3 'trial resulting in the decision': subsequent proceeding amending the original penalty

The concept of a 'conviction' has two distinct but related aspects, namely the finding of guilt and the handing down of a sentence. The guarantees laid down in Art. 6 of the ECHR apply not only to the finding of guilt, but also to the determination of the sentence.[11]

According to the legal systems of some Member States, the closely related aspects may be dissociated: after the final ruling on guilt and the imposition of a penalty (see paragraph 2.2.3.24), the *quantum* or the nature of the original penalty may be changed in a subsequent proceeding.[12]

Such a subsequent proceeding resulting in an decision modifying the level or the nature of the original penalty also is relevant for section (d), provided that:

- the authority which adopted the decision enjoyed some discretion with regard to the level or the nature of the penalty "in particular, by taking account of the situation or personality of the person concerned, or of mitigating or aggravating circumstances" AND

- that its decision finally determined the sentence.[13]

It is irrelevant whether the proceeding in question may be favourable to the person concerned, as the level or the nature of the penalty is not determined in advance.[14] Equally, it is irrelevant whether the proceeding in question cannot lead to a heavier penalty.[15]

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[11] ECJ, judgment of 10 August 2017, C-271/17, *Sławomir Andrzej Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras. 77 and 87.

[12] ECJ, judgment of 10 August 2017, C-271/17, *Sławomir Andrzej Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 94.

[13] ECJ, judgment of 10 August 2017, C-271/17, *Sławomir Andrzej Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras. 88 and 90; ECJ, judgment of 22 December 2017, *Samet Ardic*, C-571/17 PPU, ECLI:EU:C:2017:1026, paras. 66, 77 and 80.

[14] ECJ, judgment of 10 August 2017, C-271/17, *Sławomir Andrzej Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 92.

[15] ECJ, judgment of 10 August 2017, C-271/17, *Sławomir Andrzej Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 89.

If, however, the subsequent proceeding is "a purely formal and arithmetic exercise", the competent authority does not enjoy a margin and its decision to modify the level or the nature of the original penalty does not come within the ambit of Art. 6 ECHR.

Some examples.

A decision on appeal against the sentence only comes within the ambit of Art. 4a(1)/section (d), if the court or the judge enjoyed a margin of discretion with regard to the level or the nature of the sentence and if its decision finally determined the sentence.

A decision consisting in commuting into a single sentence one or more sentences which were previously imposed on the person concerned, comes within the ambit of Art. 4a(1)/section(d), if the competent authority of the issuing Member States exercised its discretion as to the level or the nature of the new sentence and if the decision finally determined the sentence. Such a decision is called a 'cumulative judgment'.[16]

A decision to revoke the suspension of the execution of a prison sentence does not come within the ambit of Art. 4a(1)/section (d), because such a decision does not change the level or the nature of the original penalty.[17] A decision to replace a non-custodial penalty with a custodial sentence does come within the ambit of Art. 4a/section (d), if in reaching that decision the competent authority of the issuing Member State enjoyed a margin of discretion with regard to the level and nature of the new sentence.

If a decision changing the level or the nature of the original penalty was taken and if the competent authority enjoyed a margin of discretion with regard to that level or that nature, the question whether the person concerned appeared in person at the 'trial resulting in the decision', must be answered with regard to two sets of proceedings:

1) the proceeding which led to the final ruling on the guilt of the person concerned and to the imposition of a penalty, following an assessment, in fact and in law, of the incriminating and exculpatory evidence *etc*. (with respect to the finding of guilt) AND

2) the proceeding which led to the subsequent final decision modifying the level or nature of the original penalty (with respect to the determination of the sentence).[18]

In doing so, one should clearly distinguish both sets of proceedings, *e.g.* by referring to the respective dates on which the decisions were adopted and/or to their respective reference numbers.

2.2.3.4 'trial resulting in the decision': plea bargain

In some Member States it is possible to enter into a plea agreement with the public prosecutor. That agreement is reviewed and, if it meets the legal requirements, ratified by a court in proceedings in which no full determination of the merits of the charge against te person concerned takes place.

[16] ECJ, judgment of 10 August 2017, C-271/17, *Sławomir Andrzej Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 86.
[17] ECJ, judgment of 22 December 2017, *Samet Ardic*, C-571/17 PPU, ECLI:EU:C:2017:1026, para. 82.
[18] ECJ, judgment of 10 August 2017, C-271/17, *Sławomir Andrzej Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 94.

The executing judicial authorities of some Member States are of the opinion that such decisions come within the ambit of Art. 4a(1), while the executing judicial authorities of other Member States deny the applicability of that provision.

As a matter of transparency, the issuing judicial authority is advised to fill in section (d) with regard to that decision and to explain under point 4 that the decision was rendered following plea bargaining. In this regard, it should be recalled that the ECtHR has ruled that plea bargaining as to the sentence and pleading *nolo contendere* as to the charge amount to a waiver of the right "to have the criminal case against him examined on the merits".[19] Even if none of points 3.2-3.4 is applicable, it should be possible for the executing judicial authority to conclude that surrendering the person concerned would not breach his rights of defence (see further paragraph 2.7).

2.2.3.5 'trial resulting in the decision': trial without a hearing

In the legal order of some Member States, a court or a judge may impose a penalty without holding a hearing.

The mere fact that no hearing was held, does not seem enough to exclude the applicability of Art. 4a(1). After all, the purpose of that provision is enabling the executing judicial authority to surrender the person concerned in the knowledge that the rights of defence were fully respected even though the person concerned was not present in person at the trial.[20]

As a matter of transparency, the issuing judicial authority is advised to fill in section (d) with regard to that decision and to explain under point 4 that the decision was rendered following proceedings without a trial.

2.2.3.6 'trial resulting in the decision': trial consisting of multiple hearings

Neither Art. 4a(1) nor points 1 and 2 of section (d) refer to hearing(s). How should the issuing and executing judicial authorities determine whether the person concerned did or did not appear at the trial, when the trial consisted of multiple hearings?

This issue has not been decided by the Court of Justice. In practice, there are three possible approaches. To exclude the applicability of Art. 4a(1): 1) the requested person must have been present at <u>every</u> hearing, 2) he must have been present <u>at least at one hearing</u> or 3) he must have been present at the hearing(s) at which the court <u>examined the merits of the case</u>.

Whatever the approach taken by the issuing judicial authority, when point 1 is ticked, as a matter of transparency it is advised to explain which approach was taken and to describe how many hearings were held, when they were held, at which of the hearings the person concerned was present and what happened at each of the hearings.

[19] ECtHR, judgment of 29 April 2014, *Natsvlishvili and Togonidze v. Georgia*, ECLI:CE:ECHR:2014:0429JUD000904305, § 92.
[20] See, *e.g.*, ECJ, judgment of 24 May 2016, *Openbaar Ministerie v. Paweł Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, par.37.

2.3 Point 3.1: was the requested person summoned in person etc. in due time?

2.3.1 General

According to Art. 4a(1)(a) FD 2002/584/JHA, the executing judicial authority may not refuse the execution of the EAW on account of the non-appearance of the person concerned, if the EAW states that the person concerned, in due time[21]:

1)

- 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

2)

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

If either of the two alternatives of 1) (personal summons in due time or official notification by other means than a summons in person in due time) is applicable and the condition set out in 2) (being informed of the possibility of an decision be handed down in his absence) is met, the issuing judicial authority must tick the box of either point 3.1a (summons in person) or of point 3.1b (official notification by other means than a summons in person).

If the defendant was either in due time personally summoned or in due time actually officially notified by other means than a summons in person, but the person concerned was not informed that a decision may be handed down if he or she does not appear for the trial, the issuing judicial authority should not tick either the box of either point 3.1a or 3.1b.

If the defendant was in due time personally summoned, mention the date on which the person concerned was summoned in person under point 3.1b.

If the defendant was in due time actually officially notified by other means than a summons in person, explain under point 4 in a factual way how and when this condition was met.

If either point 3.1a or point 3.1b is applicable, the executing judicial authority may not refuse to execute the EAW. There is no need to tick any further boxes (if applicable). However, if the issuing judicial authority is of the opinion that multiple points apply, it is free to tick the relevant boxes. Relying on more than one point may enhance the chances of execution of the EAW.

If point 3.1 is not applicable: go to paragraph 2.4.

[21] The condition of 'in due time' has not been integrated in section (d) of the form of the EAW.

2.3.2 Waiver of the right to be present at the trial

Art. 4a(1)(a) "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".[22]

2.3.3 'in due time'

According to recital (7) of the preamble, the meaning of the concept of 'in due time' is that the person concerned should have received the information about the date and the place of the trial "sufficiently in time to allow him or her to participate in the trial and to effectively exercise his or her right of defence".[23]

Section (d) of the EAW does not contain an – explicit – reference to the concept of 'in due time'. However, point 3.1a of section (d) (summons in person) requires that the date at which the summons was served is filled in and point 3.1b of section (d) (actual official notification) requires an explanation "how the relevant condition was met" (point 4 of section (d)). Both requirements present an opportunity for the issuing judicial authority to demonstrate and for the executing judicial authority to check that the person concerned was summoned or notified 'in due time'.

2.3.4 'summoned in person etc.'

The concept of a 'summons in person' is an autonomous concept of EU law.[24] 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".[25] If a particular method of service does not entail that the person concerned himself received the summons, it cannot be considered as a 'summons in person', even though according to national law the person concerned was summoned validly or is even, according to a national legal presumption, considered to have been summoned in person.

2.3.5 'by other means actually received official information etc.'

As with the concept of a 'summons in person', this concept is an autonomous concept of EU law.[26] As with a 'summons in person', this method of service ensures that the person concerned "has the information relating to the date and place of his trial".[27]

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[22] ECJ, judgment of 26 February 2013, *Stefano Melloni v. Ministerio Fiscal*, C-399/11, ECLI:EU:C:2013:107, para. 52.
[23] Recital (7) of the preamble to FD 2009/299/JHA.
[24] ECJ, judgment of 24 May 2016, *Openbaar Ministerie v. Paweł Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, par. 32.
[25] ECJ, judgment of 24 May 2016, *Openbaar Ministerie v. Paweł Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, par. 45 (emphasis added).
[26] ECJ, judgment of 24 May 2016, *Openbaar Ministerie v. Paweł Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, par. 32.
[27] ECJ, judgment of 24 May 2016, *Openbaar Ministerie v. Paweł Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, par. 46.

For this concept to apply, it must be "unequivocally established (…) that the person concerned 'actually' received the information relating to the date and place of his trial [and], where appropriate, the precise time when that information was received".[28]

> The mere 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 – in itself is not enough.[29]

In the EAW, the issuing judicial authority must mention 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".[30] Such evidence can be mentioned under point 4 of section (d).

> Evidence capable of supporting the conclusion that the requested person actually received the date and the place of the trial might consist of a document originating with the person concerned from which it follows that he was aware of the date and the place of the trial (*e.g.* a written request for an adjournment) or a statement from the third party that s/he actually passed over the information about the date and the place of the trial for and when s/he did so.
>
> The standard of 'unequivocally established' seems to rule out mere inferences which might reasonably be drawn from the facts, *e.g.* the inference that the partner of the defendant who received the summons at the address given by the defendant and with whom the defendant lived at that address, would have handed over the summons to the defendant.[31] However, for transparency's sake, the issuing judicial authority is advised to mention such inferences under point 4 of section (d). It may well be that the executing judicial authority sees fit to take such inferences under consideration when deciding whether there are 'other circumstances' that enable the executing judicial authority 'to ensure that the surrender of the person concerned does not entail a breach of his rights of defence' (see par. 2.7).

When assessing whether the conditions of Art. 4a(1)(a) are met, the executing judicial may also rely on other evidence, "including circumstances of which it became aware when hearing the person concerned".[32]

2.3.6 'informed that a decision may be handed down etc.'

This requirement will be met, *e.g.*, if the summons was accompanied by a written advisement that a decision may be handed down if the person concerned does not appear in person at the trial. Although a written advisement is preferable, Art. 4a(1)(a)(ii) does not seem to exclude

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[28] ECJ, judgment of 24 May 2016, *Openbaar Ministerie v. Paweł Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, par. 47 (emphasis added).
[29] ECJ, judgment of 24 May 2016, *Openbaar Ministerie v. Paweł Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, par. 47.
[30] ECJ, judgment of 24 May 2016, *Openbaar Ministerie v. Paweł Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, par. 49.
[31] Compare Cass. (Belgium), judgment of 24 October 2017, Ar nr. P. 17.0666.N (not an EAW-case). See also ECtHR, decision of 6 March 2018, *Nicolae Popa v. Romania*, ECLI:CE:ECHR:2018:0306DEC005524212, § 73; ECtHR, judgment of 2 February 2017, *Ait Abbou v. France*, ECLI:CE:ECHR:2017:0202JUD004492113, § 63-65.
[32] ECJ, judgment of 24 May 2016, *Openbaar Ministerie v. Paweł Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, par. 49.

that the person concerned is informed verbally of the consequence of non-appearance, provided that it is registered in an official record.

2.4 Point 3.2: was the requested person defended by a legal counsellor mandated by him?

2.4.1 General

According to Art. 4a(1)(b) FD 2002/584/JHA, the executing judicial authority may not refuse the execution of the EAW on account of the non-appearance of the person concerned, if the EAW states that the person concerned

- was aware of the scheduled trial, and
- had given a mandate to a legal counsellor (appointed by himself or by the State) to defend him or her at the trial, and
- was indeed defended by that counsellor at the trial.

If applicable, tick the box of point 3.2 and explain under point 4 in a factual way how this condition was met.

If point 3.2 is applicable, the executing judicial authority may not refuse to execute the EAW. There is no need to tick any further boxes (if applicable). However, if the issuing judicial authority is of the opinion that multiple points apply, it is free to tick the relevant boxes. Relying on more than one point may enhance the chances of execution of the EAW.

If point 3.2 is not applicable: go to paragraph 2.5.

2.4.2 Waiver of the right to be present at the trial

Art. 4a(1)(b) "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".[33]

2.4.3 Legal counsellor, appointed by the defendant or by the State

Art. 4a(1)(b) and point 3.2 do not distinguish between a legal counsellor appointed (and paid) by the defendant (hereafter: a chosen legal counsellor) and a legal counsellor appointed (and paid) by the State (hereafter: an *ex officio* legal counsellor). Both types of legal representation suffice, provided that all the requirements of Art. 4a(1)(b) are met.

2.4.4 'being aware of the scheduled trial'

Unlike Art. 4a(1)(a), Art. 4a(1)(b) does not refer to the date and the place of the trial, but rather to the 'scheduled trial'. The most likely interpretation, therefore, is that awareness of the date and the place of the trial is not required. What is needed is that the defendant knew or could reasonably expect that a trial would take place at some later, yet to be specified date and place (see also paragraph 2.4.5).

2.4.5 'had given a mandate to a legal counsellor etc.'

[33] ECJ, judgment of 26 February 2013, *Stefano Melloni v. Ministerio Fiscal*, C-399/11, ECLI:EU:C:2013:107, para. 52.

According to the preamble to FD 2002/584/JHA, the defendant "should deliberately have chosen to be represented by a legal counsellor instead of appearing in person at the trial".[34] A 'mandate', therefore, presupposes a cognitive element ('being aware of the scheduled trial') as well as a volitional element (choosing to be represented by a legal counsellor).

If the defendant or his legal counsellor states that he gave or received a mandate, the issuing judicial authority will have no trouble in establishing that the defendant had mandated his legal counsellor. However, according to the legal system of some Member States, the courts are not allowed to question the relationship between the defendant and his legal counsellor. The question whether the defendant had indeed mandated his legal counsellor may, therefore, be difficult to answer.

If the chosen legal counsellor appears at the trial and mounts a defence on behalf of the absent defendant, as a rule one may safely assume that the defendant had given a mandate to that legal counsellor and that, therefore, the defendant was aware of the scheduled trial.

The same does not necessarily follow for an *ex officio* legal counsellor. If the legal system of a Member State allows for appointment of an *ex officio* legal counsellor in the absence of the defendant, it is possible that the defendant does not know of the appointment, may not have had any contact with the legal counsellor and, consequently, may not have mandated the legal counsellor to defend him. In the absence of indications that the defendant knew of the appointment of an *ex officio* legal counsellor and accepted being represented by that legal counsellor, it is not advisable to tick point 3.2. Of course, it remains open to mention under point 4 of section (d) that the defendant was defended by an *ex officio* legal counsellor, even if it cannot be established that the defendant had given a mandate to that legal counsellor.

If the issuing judicial authority cannot establish that the person concerned had given a mandate to his or her legal counsellor, it should not tick the box of point 3.2. In such a case, the issuing judicial authority, in the interest of transparency, could mention under point 4 that the person concerned was defended by a legal counsellor, although a mandate by the person concerned could not be established.

[34] Recital (10) of the preamble to FD 2009/299/JHA.

2.5 Point 3.3: did the requested person, after being served with the decision (in person) and being expressly informed about his right to a retrial or an appeal, acquiesce in the decision?

2.5.1 General

According to Art. 4a(1)(c) FD 2002/584/JHA, the executing judicial authority may not refuse the execution of the EAW on account of the non-appearance of the person concerned, if the EAW states that the person concerned

- was served with the decision and

- was expressly informed about the 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

- either expressly stated that he or she does not contest the decision;

- or did not request a retrial or appeal within the applicable time frame.

If Art. 4a(1)(c) is applicable: tick the box of point 3.3, fill in the date at which the person concerned was served with the decision and explain under point 4 in a factual manner how the condition was met.

The executing judicial authority may not refuse to execute the EAW. There is no need to tick any further boxes (if applicable). However, if the issuing judicial authority is of the opinion that multiple points apply, it is free to tick the relevant boxes. Relying on more than one point may enhance the chances of execution of the EAW.

If Art. 4a(1)(c) is not applicable: go to paragraph 2.6.

2.5.2 'after being served with the decision'

On the face of it, Art. 4a(1)(c) does not require that the decision was served on the person concerned in person. However, the most likely interpretation of this provision is that it requires that the person actually received the decision (see also paragraph 2.3.5).

If the decision was served on a third party, *e.g.* an adult member of the household of the person concerned, the issuing judicial authority should only tick point 3.3 if it has any evidence that the person concerned actually received the decision. That evidence should then be mentioned under point 4 of section (d).

2.5.3 'after (…) being expressly informed about his right to a retrial, or an appeal'

This requirement will be met, *e.g.*, if the decision was accompanied by written instructions about the right to a retrial, or an appeal. Although a written advisement is preferable, Art. 4a(1)(c) does not seem to exclude that the person concerned is informed verbally of the consequence of non-appearance, provided that it is registered in an official record.

2.5.4 'in which the person has a right to participate (…) being reversed'

The features of the retrial, or the appeal, described in Art. 4a(1)(c)/point 3.3 seem to rule out a number of possible legal remedies.

The phrase 'in which the person has the right to participate' – *i.e.* 'the right to be present' –[35] likely rules out so-called "written proceedings".

The phrase 'which allows the merits of the case, including fresh evidence, to be re-examined' likely excludes proceedings in which only questions of law are answered, such as cassation proceedings.

It is not advised to tick the box of point 3.3, if such proceedings were the only legal remedy available against the decision. In the interest of transparency, the issuing judicial authority could mention such proceedings under point 4 of section (d).

2.5.5 Acquiescence in the decision

The box of either one of the two options – the express statement of non-contest or the failure to request a retrial or an appeal within the applicable time frame – should be ticked. However, this should only be done, if the requested person was indeed served with the decision and expressly informed about his right to a retrial or an appeal as described above. There is no need to tick one of the boxes just to accentuate that the decision is final. After all, the concept of a 'decision' itself entails that it is final.[36]

If the person concerned stated expressly that he would not contest the decision, the issuing judicial authority should explain under point 4 of section (d) how and when the person concerned made that statement.

The circumstance that the person concerned did not request a retrial or an appeal within the applicable time frame comprises two distinct situations: (1) the person concerned did not request a retrial or an appeal at all and 2) the person concerned did request a retrial or an appeal but not within the applicable time frame. The issuing judicial authority could explain under point 4 which of the two situations applies to the situation at hand.

[35] Recital (11) of the preamble to FD 2009/299/JHA.

[36] According to the Court of Justice, the decision referred to in Art. 4a(1) – and in section (d) of the EAW – is the "judicial decision which finally sentenced" the requested person: ECJ, judgment of 10 August 2017, *Openbaar Ministerie v. Tadas Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para. 74.

2.6 Point 3.4: was the requested person not served with the decision in person, but will the decision be served on him in person after surrender and will he be expressly informed about his right to a retrial or an appeal?

2.6.1 General

According to Art. 4a(1)(d) FD 2002/584/JHA, the executing judicial authority may not refuse the execution of the EAW on account of the non-appearance of the person concerned, if the EAW states that the person concerned

- was not served with the decision, but will be personally served with the decision without delay after the surrender and

- will be expressly informed about the 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

- will be informed of the applicable time frame, which must be mentioned in the EAW.

If these requirements are met, the issuing judicial authority should tick the box of point 3.4 and fill in the applicable time frame for requesting the retrial or the appeal. The executing judicial authority may not refuse to execute the EAW.

There is no need to explain under point 4 how the condition was met.

If these requirements are not met: do not tick the box of point 3.4 and go to paragraph 2.7.

2.6.2 'personally served'

It stands to reason that the concept of 'personally served' must be understood to mean that the person concerned himself actually will receive the decision.

2.6.3 'expressly informed about the right to a retrial or an appeal'

This requirement will be met, *e.g.*, if the decision is accompanied by written instructions about the right to a retrial, or an appeal. Although a written advisement is preferable, Art. 4a(1)(d) does not seem to exclude that the person concerned will be informed verbally of the consequence of non-appearance, provided that it is registered in an official record.

2.6.4 'in which the person has a right to participate (…) being reversed'

The features of the retrial, or the appeal, described in Art. 4a(1)(d)/point 3.4 seem to rule out a number of possible legal remedies.

The phrase 'in which the person has the right to participate' – *i.e.* 'the right to be present' –[37] most likely rules out so-called "written proceedings".

[37] Recital (11) of the preamble to FD 2009/299/JHA.

The phrase ‘which allows the merits of the case, including fresh evidence, to be re-examined’ seems to exclude proceedings in which only questions of law are answered, such as cassation proceedings.

It is not advised to tick the box of point 3.4, if such proceedings are the only legal remedy available against the decision. In the interest of transparency, the issuing judicial authority could mention such proceedings under point 4 of section (d).

2.7 Point 4: if none of the boxes of points 3.1-3.4 can be ticked, are there 'other circumstances' that enable the executing judicial authority 'to be assured that the surrender of the person concerned does mean a breach of his rights of defence'?

2.7.1 General

Even if none of the situations described in Art. 4a(1)(a)-(d) applies – which situations correspond to points 3.1-3.4 of section (d) – , the executing judicial authority may 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'.[38]

This is so, because the ground for refusal is an optional ground for refusal: even if none of the aforementioned situations applies, as a matter of Union law[39] the executing judicial authority is under no duty to refuse to execute the EAW, if it can be established that executing the EAW would not infringe the rights of defence of the person concerned.

The 'other circumstances' may concern "the conduct of the person concerned', in particular "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".[40]

The issuing judicial authority could bring such other circumstances to the attention of the executing judicial authority in the EAW (*e.g.* under point 4 of section (d)), when answering a request for supplementary information on the basis of Art. 15(2) of FD 2002/584/JHA or when forwarding "useful additional information" on the basis of Art. 15(3) of FD 2002/584/JHA.

The executing judicial authorities may also rely on such other "circumstances of which it became aware when hearing the person concerned".[41]

2.7.2 What constitutes 'other circumstances'?

Because of the casuistic nature of the case-law of the ECtHR, it is impossible to list exhaustively circumstances other than those enumerated in Art. 4a(1) (a-d) which would justify the conclusion that the surrender of the requested person would not entail a breach of his rights of defence.

Such circumstances will most likely occur only in cases in which, although the defendant was not summoned in person or otherwise actually officially informed about the date and the place of the trial, he had sufficient knowledge of the charges against him and the proceedings[42] and

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[38] ECJ, judgment of 24 May 2016, *Openbaar Ministerie v. Paweł Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, para. 50; ECJ, judgment of 10 August 2017, *Openbaar Ministerie v. Tadas Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para. 96; ECJ, judgment of 10 August 2017, *Openbaar Ministerie v Sławomir Andrzej Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 106-107.

[39] Some Member States transposed Art. 4a(1) as an imperative ground for refusal.

[40] ECJ, judgment of 24 May 2016, *Openbaar Ministerie v. Paweł Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, para. 51.

[41] ECJ, judgment of 24 May 2016, *Openbaar Ministerie v. Paweł Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, para. 49.

[42] See ECtHR, judgment of 1 March 2006, *Sejdovic v. Italy* [GC], ECLI:CE:ECHR:2006:0301JUD005658100, § 101.

- either unequivocally waived his/her right to attend the trial or

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

The case-law of the ECtHR on Art. 6 ECHR and *in absentia* convictions provides building blocks which can support a conclusion that the surrender of the requested person would not entail a breach of his rights of defence. This case-law is discussed in the *Case-law Guide*.[43]

[43] Accessible at www.inabsentieaw.eu.

2.8 Providing information in the EAW

Only if the box of point 3.1b, 3.2 or 3.3 is ticked, does the issuing judicial authority have to provide information under point 4 of section (d) (see paragraphs 2.2, 2.3 and 2.4). Under point 4, the issuing judicial authority is asked to "provide information about how the relevant condition has been met". In essence, the issuing judicial authority is requested to mention the information on which it based its conclusion that the particular point is applicable.

The information should be clear, correct and comprehensive and should be presented in such a way that the executing judicial authority will be able to draw the same conclusion. The issuing judicial authority should avoid using legal terms derived from the law of the issuing Member State, but rather use factual terms to describe the relevant situation. Using legal terms derived from the law of the issuing Member State may cause confusion, because these terms may have a different meaning according to the legal system of the executing Member State.

> An example.
>
> *[X] 3.1b. the person was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he or she was aware of the scheduled trial, and was informed that a decision may be handed down if he or she does not appear for the trial;*
> *(…)*
> *4. If you have ticked the box under points 3.1b, 3.2 or 3.3 above, please provide information about how the relevant condition has been met:*
>
> *The summons was handed over to the defendant's wife at the defendant's address on 1 July 2019. Referring to that summons, in a letter of 3 July 2019 the defendant asked for an adjournment of the trial. (…)*
>
> The conclusion drawn by the issuing judicial authority that the defendant actually received the summons sometime between 1 and 3 July 2019 follows logically from the fact that the defendant refers to that summons in his letter of 3 July 2019.

Even if none of points 3.1b, 3.2 or 3.3 is applicable and the issuing judicial authority is under no duty to fill in point 4, it may be advisable to do so nonetheless. Explaining the situation under point 4 serves the interest of transparency and may enable the executing judicial authority to draw the conclusion that executing the EAW would not entail a breach of the rights of defence of the person concerned (see paragraph 2.7).

2.9 Assessing information provided by the issuing judicial authority

Where the person concerned did not appear in person at the "trial resulting in the decision", it is up to the executing judicial authority to "verify whether the situation before it corresponds to one of those described under (a) to (d) [of Art. 4a(1)".[44] The situations described in Art. 4a(1)(a)-(d) correspond to points 3.1-3.4 of section (d) of the EAW.

When the issuing judicial authority ticks one of more of the boxes of points 3.1-3.4, in essence it "gives the assurance that the requirements [of Art. 4a(1)] have been or will be met, which should be sufficient for the purpose of the execution of the decision on the basis of the principle of mutual recognition".[45]

The principle of mutual trust dictates that the executing judicial authority should rely on such an assurance. A mere statement of the requested person contesting the veracity of an assurance, should not be enough to cast doubt on its trustworthiness. It is up to the requested person to back up his claim with evidence which is capable of demonstrating that an error or mistake has indeed occurred. If, and only if, such evidence is presented by the requested person, should the executing judicial authority enquire with the issuing judicial authority and apply Art. 15(2) of FD 2002/584/JHA.

In three distinct situations – *viz*. when the box of points 3.1b, 3.2 or 3.3 is ticked – the issuing judicial authority must explain under point 4 how the relevant condition was met. With regard to the information mentioned under point 4, the previous paragraph applies *mutatis mutandis*.

In these three situations, the executing judicial authority may verify whether the assurance given by the issuing judicial authority is supported by the information presented under point 4. If it is of the opinion that the assurance does not follow from that information and that, therefore, the relevant condition is not met, it should apply Art. 15(2) of FD 2002/584/JHA at least once (see paragraph 2.10).

[44] ECJ, judgment of 10 August 2017, *Openbaar Ministerie v Tadas Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para. 93.
[4545] Recital (6) of the preamble to FD 2009/299/JHA.

2.10 More information needed?

2.10.1 General

The executing judicial authority should bear in mind that requesting supplementary information on the basis of Art. 15(2) of FD 2002/584/JHA should be "a last resort in exceptional cases in which the executing judicial authority considers that it does not have the official evidence necessary to adopt a decision on surrender as a matter of urgency".[46]

Therefore, the executing judicial authority must not request "as a matter of course"[47] general information about the legal system of the issuing Member State.

2.10.2 The request

If the executing judicial authority is of the opinion that it needs supplementary information in order to "validly decide on the execution of the [EAW]", it is under a duty to request the necessary supplementary information.[48]

In requesting supplementary information, the executing judicial authority should not ask open-ended questions, but rather formulate questions which allow for a clear, correct and comprehensive answer by the issuing judicial authority (see paragraph 2.7). To facilitate such answers, the executing judicial authority should:

- identify specific parts of section (d) of the EAW which in its view are unclear, insufficient, contradictory or obviously incorrect, and

- indicate what kind of information is needed to remedy the situation.

Moreover, the executing judicial authority should not leave its counterpart guessing as to the reason why a certain piece of information is needed. Explaining the reason behind the request for supplementary information, with reference to relevant case-law of the Court of Justice (if applicable), helps the issuing judicial authority in providing that information and may also afford it an opportunity to clear up any misunderstandings in the initial assessment of the executing judicial authority.

2.10.3 Time limits

In the request for supplementary information, the executing judicial authority may "fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in Article 17" (Art. 15(2) of FD 2002/584/JHA).

In the spirit of loyal cooperation, the time limit set for receipt should not be so short as to make answering the request unfeasible.

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[46] ECJ, judgment of 23 January 2018, *Dawid Piotrowski*, C-367/16, ECLI:EU:C:2018:27, para.61.
[47] ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (conditions of detention in Hungary)*, C-220/18, ECLI:EU:C:2018:589, para. 61.
[48] ECJ, judgment of 10 August 2017, *Sławomir Andrzej Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 103.

2.10.4 Communication channels

It is up to the executing judicial authority to choose an appropriate channel for communicating with its counterpart, but given the need to observe the time limits of Art. 17 of FD 2002/584/JHA it is advisable to communicate by way of e-mail. Communication by e-mail, rather than, *e.g.*, by telephone, is also in the interest of transparency with regard to the requested person.

2.10.5 Language

Insofar as the applicable legal regime permits[49] and taking into account the rights of the person concerned,[50] the need to observe the time limits of Art. 17 of FD 2002/584/JHA strongly suggests that the executing issuing judicial authorities communicate with one another in a language which they both understand, thus obviating as far as possible the need for any translation.

2.10.6 Unsatisfactory response

The issuing judicial authority should be aware that a request for supplementary information may be the last chance it gets to convince the executing judicial authority that it should not refuse to execute the EAW on the basis of Art. 4a(1) of FD 2002/584/JHA.

After having requested supplementary information once, if the executing judicial authority is of the opinion that it "still has not obtained the necessary assurances as regards the rights of defence of the person concerned during the relevant proceedings", it may refuse to execute the EAW.[51] The executing judicial authority is under no duty to ask for supplementary information again.[52]

2.10.7 Reasons for refusal

According to Art. 17(6) of FD 2002/584/JHA, the executing judicial authority must give its reasons for any refusal to execute an EAW. The reasons for a refusal allow the issuing judicial authority to assess whether it can remedy the defect(s) established by the executing judicial authority. If, *e.g.*, the execution of the EAW was refused, because the EAW did not mention the evidence on which the issuing judicial authority based its conclusion that the defendant actually received the summons or the decision, the issuing judicial authority could mention such evidence in a new EAW (see paragraph 2.11).

[49] See Art. 8(2) of FD 2002/584/JHA concerning translation of the EAW.
[50] See Art. 3(6) of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, concerning translation of the EAW.
[51] ECJ, judgment of 10 August 2017, *Sławomir Andrzej Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 104.
[52] ECJ, judgment of 10 August 2017, *Sławomir Andrzej Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 105.

2.11 Does a refusal to execute the EAW on the basis of Art. 4a(1) of FD 2002/584/JHA have a *ne bis in idem* effect?

If the executing judicial authority refused to execute an EAW on the basis of Art. 4a(1) of FD 2002/584/JHA, is the issuing judicial authority prevented from issuing a new EAW with regard to the same person, the same offence and the same judgment?

The Court of Justice has stressed that the executing judicial authority "which does not reply following the issue of an EAW and thus does not communicate any decision to the judicial authority that issued the EAW is in breach of its obligations under those provisions of Framework Decision 2002/584".[53]

The executing judicial authority, therefore, should take a decision on the execution of an EAW, even though the execution of a previous EAW with regard to the same person, the same offence and the same judgment was refused.

However, it is advisable that the issuing judicial authority should only issue such a new EAW, if it has any information which was not available to the executing judicial authority at the time of the decision on the previous EAW, which might be relevant to Art. 4a(1) and which might lead to the execution of the EAW. Of course, the issuing judicial authority should explain all of this in the new EAW.

[53] ECJ, judgment of 25 July 2018, *AY*, C-268/17, ECLI:EU:C:2018:602, para. 31.