Questionnaire *Improving Mutual Recognition of European Arrest Warrants through Common Practical Guidelines (ImprovEAW)*

Introduction

This questionnaire is meant as a tool to:

- identify any practical problems issuing judicial authorities and executing judicial authorities may experience when dealing with EAW's which are related – either directly or indirectly – to the EAW-form and
- identify the roots of these problems.

The questionnaire consists of 5 parts.

Part 1 concerns preliminary matters.

Part 2 concerns the transposition of FD 2002/584/JHA.

Part 3 concerns problems regarding the individual sections of the EAW-form.

Part 4 concerns problems concerning providing information which are not directly related to the EAW-form.

Part 5 invites the partners to draw conclusions and offer opinions based on their experiences (or on those of their Member State's authorities). Furthermore, the partners are encouraged to make any comments, put forward any information, pose any questions and make any recommendation they feel are relevant to the project, but which are not directly related to Parts 2-4.

From Part 2 on, each set of questions is preceded by an explanation. The explanation describes the context and the background of the questions, with reference to the relevant legal provisions and the relevant judgments of the Court of Justice. It also mentions (possible) issues in order to give some guidance in answering the questions. In answering the questions, besides flagging your 'own' issues, please indicate whether the issues mentioned in the explanation-part exist in your Member State.

Besides answering the questions in the questionnaire, please submit documents you deem relevant in answering the questions and please refer to relevant (European or national) case-law and legal literature, where available and applicable, otherwise provide your own expert opinion.

Some of the questions are (partly) identical to questions from the *InAbsentiEAW* questionnaire (see, *e.g.*, Part 1 and some questions in Part 2).[1] In respect of those questions, you may want to duplicate your answers to that questionnaire, unless there is a change of circumstances.

[1] https://www.inabsentieaw.eu/wp-content/uploads/2018/10/InAbsentiEAW_QUESTIONNAIRE.pdf.

Part 1: preliminary matters

1. Please indicate who completed the questionnaire in which capacity and how much years of experience you have had in dealing with EAW cases, in particular whether you have experience as issuing and/or executing judicial authority.

Jan Van Gaever, advocate general, Prosecutor General's Office at the Court of Appeal of Brussels.
I have been dealing with EAW cases from 2004 on, first as issuing authority, from 2007 on as representative of the public ministry in the investigating chamber of the Brussels' court of appeal (executing judicial authority) and from 2019 on once again also as issuing authority.
I am specialised in international cooperation in criminal affairs. I'm also the national expert for Belgium on the topic of the EAW.

Eric Verbert, attaché at the Justice Department of the Federal Public Service for the Petruhhin part. Eric is an expert (also) on extradition law.

Part 2: transposition of Framework Decision 2002/584/JHA

Explanation

Part 2 concerns the national transposition of FD 2002/584/JHA. The questions aim to establish how the Member States have transposed the relevant provisions and whether they have transposed them correctly.

[When referring to (provisions of) FD 2002/584/JHA or the EAW-form, please use the consolidated English language version, available at: https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/787.]

A. General questions

Explanation

Part 2A is dedicated to the transposition of provisions regarding the EAW-form and regarding grounds for refusal and guarantees.

Art. 8(1) of FD 2002/584/JHA concerns the content and form of the EAW. In the Annex to FD 2002/584/JHA, the EAW-form is set out. Member States must implement Art. 8(1) and the Annex.

Grounds for refusal/guarantees exhaustively listed

Art. 3-5 of FD 2002/584/JHA contain grounds for refusal and guarantees. Executing judicial authorities may, *in principle*:

- refuse to execute an EAW *only* on the grounds for non-execution *exhaustively* listed by Art. 3-4a of Framework Decision 2002/584/JHA, and

- make the execution of an EAW subject *only* to one of the conditions *exhaustively* laid down in Art. 5 of FD 2002/584/JHA (see, *e.g.*, ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, C-314/18, ECLI:EU:C:2020:191, paragraphs 39-40).

The words 'in principle' obviously refer to 'exceptional circumstances' in which the principles of mutual trust and mutual recognition can be limited, such as those identified in *Aranyosi en Căldăraru* (ECJ, judgment of 5 April 2016, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198) and in *Minister for Justice and Equality (Deficiencies in the system of justice)* (ECJ, judgment of 25 July 2018, C-216/18 PPU, ECLI:EU:C:2018:586).

Transposition of grounds for refusal/guarantees

Regarding the transposition of Art. 3-5 of FD 2002/584/JHA, Member States are free whether or not to transpose:

- the grounds for mandatory refusal of Art. 3 (ECJ, judgment of 28 June 2012, *West*, C-192/12 PPU, ECLI:EU:C:2012:404, paragraph 64);

- the grounds for optional refusal of Art. 4 (ECJ, judgment of 6 October 2009, *Wolzenburg*, C-123/08, ECLI:EU:C:2009:616, paragraph 58), and

- the guarantees of Art. 5 (ECJ, judgment of 28 June 2012, *West*, C-192/12 PPU, ECLI:EU:C:2012:404, paragraph 64).

Margin of discretion

When a Member States chooses to implement the ground for optional refusal of Art. 4(6) of FD 2002/584/JHA, it must provide the executing judicial authority with 'a margin of discretion as to whether or not it is appropriate to refuse to execute the EAW' (ECJ, judgment of 29 June 2017, *Popławski*, C-579/15, ECLI:EU:C:2017:503, paragraph 21). It could be argued that the interpretation of this particular provision applies equally to *all* grounds for optional refusal mentioned in Art. 4 (cf. opinion of A-G M. Szpunar of 16 May 2018, *AY (Arrest warrant – Witness)*, C-268/17, ECLI:EU:C:2018:317, paragraph 60, with regard to Art. 4(3)).

2. Did your Member State transpose Art. 8(1) of FD 2002/584/JHA and the Annex to FD 2002/584/JHA (containing the EAW-form) correctly? If not, please describe in which way your national legislation deviates from FD 2002/584JHA. Was there any debate about the correctness of the transposition in your national law, *e.g.* in academic literature or in court proceedings? If so, please specify.

As to the form to be used, the wordings of the national law (art. 2 of the law of 19 December 2003 on the European Arrest Warrant – hereafter EAW law) do not refer to the Annexe of the Framework Decision (hereafter FD). Article 2, § 5 of the EAW law states that the EAW must be made up in the form set out in the annexes of the law. The explanatory memorandum to the draft law mentions however that the form contained in the Annexe of the Framework Decision must be used. That form was also joined in the annexe to the draft law (and adapted with the transposition of FD 2009/299/JHA in the law of 25 April 2014 containing various provisions regarding Justice).

The Commission states in the Handbook on how to issue and execute a European Arrest Warrant on page 13:

"1.3. The EAW form

The EAW is a judicial decision issued in the form laid down in an annexe to the Framework Decision on EAW. The form is available in all official languages of the Union. Only **this form may be used and it must not be altered**. The intention of the Council was to create a working tool easily filled in by the issuing judicial authorities and recognised by the executing judicial authorities."

The Court of Justice stated on 28 January 2021 (C-649/19) that it suffices that the form annexed to the national law corresponds to Article 8 of the FD and the form set out in the annexe to that decision.

2BIS
Have infringement procedures been initiated against your Member State by the European Commission for incorrect transposition of the EAW Framework Decision? If so, on which points?

There is an ongoing discussion with the Commission regarding the transposition of the EAW-FD.
The Commission holds that Belgium:
- did not transpose or did not transpose correctly articles 18, 19 and 28 par. 3 as executing State
- is not allowed to perform a check on double criminality when a list offence is ticked – this is related to the pending cases regarding the Catalan ex-ministers.
- Did not transpose correctly the grounds for refusal: article 4, par. 1, 3 and 4
- Does not respect the delays set out in articles 15 and 17 FD
- Does not respect the obligation to take all measures needed to be able to surrender the person concerned – this is a discussion on obligatory detention (if the investigating chamber exceeds the time limits set in the national law to take a decision on surrender, the person must be released from detention – the Commission does not take into consideration the exceptions to this rule)

3. Did your Member State transpose *all* the grounds for refusal (Art. 3-4a of FD 2002/584/JHA) and *all* the guarantees (Art. 5 of FD 2002/584/JHA)?

Belgium transposed all the grounds for refusal. Regarding the guarantees, it was deemed not necessary to transpose the guarantee of Article 5 (2)

4. Were those grounds for refusal and guarantees transposed as grounds for mandatory or optional refusal/guarantees? Do the *travaux préparatoires* of the transposing legislation and/or the parliamentary debates on that legislation shed any light on the choices made and, if so, what were the reasons for those choices?

The ground for refusal Article 4 (4) of the FD has been transposed as a mandatary ground for refusal without the *travaux préparatoires* mentioning a specific reason for doing so. There wasn't a parliamentary debate on the issue neither. In a commentary, the head of the Justice subdepartment for legislation stated that the statutory limitation of the criminal prosecution does not pertain to the opportunity of prosecution but to the possibility of prosecution. If this situation occurs when deciding on the EAW it should not be made possible for Belgian judicial authorities to decide whether or not to apply this ground for refusal. The ground for refusal would otherwise remain meaningless.

The national law corresponds with the choices made in the FD (mandatory or optional) regarding the other grounds for refusal.

5. Does the national law of your Member State, as interpreted by the courts of your Member State, contain a provision for applying the two-step test for assessing a real risk of a violation of Art. 4 and of Art. 47 of the Charter (see Part 4D)?

The two-step test is not provided for in a specific article in the national law. However, the conditions for the application of that specific ground for refusal are specified in the FD and the jurisprudence of the Court of Justice. The national law must therefore be applied in accordance with this jurisprudence.

5BIS
How does your Member State implement the "dual level of protection" to which the requested person is entitled as required in the case law of the Court?

Also with reference to the answers to question 8:
National arrest warrants are issued by the investigative judge or by the court (in the trial phase when certain conditions are met). Prosecution EAW's will be issued by the investigative judge. In the very rare case in which a court would issue a national arrest warrant, the EAW would be issued by the public prosecutor. The public prosecutor discloses all information at his disposal to the court before the court decides on the issuing of the national arrest warrant. The court will or should therefore also assess the possibility of the issuing of an EAW before deciding on issuing a national arrest warrant.

In the event that the court issues a national arrest warrant for the purpose of organising a temporary surrender as part of a surrender procedure, the court knows that an EAW will be issued by the public prosecutor. There is no recourse needed because the EAW is issued with the consent of the requested person and serves only as a means to make it possible for the requested person to be present in person at his own trial.

There is no recourse needed where it concerns the execution of sentences. There is no specific recourse provided for EAW's issued for the prosecution of minors (but any issues or objections or requests related to the EAW and regarding the situation of the minor can be brought to the attention of the at all times competent juvenile court). The juvenile court/judge will also only issue a measure against an absent minor after assessing the proportionality of an EAW (situation can be compared to the one in C-625/19).

6.

a) Did your Member State transpose the grounds for refusal and guarantees of Art. 3-5 of FD 2002/584/JHA correctly, taking into account the case-law of the Court of Justice? If not, please describe in which way the national legislation deviates from FD 2002/584/JHA. Was there any debate about the correctness of the transposition in your national law, *e.g.* in academic literature or in court proceedings? If so, please specify.

Yes, we did (see also question 4).

b) If your Member State transposed Art. 4(6) of FD 2002/584/JHA, does your national legislation:

- (i) differentiate in any way between nationals of your Member State and residents,

and, if so, in what way? According to which criteria is 'residency in the executing Member State' established?

The Belgian national law does not differentiate between nationals and residents. The national law is identical to the terms of Article 4(6) of the FD. And similar to the FD, the national law has no own definition of the term residency.

The national law has been adapted in the light of the *Kozlowski* ruling of the Court of Justice. Residency is therefore defined in accordance with the jurisprudence of the Court of Justice. The CJEU stated in the rulings of *Kozlowski*, *Wolzenburg* and *Da Silva Jorge* that the terms "resident" and "staying in" are autonomous concepts of EU law. Those terms must be given a meaning that complies with Article 18TFEU: Member States must take into account the social reintegration objective of Article 4(6) EAW FD, meaning that nationals and nationals of another Member State that are integrated into the society should, as a rule, not be treated differently. In this regard, it cannot be permitted that the national law of the executing Member State reserves this ground for optional non-execution exclusively to its own nationals.

Kozlowski: A requested person is 'resident' in the executing Member State when he has established his actual place of residence there and he is 'staying' there when, following a stable period of presence in that State, he has acquired connections with that State which are of a similar degree to those resulting from residence. To ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying' within the meaning of Article 4(6), it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of his presence and the family and economic connections which that person has with the executing Member State.

Wolzenburg: A national legislation that applies the ground included in Article 4(6) automatically to its own nationals while it requires a lawful residence for a continuous period of 5 years for non-nationals is compatible with the principle of non-discrimination on grounds of nationality if it is (and remains) proportionate and pursues a legitimate objective, namely the reintegration in society. However, national legislation that makes the application of Article 4(6) subject to supplementary administrative formalities, such as a residence permit of indefinite duration, is not compatible with this principle.

Lopes Da Silva Jorge: Although a Member State may decide to limit the situations in which an executing judicial authority may refuse to surrender a person who falls within the scope of that provision, it cannot automatically and absolutely exclude from its scope the nationals of other Member States staying or resident in its territory irrespective of their connections with it. The national court is required, taking into consideration the whole body of domestic law and applying the interpretative methods recognized by it, to interpret that law, so far as possible, in the light of the wording and the purpose of the EAW FD, with a view to ensuring that that FD is fully effective and to achieving an outcome consistent with the objective pursued by it.

- (ii) guarantee that, when the surrender of a national or a resident for the purposes of executing a sentence is refused, the foreign sentence is actually executed in your Member State and, if so, how?

The CJEU holds that Article 4(6) presupposes an actual undertaking on the part of the executing Member State to execute the custodial sentence imposed on the requested person. The mere fact that a Member State declares itself 'willing' to execute the sentence cannot be regarded as justifying such a refusal (*Poplawski I, Poplawski II*).

Reference is made to the rulings *Kozlowski*, *Wolzenburg* and *Da Silva Jorge*, *Poplawski* (I and II) and *Marin-Simion Sut*.

It has always been the Belgian general point of view that this ground for refusal should only be applied after a thorough verification that all conditions of application are fulfilled. Only in such conditions can it be guaranteed by the executing State that the foreign sentence will actually be executed. As the foreign sentence will be executed in accordance with national law and the rules valid for the execution of sentences, differences in the modalities and the duration of the sentence can occur.

The CJUE stated in the *Sut* ruling (par. 32) that the application of the ground for optional non-execution as laid down in Article 4(6) requires two conditions to be satisfied, namely, first, that the requested person is staying in, or is a national or a resident of the executing Member State, and, second, that that State undertakes to enforce the sentence or detention order in accordance with its domestic law.

Can the final decision to take over the sentence however still be dependent on the fulfillment of some other conditions? A positive reply can be given.

Whether or not the State can undertake to enforce the sentence is a matter of national law of the Member State. The refusal to execute the EAW must be preceded by the executing judicial authority's examination of whether it is actually possible to enforce the custodial sentence in question in accordance with its domestic law (*Sut*, par. 35). In the event that the executing Member State finds that it is in fact impossible to undertake to enforce the sentence, it falls to the executing judicial authority to execute the EAW and, therefore, to surrender the requested person to the issuing Member State.

To undertake to enforce the sentence thus requires that it must be possible to execute the sentence. As stated also by the Amsterdam Court in its ruling of 17 October 2019 (ECLI:NL:RBAMS:2019:7754, point 6.3.4), an interpretation in conformity with EU law of Article 6, par. 2 to 5 of the Dutch law on surrender entails that the court must have a margin of interpretation when deciding on the application of this ground for refusal and that the application of this ground for refusal is dependent on the genuine commitment to execute the (foreign) sentence.

According to Belgian practice:
- the requested person himself or his lawyer must ask for the application of Article 4(6) meaning that an *ex-officio* application by the court is not possible (the request to apply this ground for refusal entails that the requested person automatically consents to the transmission of the certificate of FD 2008/909/JHA – see in the same sense Amsterdam,

17 October 2019, (https://uitspraken.rechtspraak.nl, ECLI:NL:RBAMS:2019:7754, point 6.3.9, 6th paragraph);
- the foreign judgment must be final (see also FD 2008/909/JHA, Article 1(a): 'judgment' shall mean a final decision or order of a court of the issuing State imposing a sentence on a natural person);
- the execution of the custodial sentence may not be statute-barred according to Belgian law (if it is, the foreign sentence cannot be executed and hence not be taken over neither) – see however also the answer to question 24 regarding cumulative judgments;
- the facts for which the custodial sentence was imposed must also be punishable with a custodial sentence in Belgium (see FD 2008/909/JHA, Article 8(3): the custodial sentence shall not be converted into a pecuniary punishment and the sentence can only be adapted where that sentence exceeds the maximum penalty provided for similar offences under its national law - there is however a possibility to replace the custodial sentence with a community service albeit that in the event of non-execution of the community service only a fine can be imposed and not a custodial sentence: the fact that the acts at the basis of the sentence are not punishable by a custodial sentence in Belgian national law must remain respected when determining the consequences for non-compliance of the community service – solution accepted by the Court of Appeal of Ghent of 30.06.2015 following the ruling 34/2014 of the Constitutional Court of 27.02.2014).

As regards the latter condition, the CJEU stated as follows:

- Article 4(6) FD does not give any indication from which the second condition in that provision could be interpreted as automatically precluding a judicial authority of the executing Member State from refusing to execute a EAW where the law of that Member State provides only for a fine in response to the offence to which the warrant relates.
- By virtue of the options afforded it by Article 4 of the FD, a Member State can choose to limit the situations in which the national executing authority may refuse to surrender a requested person.
- Although, in accordance with Article 25 of FD 2008/909, the provisions of FD 2008/909 are to apply, *mutatis mutandis*, to the enforcement of sentences in cases where a Member State undertakes to enforce the sentence pursuant to Article 4(6) FD EAW, the EU legislature expressly provided that the provisions of the former FD apply only to the extent they are compatible with the provisions of the latter.

In the English version of the *Poplawski* ruling the CJEU stated that on the date of the refusal to surrender, the execution must in fact been taken over, and, in the event that taking over that execution subsequently proves to be impossible, the refusal to surrender must be able to be challenged. It should however be emphasized that the Dutch version of paragraph 24 of the ruling is different from the English version: in the Dutch version is mentioned that on the date of the refusal only the guarantee must exist that the execution of the foreign sentence will be taken over, meaning that the execution could start at a later date.

According to Article 38(1) of the Belgian Law of 15 May 2012 holding transposition of FD 2008/909/JHA, the decision to refuse the surrender on the basis of Article 4(6) FD EAW entails recognition and immediate and direct enforcement of the sentence or

measure, even if the duration of the sentence will be adapted because it exceeds the maximum penalty provided for similar offences under national law.

If the requested person is in custody (based on the EAW or other grounds), the final decision not to execute the EAW (refusing the surrender and taking over of the execution of the foreign sentence) is carried out instantly. This means that the execution of the foreign sentence starts the same day and that the further execution of the sentence will be according to Belgian law. The issuing authority will be notified of this and will be requested to transmit the remaining information (duration of pre-trial detention) or documents (certificate according to FD 2008/909/JHA and copy of the judgment). Immediate execution is necessary to preclude that the requested person once again absconds (e.g. during the time in which the person is set free while awaiting the "consent" of the sentencing State and the actual transmission of the certificate). The question has not been posed yet whether the transmission of the certificate of FD 2008/909 is actually necessary but the Commission is busy studying this topic. A withdrawal of the EAW is however no longer possible after the start of the execution of the sentence that has been taken over.

If the requested person is not detained and there is no risk of absconding, the issuing authority will be notified of the refusal of surrender and will be requested to transmit the remaining information (e.g. duration of pre-trial detention) or documents (certificate according to FD 2008/909/JHA and copy of the judgment). The execution of the foreign sentence will in principle be put on hold till after reception of the requested information although it is considered that the absence of such a certificate does not constitute an insurmountable obstacle to the execution of the foreign sentence if the EAW contains the necessary information.

As Advocate General Sanchez-Bordona has said: "where the executing Member State undertakes to execute a sentence, in accordance with the requirements of Article 4(6) of Framework Decision 2002/584, the issuing Member State is bound to grant the executing State's request to forward it the judgment together with the certificate in Annex I of Framework Decision 2008/909" (Opinion of the AG of 27 November 2018 in C-573/17, par. 97 and 90-97).

A similar point of view is found in the jurisprudence of the Netherlands: Amsterdam, 17 October 2019, (https://uitspraken.rechtspraak.nl, ECLI:NL:RBAMS:2019:7754, point 6.3.9): the issuing State (Poland) is obliged to honour the request of the Minister to transmit the judgment and the certificate of FD 2008/909/JHA.

As practice shows and in response to the question of how one can guarantee that the foreign sentence will be executed: "being bound" does not mean that the execution of the foreign sentence will always remain guaranteed.

Some people consider themselves not bound by the refusal of the surrender and the subsequent taking over of the foreign sentence. They seem to consider that the execution of the foreign sentence can only take place in respect with FD 2008/909/JHA giving the latter FD priority over the EAW FD. In a case where the surrender was refused and the German sentence was not only taken over but also executed, the (detained) requested person was sent home by the Belgian prison authorities awaiting instalment of a device

of electronic surveillance. Informed of the refusal of surrender, the German authorities refused to send the FD 2008/909/JHA certificate and to acknowledge the refusal of the surrender, stating that the taking-over of the German sentence required the consent of the German authorities and the prior sending of the 2008/909 certificate after reaching an agreement on the conditions of the execution of the sentence (duration of the time to be spend in prison). For an unknown reason, the requested person decided to travel to Germany where he was arrested and incarcerated by the German authorities to execute the German sentence. The Belgian authorities formally objected but to no avail.

It should however be borne in mind that the substantive legality of an EU act cannot be examined in the light of another EU act of the same status in the hierarchy of legal rules unless the former has been adopted pursuant to the latter or unless it is expressly provided, in one of those two acts, that one takes precedence over the other (judgment of 8 December 2020, Hungary v Parliament and Council, C-620/18, EU:C:2020:1001, paragraph 119; see also judgment of 28 January 2021, *IR*, C-649/19, paragraphs 65-66: "In the present case, Framework Decision 2002/584 and Directive 2012/13 are both acts of secondary law and Framework Decision 2002/584 was not adopted pursuant to Directive 2012/13, which, furthermore, postdates that framework decision. Moreover, it is not expressly provided that one of those two acts is to take precedence over the other. Consequently, it is not appropriate to examine the validity of Framework Decision 2002/584 in the light of the provisions of Directive 2012/13.")

In the evaluation report on Belgium for the ninth round of mutual evaluations (st12996/20, 17 November 2020, p. 74-75), the evaluation team stated as follows:

> "*In its judgment in Popławski (C-579/15), the CJEU ruled that if an executing judicial authority intends to make use of the grounds for refusal provided for in Article 4(6) of FD 584, it may not do so where, 'on the date of the refusal to surrender, the execution has not in fact been taken over and where, furthermore, in the event that taking over that execution subsequently proves to be impossible, such a refusal may not be challenged'. In its decision, the CJEU did not rule on the procedure to be followed. The evaluation team points out that in this respect the case-law of the CJEU is very clear and if, at the time of surrender, there are still outstanding decisions to be adopted concerning enforcement, enforcement is consequently not guaranteed.*
>
> *Bearing this in mind, the evaluation team is of the view that Belgium's practice of refusing surrender on the basis of Article 4(6) of FD 584 even before the decision on transfer pursuant to FD 909 has become final should be modified in the light of Article 25 of FD 909, as interpreted by the CJEU, which does not provide for such exceptions. In this regard, the evaluation team stresses that the decision to enforce the sentence should be irrevocable before the decision to refuse the EAW is made.*
>
> *The first question that arises is what will happen if the Member State that issued the EAW does not send the certificate provided for in FD 909. In this regard, it should be noted that when Belgium is the issuing state, the Belgian legislator encourages the use of a certificate as the basis for recognising and enforcing the sentence for which surrender has been refused by the executing Member State;*

in such cases, Article 38(2) of the Law of 15 May 2012 makes it mandatory for the public prosecutor to forward a certificate.

Although as the executing state Belgium also prefers to receive a separate certificate pursuant to FD 909 for the purpose of enforcing a sentence on the basis of an EAW, in their day-to-day work Belgian practitioners do not consider that the absence of such a certificate constitutes an insurmountable obstacle to refusing surrender on the basis of Article 4(6). In such cases, the sentence is enforced in Belgium on the basis of the information in the EAW.

The evaluation team notes that it is technically possible to enforce a sentence handed down in another Member State merely on the basis of the information in the EAW, but it lacks the legal framework of FD 909. In this regard, Article 25 of FD 909 would mean that the procedure for recognising a sentence on the basis of a certificate would be followed, but also that the legal guarantees accompanying the recognition and subsequent enforcement of the sentence would apply in the event of a refusal based on Article 4(6) of FD 909.

However, in reality, the practice of applying Article 4(6) of FD 584, with or without a certificate, differs between Member States and sometimes within the same Member State. The implementation of the Popławski ruling would therefore require further discussion at EU level among practitioners in order to clarify the situation and improve legal certainty.

The second issue worth highlighting is the timeline for adapting the sentence. As already noted in section 4.4, general practice in Belgium is for the sentence to be adapted after the person is transferred, which is not in accordance with Article 12 of FD 909. Moreover, in the Popławski judgment, the CJEU ruled very explicitly on the time at which the decision to refuse is made, stating 'on the date of the refusal to surrender, the execution has ... in fact been taken over'. The mere fact that the sentence was adapted subsequent to the refusal indicates that, at the time the surrender was refused, enforcement of the sentence was not guaranteed."

The point of view of the evaluation teams entails that the issuing Member State has the final word on whether or not the surrender can be refused on the basis of Article 4(6) FD. It actually leads to a situation where the issuing Member States can effectively block the refusal of the surrender by refusing or even omitting transmission of the FD 2008/909/JHA certificate, hence prohibiting the taking over and execution of their sentence. Even if it is based on an interpretation of the *Poplawski* ruling, this opinion appears difficult to reconcile with both that ruling and the *Sut* ruling as it is adding a condition for the application of the ground for refusal. Furthermore, the adaptation of the foreign sentence according to the national law of the executing State is not of the competency of the sentencing State and considerations regarding a possible adaptation of the sentence should not be used to justify a refusal to transmit the certificate of FD 2008/909 after a decision of refusal of an EAW.

One might also refer to the ruling of 17 December 2020 in the *TR* case (C-416/20, par. 47): "Reliance on the provisions of a directive in order to prevent the execution of a

European arrest warrant would make it possible to circumvent the system established by Framework Decision 2002/584, which provides an exhaustive list of the grounds for non-execution. This is a fortiori the case when Directive 2016/343 does not contain provisions applicable to the issue and execution of European arrest warrants." The same could be said when calling on FD 2008/909 serves only as a means to prevent the application of FD 2002/584.

7. Did your Member State include in the national transposing legislation grounds for refusal or guarantees not explicitly provided for in Art. 3-5 of FD 2002/584/JHA (apart from the two-step test referred to in question 5)? If so, which grounds for refusal or guarantees?

No other grounds for refusal besides the possible breach of fundamental rights.

B. Your Member State as issuing Member State

Explanation

Part 2B concerns the designation of issuing judicial authorities and Central Authorities by the Member States and the competence of those authorities.

Issuing judicial authority
According to Art. 6(1) of FD 2002/584/JHA, the issuing judicial authority 'shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State'. Pursuant to Art. 6(3), each Member State must 'inform the General Secretariat of the Council of the competent judicial authority under its law'.

The term 'issuing judicial authority' is an *autonomous* concept of Union law, the meaning and scope of which 'cannot be left to the assessment of each Member State'. In accordance with the principle of procedural autonomy, the only role of the Member States is to designate national authorities which meet the conditions for being issuing judicial authorities (ECJ, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, paragraphs 31-33).

The term 'issuing judicial authority' is 'not limited to designating only the judges or courts of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from, inter alia, ministries or police services which are part of the executive' (ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 50). Therefore, that term is 'is capable of including authorities of a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that Member State' (ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 51), such as a Public Prosecution Office which participates in the administration of criminal justice in the issuing Member State.

When deciding whether to issue an EAW, the issuing judicial authority 'must review, in particular, observance of the conditions necessary for the issuing of the European arrest warrant

and examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant' (ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 71, regarding a prosecution-EAW; ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Procureur du Roi de Bruxelles)*, C-627/19 PPU, ECLI:EU:C:2019:1079, paragraph 31, in a case concerning an execution-EAW).

The issuing judicial authority must be capable of exercising its responsibilities objectively and independently. This independence 'requires that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive' (ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraphs 73-74).

Effective judicial protection

When a Member State conferred the competence to issue an EAW on an authority which participates in the administration of justice, *but is not itself a court* – such as a Public Prosecutor's Office –, that authority's decision to issue a *prosecution*-EAW and, *inter alia*, the proportionality of such a decision 'must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection' (ECJ, judgment of 27 May 2019, *OG and PI (Public Prosecutor's Office in Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, ECLI:EU:C:2019:456, paragraph 75). This requirement is not one of the conditions for being designated as an issuing judicial authority, but concerns the procedure for issuing a prosecution-EAW (ECJ, judgment of 12 December 2019, *JR and YC (Public Prosecutor's Office in Lyon and Tours)*, C-566/19 PPU and C-626/19 PPU, ECLI:EU:C:1077, paragraph 48). Failure to meet this requirement, means that the issuing judicial authority is not competent to issue a prosecution-EAW (according to A-G M. Campos Sánchez-Bordona, opinion of 25 June 2020, *Openbaar Ministerie (Faux en écritures)*, C-510/19, ECLI:EU:C:2020:494, paragraph 59).

Member States are given a lot of leeway as regards the requirement of effective judicial protection. Even if there is no specific remedy against the decision to issue an EAW, that requirement is met if the conditions for issuing an EAW, and its proportionality, are reviewed by a court before or at the same time as the adoption of a national arrest warrant, but also afterwards (ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Parquet Suède)*, C-625/19 PPU, ECLI:EU:C:2019:1078, paragraphs 52-53) and even after surrender (ECJ, order of 21 January 2020, *MN*, C-813/19, ECLI:EU:C:2020:31, paragraph 52).

The requirement of effective judicial protection does not concern *execution*-EAWs, as the judicial review which meets the requirement of effective judicial protection referred to in paragraph 75 of *OG and PI* is incorporated in the proceedings which resulted in the enforceable judgment (ECJ, judgment of 12 December 2019, *Openbaar Ministerie (Procureur du Roi en Bruxelles)*, C-627/19 PPU, ECLI:EU:C:2019:1079, paragraphs 35-36).

Central authority

According to Art. 7(1) of FD 2002/584/JHA, each MS may under certain conditions designate one or more central authorities 'to assist the competent judicial authorities'.

Central authorities are non-judicial authorities, such as a Ministry for Justice (ECJ, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, paragraph 38).

The role of central authorities in the execution of EAWs is limited to 'practical and administrative assistance' (recital (9) of the preamble to FD 2002/584/JHA) as regards the transmission and reception of EAWs and 'all other official correspondence relating thereto'. Therefore, Member States are not allowed to 'substitute the central authority for the competent judicial authorities in relation to the decision to issue the [EAW]' (ECJ, judgment of 10 November 2016, *Kovalkovas*, C-477/16 PPU, ECLI:EU:C:2016:861, paragraph 39).

Member States must communicate information relating to the designated central authorities to the General Secretariat of the Council. Such 'indications shall be binding upon all the authorities of the issuing Member State" (Art. 7(3) of FD 2002/584/JHA).

Issues concerning designation/competence issuing judicial authority

Assessing effective judicial protection
If a prosecution-EAW was issued by a public prosecutor (who meets the requirements for being an issuing judicial authority), it is not clear whether the executing judicial authority should examine whether the decision to issue that EAW and its proportionality can be subject to court proceedings in the issuing Member State which fully meet the requirements of effective judicial protection. Neither is it clear what the effect should be of a finding that the national law of the issuing Member State does not provide for such court proceedings.

8.
a) Which authorities did your Member State designate as issuing judicial authorities? Did your Member State centralise the competence to issue EAWs?

No centralisation of issuing of EAW's.

The investigating judge in case of prosecution of adults or minors (above the age of 16 years) treated as adults (minors dealt with by an investigating judge in the pre-trial phase).
The public prosecutor (generic name) in case of prosecution of minors (minors above the age of 16 years appearing before a juvenile court), execution of sentences and EAW's based on arrest warrants issued by courts in the trial phase (A. defendant incarcerated in a foreign prison; EAW issued to organise a temporary surrender as part of a surrender procedure allowing for the accused detained abroad to be present at his own trial – B. there is also a legal possibility for a court to issue a national arrest warrant if the investigating judge previously decided to not detain the accused or if the (detained) accused was set free and the accused omits to be present at any procedural step (but this is theoretical as the accused has no obligation to be present at his own trial) or if new and serious circumstances justify the issuing of a national arrest warrant).

b) If your Member State conferred the competence to issue EAWs on public prosecutors,

- (i) does the principle of mandatory prosecution apply, according to which a public prosecutor must prosecute each offence of which he has knowledge, and, if so, does that principle extend to the decision whether or not to issue an EAW;

  No

- (ii) do those public prosecutors meet the autonomous requirements for being issuing judicial authorities, and, if so, describe how they meet those requirements and if not, please specify why not;

  Yes. The independence of the Belgian public prosecutor is embedded in the Constitution. See also the CJEU judgment *ZB* of 12 December 2019 (C-627/19, par. 27).

- (iii) if those public prosecutors meet the autonomous requirements for being issuing judicial authorities, can the decision to issue a prosecution-EAW taken by a public prosecutor, and, *inter alia*, the proportionality of such a decision, be the subject of court proceedings in your Member State – before or at the same time as the adoption of the national arrest warrant or afterwards – which meet in full the requirements inherent in effective judicial protection, and, if so, describe that recourse;

  No recourse needed where it concerns the execution of sentences. No recourse needed where it concerns the issuing of an EAW in the trial phase (EAW is issued with the consent of the person requested). No specific recourse provided for EAW's issued for the prosecution of minors (but any issues or objections or requests related to the EAW and regarding the situation of the minor can be brought to the attention of the at all times competent juvenile court). The juvenile court/judge will also only issue a measure against an absent minor after assessing the proportionality of an EAW (situation can be compared to the one in C-625/19).

- (iv) is the fact that the public prosecutor meets the autonomous requirements for being designated as an issuing judicial authority and is the availability of a recourse against the decision to issue a prosecution-EAW before a court in the issuing Member State mentioned in the EAW-form?

  No. See also CJEU, 28 January 2021, *IR*, C-649/19, par. 80: the mere fact that the person who is the subject of an EAW issued for the purposes of criminal prosecution is not informed about the remedies available in the issuing Member State (to challenge the decision to issue an EAW) and is not given access to the materials of the case until after he or she is surrendered to the competent authorities of the issuing Member State cannot result in any infringement of the right to effective judicial protection.

9.
a) Who prepares the decision to issue an EAW (*e.g.* who fills in the EAW-form), the representative of the issuing judicial authority, an employee of that authority or someone else?

The magistrate (judge or public prosecutor) or administrative staff under the supervision of a magistrate.

b) What are the formalities for issuing an EAW? Does your Member State have a (digital) template of the EAW-form?[2] If so, please attach a hardcopy of the template to the questionnaire.

We use the Word version (corrected in its layout) of the EAW form that is available on the EJN-website, which is in fact the consolidated version of the EAW form send by the Council in annexe to its letter of 27 July 2011 (13297/11).

c) When deciding on issuing:

- a *national* arrest warrant,[3] do the judicial authorities in your Member State examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that national arrest warrant? If so,

    - (i) please describe in which way this examination takes place and which factors are taken into consideration. Please give some examples;

      The specific criteria that need to be met are laid down in Article 16 of the Law of 20 July 1990 on provisional detention:
      1) strong indications of guilt;
      2) the offence is punishable by a prison sentence with a maximum of at least one year;
      3) absolute necessity for the public security
      4) additionally if the maximum penalty does not exceed 15 years of imprisonment: strong indications for the existence of a serious risk of recidivism or evading justice or destroying evidence or collusion (except for cases of terrorism where the sentence to which the person is liable is more than five years imprisonment)

      Trial readiness is not a criterion.
      If the suspect cannot be found, a national alert or even a SIS alert (for localisation) could/would be issued.

    - (ii) does the fact that a requested person is a Union citizen who exercised his right to free movement play any role in that examination;

      There is no difference in treatment between Belgian nationals and Union citizens.

    - (iii) is the possibility of issuing a European Supervision Order (ESO) pursuant to Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional

[2] Compare the consolidated EAW-form in word format at:
https://www.ejn-crimjust.europa.eu/ejn/libcategories/EN/5/-1/0.
[3] *I.e.* a national judicial decision ordering the arrest and/or detention of a person.

detention (*OJ*, L 294/20)[4], instead of issuing a national arrest warrant, expressly addressed in that examination, both in law[5] and in practice?

ESO as an alternative to provisional detention is not addressed in law but the possibility of a conditional release (supervision measures) as an alternative to provisional detention is mentioned in Article 35 of the Law of 20 July 1990 on provisional detention. The possibility addressed in this question will however not occur in Belgium as the public prosecutor is exclusively competent to issue an ESO (Article 25 of the Law of 23 March 2017 on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention). The national decision on conditional release will therefore always precede the ESO and the aforementioned decisions are taken by different authorities.

- an EAW, do the issuing judicial authorities in your Member State examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that EAW? If so,

    - (i) please describe in which way this examination takes place and which factors are taken into consideration. Please give some examples;

      Prosecution: same conditions as those to issue a national arrest warrant. There is no additional proportionality test nor check to be performed. Regarding non-nationals, preference will be given, if possible and proportionate given the circumstances of the case and the seriousness of the facts, to issuing EIO's over EAW's. As each investigating judge assesses independently the merits of the case, giving examples might lead to unwanted assumptions on the existence of a standardized and widely accepted common best practice.

      One might however point out that the fulfilment of other investigative acts such as e.g. a house search or the collection of other evidence, will be accompanied by the request for interrogation of the suspect, which will all be part of an EIO. In such cases, an EAW might not be issued, could be issued together with the EIO or could be issued separately after the execution of the EIO.

      Minors (juvenile court): the juvenile court or judge will order the minor (above 16 years of age) to be placed in a secure young offender institution. The measure involving deprivation of liberty is taken on assessment of a certain number of factors, such as the seriousness of the offence, the (regular or current) living environment and the personality and maturity of the person concerned.

      The judge will at that moment also assess the proportionality of issuing an EAW knowing that his decision of placement concerning the absconding minor most likely will be followed by the issuing of an EAW by the public prosecutor whose

[4] According to the information provided on the website of the European Judicial Network, only Ireland has not transposed FD 2008/829/JHA yet.

[5] *I.e.*: does your national law expressly oblige the competent authority to take into account such a possibility and to expressly mention in its decision that it has done so?

role is to enforce the decision of the juvenile court or judge. See in this regard also the judgment of the CJEU of 10 March 2021, *PI*, C-648/20, par. 51).

Execution of sentences: given the limited margin of discretion following an effective conviction and in the interests of legal certainty and uniformity of practices throughout Belgium, the Board of Prosecutor Generals has drawn up guidelines setting out the conditions governing the issue of such EAW's. In principle, this type of EAW can be issued only for one or more prison sentences as principal sentences totalling at least three years and where at least two years remain to be executed). Three categories of exceptions are included:

1) The nature of the offence: if the person concerned has been convicted of an offence defined as a priority under the criminal policy guidelines. This includes e.g. terrorism, hostage-taking, organised crime, murder, torture or sex crimes.
2) Special circumstances: if the person concerned has escaped from a prison facility. An escape will mean that all still to be served sentences of at least four months will be the subject of an EAW.
3) Specific circumstances related to the person concerned: if the person is dangerous or violent or a repeat or persistent offender.

- (ii) does the fact that a requested person is a Union citizen who exercised his right to free movement play any role in that examination;

  Nationals and Union citizens are not treated differently. Concerning the execution of sentences, preference can be given to the application of FD 2008/909/JHA especially for sentences under 3 years imprisonment.

- (iii) is the possibility of issuing a European Investigation Order (EIO) pursuant to Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters (*OJ*, L 130/1)[6], in particular the possibility of issuing an EIO for the hearing of a suspected or accused person, by temporary transfer of a person in custody in the executing Member State to the issuing Member State,[7] by videoconference or other audiovisual transmission,[8] or otherwise,[9] instead of issuing a prosecution-EAW, or the possibility of applying Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (*OJ*, L 327/27), instead of issuing

[6] This directive does not apply to Ireland.
[7] See Art. 22(1) of Directive 2014/41/EU and recital (25) of the preamble to that directive. In this regard, it is of note that the execution of such an EIO may be refused when the person concerned does not consent (Art. 22(2)(a) of Directive 2014/41/EU).
[8] See Art. 24(1) of Directive 2014/41/EU and recitals (25) and (26) of the preamble to that directive. In this regard, it is of note that the execution of such an EIO may be refused when the person concerned does not consent (Art. 24(2)(a) of Directive 2014/41/EU).
[9] An EIO can also be issued for hearing an accused or suspected person on the territory of the executing Member State other than by videoconference or other audiovisual transmission (see Art. 10(2)(c) of Directive 2014/41/EU).

an execution-EAW, expressly addressed in that examination, both in law[10] and in practice?

Not in law but it is in practice as mentioned above. Regarding the use of the alternative of the EIO much depends of course on the willingness, if any, of the authorities of the other Member State to provide for a swift and expedient execution of the EIO.

d) Did your Member State designate a central authority responsible for transmission of the EAW and all other official correspondence thereto? If so, which authority? Is that authority competent to answer requests for supplementary information (Art. 15(2) of FD 2002/584/JHA) or to forward additional information (Art. 15(3) of FD 2002/584/JHA) without supervision by the issuing judicial authority?

No.

C. Your Member State as executing Member State

Explanation

Part 2C concerns the designation of executing judicial authorities by the Member States and the competence of those authorities.

According to Art. 6(2) of FD 2002/584/JHA, the executing judicial authority 'shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State'. Pursuant to Art. 6(3), each Member State must 'inform the General Secretariat of the Council of the competent judicial authority under its law'.

The term 'executing judicial authority' is an *autonomous* concept of Union law, the meaning and scope of which 'cannot be left to the assessment of each Member State' (compare part 2B; the Court of Justice has not addressed this issue yet).

10.
a) Which authorities did your Member State designate as executing judicial authorities? Did your Member State centralise the competence to execute EAWs?

No centralisation.

The executing judicial authorities are the penal court's investigating chambers (*Chambre du Conseil* – council chamber in first instance and the *Chambre des mises en accusation* – indictment chamber in appeal). The investigating chambers are also the competent authorities for the additional surrender (article 27(4) FD) (proceedings are the same as for normal surrender and will begin at the council chamber). If the requested person consents to surrender, the

[10] *I.e.*: does your national law expressly oblige the issuing judicial authority to take into account such a possibility and to expressly mention in its decision that it has done so?

decision on surrender is taken by the public prosecutor but only if that consent is given by the requested person, assisted by his lawyer, before the public prosecutor after being informed of the scope and consequences of a consent to surrender.
Due to an omission in the EAW law and a consolidated jurisprudence of inadmissibility of such proceedings before the investigating chambers, there is presently no competent authority to decide on subsequent surrender (article 28(3) FD) although there seem to have been cases in which a public prosecutor has permitted a subsequent surrender.
The public prosecutor decides on postponed or conditional surrender.

Authorisation for transit is given by the Ministry of Justice but that decision must not be taken by a judicial authority.

b) As regards the competent executing judicial authority, does your national legislation differentiate between:

- cases in which the requested person consents to his surrender and cases in which he does not;

  yes, see above.

- the decision on the execution of an EAW, the decision on consent as referred to in Art. 27(3)(g) and (4) and in Art. 28(2)-(3) of FD 2002/584/JHA and decisions regarding the (postponed or conditional) surrender of the requested person (Art. 23(3)-(4) and Art. 24 of FD 2002/584/JHA)?

  Yes, see above.

c) When deciding on the execution of an EAW, can the executing judicial authorities in your Member State examine whether, in the light of the particular circumstances of each case, it is proportionate to execute that EAW? If so:

  - (i) please describe in which way this examination takes place and which factors are taken into consideration. Please give some examples;

    Consolidated Belgian jurisprudence states that there is no margin for discretion; surrender must be ordered unless a ground for refusal is applicable. Proportionality or the lack of is not a ground for refusal.
    The jurisprudence of the CJEU is consistent that execution of the EAW constitutes the rule and refusal to execute is intended to be an exception which must be interpreted strictly and in accordance with the provisions of the FD 2002/584.

  - (ii) does the fact that a requested person is a Union citizen who exercised his right to free movement play any role in that examination;

    Not relevant (see answer above)

  - (iii) is the possibility of issuing a EIO pursuant to Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters (*OJ*,

L 130/1)[11], in particular the possibility of issuing an EIO for the hearing of a suspected or accused person, by temporary transfer of a person in custody in the executing Member State to the issuing Member State,[12] by videoconference or other audiovisual transmission,[13] or otherwise,[14] or the possibility of applying Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (*OJ*, L 327/27), instead of issuing an EAW, expressly addressed in that examination, both in law[15] and in practice?

Not relevant (see answer above). This question is part of a line of questions concerning the execution of the EAW ; it is therefore confusing to refer to the issuing of the EAW (see for instance what is mentioned in footnote 15).

d) If your Member State designated public prosecutors as executing judicial authorities,

- (i) do those public prosecutors meet the autonomous requirements for being executing judicial authorities, and, if so, describe how they meet those requirements;

  Yes. The independence of the Belgian public prosecutor is embedded in the Constitution. See also the CJEU judgment *ZB* of 12 December 2019 (C-627/19, par. 27).

- (ii) if those public prosecutors meet the autonomous requirements for being executing judicial authorities, can a decision taken by a public prosecutor as executing judicial authority, and, *inter alia*, the proportionality of such a decision, be the subject of court proceedings, in your Member State, which meet in full the requirements inherent in effective judicial protection? If so, please describe that recourse.

  If the requested person consents to surrender, the decision on surrender is taken by the public prosecutor instead of the court (see also the answer to question 10). Consent to surrender cannot be revoked. It would therefore be illogical to provide for a senseless recourse against a positive decision on surrender or to examine the proportionality of such a decision.

  As for postponing the surrender or organising a temporary surrender (also decisions of the exclusive competence of the public prosecutor), there is no indication in the jurisprudence of the CJEU that such a decision should be open to recourse.

[11] This directive does not apply to Ireland.
[12] See Art. 22(1) of Directive 2014/41/EU and recital (25) of the preamble to that directive. In this regard, it is of note that the execution of such an EIO may be refused when the person concerned does not consent (Art. 22(2)(a) of Directive 2014/41/EU).
[13] See Art. 24(1) of Directive 2014/41/EU and recitals (25) and (26) of the preamble to that directive. In this regard, it is of note that the execution of such an EIO may be refused when the person concerned does not consent (Art. 24(2)(a) of Directive 2014/41/EU).
[14] An EIO can also be issued for hearing an accused or suspected person on the territory of the *executing* Member State other than by videoconference or other audiovisual transmission (see Art. 10(2)(c) of Directive 2014/41/EU).
[15] *I.e.*: does your national law expressly oblige the issuing judicial authority to take into account such a possibility and to expressly mention in its decision that it has done so?

e) Did your Member State designate a central authority responsible for reception of the EAW and all other official correspondence thereto? If so, which authority? Is that authority competent to request supplementary information (Art. 15(2) of FD 2002/584/JHA) without supervision by the executing judicial authority?

No.

10BIS
How does your country organise a temporary surrender (as meant in art. 24(2) of FD 2002/584/JHA), what regime, what conditions? What is the legal basis for detention?

According to Article 24(1) FD, postponing a surrender is only possible after a positive decision on execution of the EAW. The decision on surrender is not executed because the requested person is still needed in the executing state (for purposes of prosecution or execution of a sentence: "*so that he or she may be prosecuted in the executing Member State or, if he or she has already been sentenced, so that he or she may serve, in its territory, a sentence passed for an act other than that referred to in the European arrest warrant*").

Article 24(2) FD holds that the executing authority, instead of postponing the surrender, may temporarily surrender the requested person to the issuing member state under conditions to be determined by mutual agreement between the executing and the issuing judicial authorities. The agreement shall be made in writing and the conditions shall be binding on all the authorities in the issuing member state.

Stating that a temporary surrender is an alternative to postponing a surrender is however not correct as a temporary surrender is a mere modality of a postponed surrender. In a postponed surrender,

- two situations are possible: the requested person is detained or is not detained;
  and
- two modalities are possible:
  - the requested person stays in the executing state until the decision on surrender is executed or is no longer valid;
  - or the requested person is temporarily transferred (article 22 directive EIO) or temporarily surrendered (article 24/2 FD EAW) to the issuing state but must be returned to the executing state.

The difference between a (final) surrender and a temporarily surrender is that in the latter the requested person is not conceded to the issuing state but is merely temporarily handed over to the issuing state for specific purposes.

A temporary surrender is a coercive measure with a restriction to the freedom of movement of the requested person and entails as such that the requested person is in detention in the executing state, either for prosecution purposes or for the execution of a sentence (a detention of the requested person in the surrender proceedings serves only the purpose of being able to execute the positive decision on surrender and that situation of detention cannot as such be used as a basis for postponing a surrender – the period of detention in the surrender proceedings must also be attributed in the issuing state and in case of conviction be deducted from the sentence to be served – neither can the decision to postpone a surrender be used as a title to warrant a detention). A temporary surrender will also not be allowed if the issuing state does not agree to

incarcerate the surrendered person for the period of the temporary surrender (this incarceration serves only the purpose of being able to execute the given guarantee that the temporarily surrendered person will be returned to the executing state at the end of the period of temporary surrender and at any time his or her presence is required in the executing state).

The temporarily surrendered person remains therefore under the judicial control of the executing state and is not at the disposal of the authorities of the issuing state. As a consequence:

- the national arrest warrant at the basis of the EAW cannot be executed in the issuing state and the issuing of a new national arrest warrant (related to the same acts for which surrender was asked) is also not possible
- the execution in the issuing state of any title of detention or even the notification of any judgment condemning the requested person (in order to start the period within which legal recourses must be used) is not possible
- a judicial control of the necessity of (maintaining) the detention and the modalities of detention (in prison or not in prison but with a monitoring device) cannot be performed by the courts in the issuing state as they have no jurisdiction

The conditions of the temporarily surrender will be agreed upon by the Belgian public prosecutor and the competent authority in the executing state. This usually entails an agreement:
- on the reason for the temporary surrender,
- on the duration of the temporary surrender,
- on the incarceration of the temporarily surrendered person for the entire duration of the temporary surrender (possibly in a specific prison if detention conditions would be discussed during the negotiations)
- and on the return of that detained person to the executing state at the end of the period of temporary surrender and at any time his or her presence is required in the executing state (the return will be executed by the Belgian police).

Article 24(2) FD holds however that the conditions to be determined must be made by mutual agreement between the executing and the issuing judicial authorities, meaning that a non-judicial authority such as a non- independent prosecutor or a ministry (see in this context article 36(2 and 3) of the new Dutch law on surrender that entered into force on 7 May 2021) cannot intervene.

The temporarily surrendered person will be incarcerated on the basis of the agreement on temporarily surrender (the denominator being the detention title in the executing state) where the period of detention must be attributed in the executing state to the remaining sentence to be served or added to the duration of the pre-trial detention. In Belgium the temporarily surrendered person will be incarcerated in the prison on the basis of "*een bevel tot bewaring*" which I believe has no equivalent in English but could be translated as an 'order to retain the person concerned in a detention centre' (the term goes back to the time when horse-drawn carriages where used for transferring detainees; if the journey took more than 1 day, the detainee spent the night in a local house of arrest on the basis of an – so translated – "order to retain" – it was as such a temporary title of detention).

Reference can also be made to article 22 of the EIO Directive concerning the temporary transfer to the issuing state, that holds the same principles (but holds a possible ground of refusal if the person concerned does not consent):

"5. The practical arrangements regarding the temporary transfer of the person including the details of his custody conditions in the issuing State, and the dates by which he must be transferred from and returned to the territory of the executing State shall be agreed between the issuing State and the executing State, ensuring that the physical and mental condition of the person concerned, as well as the level of security required in the issuing State, are taken into account.
6. The transferred person shall remain in custody in the territory of the issuing State and, where applicable, in the territory of the Member State of transit, for the acts or convictions for which he has been kept in custody in the executing State, unless the executing State applies for his release.
7. The period of custody in the territory of the issuing State shall be deducted from the period of detention which the person concerned is or will be obliged to undergo in the territory of the executing State.
8. Without prejudice to paragraph 6, a transferred person shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the issuing State for acts committed or convictions handed down before his departure from the territory of the executing State and which are not specified in the EIO.
9. The **immunity** referred to in paragraph 8 shall cease to exist if the transferred person, having had an opportunity to leave for a period of 15 consecutive days from the date when his presence is no longer required by the issuing authorities, has either:
(a) nevertheless remained in the territory; or
(b) having left it, has returned."

D. EAW-form

Explanation

All Member States implemented FD 2002/584/JHA and FD 2009/299/JHA.

Art. 2 FD 2009/299/JHA inserts Art. 4a in FD 2002/584/JHA and amends section (d) of the EAW-form.

All issuing judicial authorities are obliged to use the EAW-form as amended by FD 2009/299/JHA (Art. 8(1) FD 2002/584/JHA).

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

11. Does the national law of your Member State, as interpreted by the courts of your Member State, oblige the issuing judicial authorities of your Member State to use the amended EAW-form? If not, please attach the document which is used for issuing an EAW.

Yes. See question 2 and 9b):

As to the form to be used, the wordings of the national law (art. 2 of the law of 19 December 2003 on the European Arrest Warrant – hereafter EAW law) do not refer to the Annexe of the Framework Decision (hereafter FD). Article 2, § 5 of the EAW law states that the EAW must be made up in the form set out in the annexes of the law. The explanatory memorandum to the draft law mentions however that the form contained in the Annexe of the Framework Decision must be used. That form was also joined in the annexe to the draft law (and adapted with the transposition of FD 2009/299/JHA in the law of 25 April 2014 containing various provisions regarding Justice).

The Commission states in the Handbook on how to issue and execute a European Arrest Warrant on page 13:

"1.3. The EAW form

The EAW is a judicial decision issued in the form laid down in an annexe to the Framework Decision on EAW. The form is available in all official languages of the Union. Only **this form may be used and it must not be altered**. The intention of the Council was to create a working tool easily filled in by the issuing judicial authorities and recognised by the executing judicial authorities."

The Court of Justice stated on 28 January 2021 (C-649/19) that it suffices that the form annexed to the national law corresponds to Article 8 of the FD and the form set out in the annexe to that decision.

We use the Word version (corrected in its layout) of the EAW form that is available on the EJN-website, which is in fact the consolidated version of the EAW form send by the Council in annexe to its letter of 27 July 2011 (13297/11).

E. Language regime

Explanation

According to Art. 8(2) FD 2002/584/JHA the EAW 'must be translated into the official language or one of the official languages of the executing Member State'. However, a Member State may 'state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Communities'.

The Netherlands have made the following declaration: 'In addition to [EAW's] drawn up in Dutch or English, [EAW's] in another official language of the European Union are accepted provided that an English translation is submitted at the same time'.

Issues concerning the language regime

Using the official form
The issuing judicial authorities do not always use the official English EAW-form as a basis for the English translation of the original EAW, but rather provide for an *integral* English translation of the original EAW. In such cases the text of the English translation sometimes deviates from the official English EAW-form;

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

Quality of translations
The quality of some English translations is (very) poor.

12. Has your Member State made a declaration as provided for in Art. 8(2) FD 2002/584/JHA? If so,

- what does this declaration entail?

  An EAW send to the Belgian authorities must be translated into Dutch, French, German or English (meaning that the original sent is accompanied by a translation).

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

  A declaration should have been made to the General Secretariat of the Council. Translation in English is only possible after the amendment in 2014 of the EAW law. The declaration made by the Belgian authorities cannot be found on the EJN-website. The handbook on how to issue and execute a European arrest warrant (Official Journal of the European Union, C 335, 6 October 2017) does not mention that Belgian authorities also accept EAW's send in English.

13.
a) Have the issuing judicial authorities of your Member State had any difficulties in complying with the language requirements of the executing Member State? If so, please describe those difficulties and how they were resolved.

Difficulties have been reported on finding persons not only qualified but also able to translate in a very short amount of time the EAW into the official (or accepted) language of the executing State. The quality of our translations can still be an issue too. Translators are requested to use the official EAW form in the designated language and therefore consult the forms available on the EJN website.

b) If the translation of the EAW deviates from the official EAW-form in the language of the executing Member State – or from the official EAW-form in the designated language –, what, if any, consequences should this have for the decision on the execution of the EAW from the perspective of the executing authorities of your Member State?

In cases where the standard part of the form send (original EAW or the translated version) deviates from the official EAW-form, the court will consider only the standard part of the EAW-form in the language of the proceedings. If discussions arise concerning the transmitted original EAW and/or its translation, the public prosecutor can/will ask an official translator to translate this part of the EAW again. If absolutely needed, the issuing authorities can be asked to provide additional information.

Part 3: problems regarding the individual sections of the EAW-form

Explanation

Art. 8(1) of FD 2002/584/JHA lists the information which an EAW must contain. The purpose of that information is 'to provide the minimum official information required to enable the executing judicial authorities to give effect to the European arrest warrant swiftly by adopting their decision on the surrender as a matter of urgency'(ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/17, ECLI:EU:C:2018:27, paragraph 59).

Each section of the EAW-form covers one or more of the requirements set out in Art. 8(1).

The issuing judicial authorities 'are required to complete [the EAW-form contained in the Annex to FD 2002/584/JHA], furnishing the specific information requested' (ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/17, ECLI:EU:C:2018:27, paragraph 57).

Art. 8(1) lays down requirements as to lawfulness 'which must be obeyed if the [EAW] is to be valid' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 64; ECJ, judgment of 6 December 2018, *Piotrowski*, C-551/18 PPU, ECLI:EU:C:2018:991, paragraph 43).

Although the grounds for refusal and guarantees are *exhaustively* listed in Art. 3-5 of FD 2002/584/JHA, a failure to comply with one of those requirements 'must, in principle, result in the executing judicial authority refusing to give effect to that [EAW]' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 64). This is so, because Art. 3-5 are based on the premiss that 'that the [EAW] concerned will satisfy the requirements as to the lawfulness of that warrant laid down in Article 8(1) of the Framework Decision' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 63).

However, before refusing to give effect to the EAW, the executing judicial authority must first apply Art. 15(2) of FD 2002/584/JHA and 'request the judicial authority of the issuing Member State to furnish all necessary supplementary information as a matter of urgency' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 65).

A. Information regarding the identity of the requested person

Explanation

Section (a) of the EAW-form is dedicated to information regarding the identity of the requested person. This sections covers the requirements of Art. 8(1)(a) of FD 2002/584/JHA ("the identity and the nationality of the requested person").

This information enables the executing judicial authority to establish whether the person who is brought before it is actually the person who is sought by the issuing judicial authority.

Information regarding the nationality of the requested person is relevant for applying the ground for refusal of Art. 4(6) of FD 2002/584/JHA and for requesting the guarantee of Art. 5(3) of FD 2002/584/JHA.

Issues regarding section (a)

Relationship between SIS-II-Sirene and the EAW
Issuing judicial authorities do not always enter all relevant data into SIS. Often there is no photo or fingerprints. This causes problems in identifying people with common names without proper documentation (*e.g.* refugees/immigrants) and can lead to repeated arrests of people with the same common name. Other Member States do not always respond to requests for complete information in SIRENE.

14. Have the issuing judicial authorities of your Member State experienced any difficulties with regard to section (a)? If so, please describe those difficulties and how they were resolved.

I'm unaware of the existence of specific difficulties. When filling in EAW's specific attention is given to mentioning the available and relevant information useful for identification purposes. If the requested person was interrogated as a suspect, a photo and fingerprints will be available. If the requested person was not interrogated and a booking photograph or another image, fingerprints or information regarding physical appearance, family ties or used aliases are not available to properly identify the requested person, an EAW should not be issued till after reception of sufficient data allowing for proper identification of the person sought through the use of other mutual legal assistance instruments.

Sis-recast will probably bring about major changes.

15. Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (a)? If so, please describe those difficulties and how they were resolved.

This does occur but rather seldom. Any doubts about the corresponding identity of the person found and the person requested will be dealt with immediately by using all available channels. The person found will be interrogated using the information contained in the SIS alert or the EAW. All remarks made by the person found will be checked and, if useful, presented to the issuing authority to clarify the identity issue as fast as possible. I do not know of cases in which the identity issue wasn't solved before the court decided on surrender.

B. Decision on which the EAW is based

Explanation

Section (b) of the EAW-form covers the requirements of Art. 8(1)(c) of FD 2002/584/JHA ('evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2').

Mentioning the existence of an arrest warrant or a judgment signifies that the requested person already had the benefit of judicial protection of procedural safeguards and fundamental rights at the level of the adoption of the *national* judicial decision (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraphs 55-56).

The term 'arrest warrant', as used in Art. 8(1)(c), refers 'to a national arrest warrant that is distinct from the [EAW]' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 58).

The adoption of the EAW 'may occur, depending on the circumstances, shortly after the adoption of the national judicial decision' (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 56). Presumably, this means that it is not contrary to FD 2002/584/JHA if the authority competent to issue the EAW is the authority which also rendered the national judicial decision.

The national decision referred to in Art. 8(1)(c) and section (b) must be a 'judicial decision'. That term 'covers decisions of the Member State authorities that administer criminal justice, but not the police services' (ECJ, judgment of 10 November 2016, *Özçelik*, C-453/16 PPU, ECLI:EU:C:2016:860, paragraph 33). Because the Public Prosecutor's Office 'constitutes a Member State authority responsible for administering criminal justice' (ECJ, judgment of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraph 39), a decision rendered by that authority 'must be regarded as a judicial decision, within the meaning of Article 8(1)(c) of the Framework Decision' (ECJ, judgment of 10 November 2016, *Özçelik*, C-453/16 PPU, ECLI:EU:C:2016:860, paragraph 34).

The enforceability of a national judicial decision is 'decisive in determining the time from which [an EAW] warrant may be issued' (ECJ, judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, paragraph 71).

The information provided in section (b), in combination with the information in section (c), enables the executing judicial authority to determine whether the EAW is issued for the purposes of conducting a criminal prosecution (section (b)(i) in combination with section (c)(i)) or for the purposes of executing a custodial sentence or detention order (section (b)(ii) in combination section (c)(ii)).

If a judgment is not yet enforceable, 'the surrender would serve the specific purpose of enabling a criminal prosecution to be conducted' (ECJ, judgment of 21 October 2010, *B.*, C-306/09, ECLI:EU:C:2010:626, paragraph 56, regarding an *in absentia* judgment).

If a judgment was rendered *in absentia* and the requested person can still apply for a retrial, his position is 'comparable to that of a person who is the subject of [an EAW] for the purposes of prosecution' (ECJ, judgment of 21 October 2010, *B.*, C-306/09, ECLI:EU:C:2010:626, paragraph 57).

According to Advocate-General J. Kokott:

- FD 2002/584/JHA is applicable 'in a situation where the requested person was convicted and sentenced in [a third State, *i.e.* not a Member State of the EU], but by virtue of an

international agreement with [that third State] the judgment is recognised in the issuing Member State and executed according to the laws of the issuing State'; but

- the executing judicial authority must end the EAW-proceedings 'if it has substantial grounds to assume that execution of the [foreign] custodial sentence, which the [issuing Member State] has recognised, would lead to a serious breach of fundamental rights' (opinion of 17 September 2020, *Minister for Justice and Equality v JR (Conviction by an EEA third State)*, C-488/19, ECLI:EU:C:2020:738, paragraphs 62-63).

Issues regarding section (b)

Date of issue and issuing authority
The date of issue of the national judicial decision and/or the authority which issued that decision are not always mentioned in section (b).

Distinguishing between prosecution and serving a sentence
An EAW can be issued for the purposes of conducting a criminal prosecution or executing a custodial sentence or for both of those purposes.
If an EAW is issued which does not belong to the latter category (EAWs issued both for conducting an prosecution and for serving a sentence), issuing judicial authorities sometimes complete *both* subsections of section (b) instead of completing only the applicable subsection.
If an EAW is issued for both purposes, issuing judicial authorities do not always clearly distinguish between information pertaining to the prosecution and information pertaining to the sentence, in particular with regard to the offences mentioned in section (e) of the EAW.

Decision to execute a suspended sentence
When the requested person was originally given a suspended sentence and the execution of that sentence was ordered by a subsequent decision, some executing judicial authorities request information about the reasons for deciding to execute the suspended sentence.

16. Have the issuing judicial authorities of your Member State experienced any difficulties with regard to section (b)? If so, please describe those difficulties and how they were resolved.

In the training sessions, specific attention is given to how to fill in correctly section (b) so in principle, Belgian EAW's should be clear. Furthermore, a Belgian EAW issued for both prosecution and executing purposes would be a very rare commodity as issuing authorities normally differ.

17. Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (b)? If so, please describe those difficulties and how they were resolved.

Some EAW's lack information about the date or even the existence of the national title on which they are based. It also occurs that the information is not or cannot be correct, e.g. when comparing the information with what is mentioned in section (c). In those circumstances, the issuing authority is requested to provide additional information. If the information is not given

or is not adequate, the Bob-Dogi jurisprudence of the CJEU can be applied. The form will not be considered being an EAW and the request for surrender will be declared without object.
But the former could be criticised in the light of the jurisprudence of the Belgian Court of Cassation mentioned in the answer to the previous question.

17BIS
What is the position of your country on the conformity of the EAW and the national arrest warrant: should there be full conformity between the two documents or can they diverge from each other (can you add in the EAW offences that are not included in the national arrest warrant?) ? Do you as executing authority check on the national arrest warrant or do you ask for a (translated?) copy of the national arrest warrant (in case of doubt of conformity?). (possible issues: Bob-Dogi ruling, rule of speciality, deprivation of liberty, …)

I want to start with a reference to a ruling of 7 March 2018 of the Belgian Court of Cassation (https://juportal.be/zoekmachine/zoekformulier, rolnummer P.18.0228.F). In this case the Liege investigating judge issued a national arrest warrant for 1 act of theft with breaking and entering and a number of attempted thefts with breaking and entering. The same day an EAW was issued for several acts of theft with breaking and entering, several attempted thefts with breaking and entering, fencing and association of criminals (gang), for a total of 10 offences. The requested person was already arrested in France and consented to his surrender. After his surrender, the legality of his arrest and his surrender was challenged as there was a difference in offences between the national arrest warrant and the EAW. The Belgian Court of Cassation, following the conclusion of his Advocate General, stated that the rule of speciality is defined by what is mentioned in the EAW and not by what is mentioned in the national arrest warrant. Where it is necessary that the EAW contains the acts mentioned in the national arrest warrant, there is no legal rule that prohibits adding in the EAW acts that are not mentioned in the national arrest warrant, such as acts that will not lead to a deprivation of liberty or acts that are complementary to those already mentioned in the national arrest warrant.

« *Aucune disposition légale n'interdit au juge d'instruction de compléter, dans le mandat d'arrêt européen, les faits qu'il a visés dans le mandat d'arrêt par défaut, ni le lui impose de qualifier dans les mêmes termes les faits mentionnés dans le mandat d'arrêt européen et dans le mandat d'arrêt national.* »

In the *Bob-Dogi* ruling of 1 June 2016, C-241/15- C, the Court of Justice stated:

> *42 It should be noted in that regard that, while the Framework Decision does not define the term 'arrest warrant', as used in Article 8(1)(c) thereof, 'European arrest warrant' is defined in Article 1(1) of that decision as 'a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order'.*
>
> *43 It is that definition of 'European arrest warrant', which is used systematically in the title, recitals and articles of the Framework Decision, with the exception of Article 8(1)(c), which suggests that the latter provision refers to an arrest warrant other than the European arrest warrant referred to by all the other provisions of the Framework Decision, which may therefore only be a national arrest warrant.*

> *44 That interpretation is also supported by the wording of section (b) of the form contained in the Annex to the Framework Decision, in particular by the words 'Decision on which the warrant is based', a formula to which the first subparagraph of Article 8(1) of that decision expressly refers and which must therefore be taken into account for the purpose of interpreting Article 8(1)(c) as those words confirm that the European arrest warrant must be based on a judicial decision, thus implying that what is meant is a judicial decision that is separate from the decision issuing the European arrest warrant.*

If the EAW must necessarily be based on a national judicial decision that is distinct from that warrant and constitutes the legal basis for the EAW (see opinion of AG Bot in C-241/15, par 41), adding offences in the EAW, not mentioned in the national arrest warrant, must therefore correspond to the situation where no prior national arrest warrant was issued. In such a situation the dual level of judicial protection is in principle also lacking.

The advocate general also stated:

- in par. 51 of his opinion: (…) "*the specific nature of this instrument of judicial cooperation precludes any possibility that extending the scope of that instrument to the territory of the issuing Member State under the national law of that Member State may compensate for any failure to issue a national arrest warrant or other enforceable act having the same effect, which deprives the European arrest warrant of any legal basis*."
- in par. 61: "*The fact that there is a national arrest warrant for the execution of which the European arrest warrant is issued therefore guarantees to the judicial authorities of the other Member that <u>all the national statutory requirements have been met for an order for the arrest and detention of the requested person</u> for the purposes of criminal proceedings. If there were no such minimum guarantee, far from encouraging the mutual confidence which should prevail in relations between the issuing and executing judicial authorities, the simplified surrender system would give rise to mutual mistrust*."

If correspondence of the national arrest warrant with the EAW is not required, how can one guarantee that all the national statutory requirements have been met for an order for the arrest and detention of the requested person?

But the most compelling argument might be found in par. 66 of the opinion of the AG: "*The fact that there is a national arrest warrant serving as the basis of a European arrest warrant must therefore be understood as an expression of the principle of legality, which implies that the coercive power under which an order for arrest and detention is made cannot be exercised outside the legal limits determined by the national law of each Member State and within which the public authority is authorised to search for, prosecute and try persons suspected of having committed an offence.*" The EAW is therefore not an autonomous title of detention.

The issue of a European arrest warrant cannot exempt a member state from observance of the procedural safeguards provided for by its national law where a decision is made to deprive a person of his liberty.

I should also add here that Belgium does not allow for accessory surrender and neither (with reference to the case I mentioned) does France.

There is no obligation for the issuing judicial authority to forward the national arrest warrant and there is no obligation for the executing judicial authority to ask for nor to check the national arrest warrant but if a discussion arises with regard to the existence of a national arrest warrant (or in my opinion also with regard to the conformity of the national arrest warrant with the EAW) the executing state must apply article 15(2) FD and request the judicial authority of the issuing member state to furnish alle necessary supplementary information to enable it to examine the issue at hand. If a copy of the national arrest warrant is sent by the issuing authority, the executing judicial authority must be permitted to examine the conformity of the national arrest warrant with the EAW.

In the Belgian case, no breaches of the rule of speciality or defaults in the detention title were found but this is the result of the fact that a new national arrest warrant is issued after the surrender (and in this case it was issued on the basis of the offences for which surrender was allowed) making it so that the old national arrest warrant, at the basis of the EAW, no longer exists. Although the ruling is completely in accordance with the national legislation (and the requested person also consented with his surrender), one cannot deny that there has been a *de facto* regularisation after the execution of the surrender.

I fail to see how an EAW that does not correspond with the national arrest warrant on which it must be based, can be considered valid. Adding facts for which surrender is asked in the EAW without having issued a national arrest warrant for those facts, also implies a possible risk that the issuing authority will not respect the rule of speciality which as a consequence implies the existence of a risk of a breach of the fundamental right on a fair trial.

C. Indications on the length of the sentence

Explanation

Section (c) of the EAW-form refers to the 'sentence which, depending on the case, is liable to be imposed or has actually been imposed in the conviction decision' (ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, paragraph 31). Section (c) covers the requirements of Art. 8(1)(f) of FD 2002/584/JHA ('the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State').

Regarding amendments of the national law of the issuing Member State between the commission of the offence and the date of issue, or execution, of the EAW, only the version of that law of the issuing Member State 'which is applicable to the facts in question' is determinative (ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, paragraph 31).

The information provided in section (c) enables the executing judicial authority to verify compliance with the penalty thresholds of Art. 2(1) and (2) of FD 2002/584/JHA (ECJ, judgment of 6 December 2018, *IK*, C-551/18 PPU, ECLI:EU:C:2018:991, paragraph 51; ECJ, judgment of 3 March 2020, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2020:142, paragraph 33).

If the EAW is issued for the purposes of executing a sentence, *i.e.* if there is a final judgment, section (c), read in conjunction with Art. 8(1)(f), 'requires the issuing judicial authority to provide only information on the penalty imposed' (opinion of A-G M. Bobek of 26 November 2019, *X (European arrest warrant – Double criminality)*), C-717/18, ECLI:EU:C:2019:1011, paragraph 64). This suggests that in case of an execution-EAW concerning one or more of the offences of Art. 2(2) the standard statement contained in section (e) of the EAW-form ('If applicable, tick one or more of the following offences punishable in the issuing Member State by a custodial sentence or detention order of a maximum of at least 3 years as defined by the laws of the issuing Member State') suffices.

Issues concerning section (c)

Accessory surrender
FD 2002/584/JHA does not explicitly provide for *accessory surrender* (*i.e.* surrender for an offence or a sentence which does not meet the threshold of Art. 2(1) of FD 2002/584/JHA together with the surrender for one or more offences or sentences which do meet that threshold). However, some Member State allow for issuing and/or executing an EAW for accessory offences/sentences,[16] whereas others do not.

Penalty threshold and multiple offences/sentences
If a *prosecution*-EAW is issued for multiple offences, the issuing judicial authorities of some Member States mention the maximum sentence for each offence separately, whereas the issuing judicial authorities of other Member States mention only one maximum sentence for all offences together. The latter course of action may be the result of national rules concerning concurrence of offences and sentences. According to the legal systems of some Member States, in case of conviction for multiple offences the court must impose a single sentence, the maximum of which is usually 'capped': the maximum sentence is not determined by simply adding up the *maximum* sentences which apply to the offences separately. (In the Netherlands, *e.g.*, the maximum sentence is equal to the heaviest maximum sentence applicable to the offences plus one third of that maximum sentence.)
If an *execution*-EAW is issued for multiple sentences, must *each* of those sentences meet the four months requirement *separately*? Or is it allowed to surrender for the execution of those sentences if they *add up* to at least four months?

Partial refusal of execution-EAWs: 'aggregate sentences'
Situations in which a single sentence was imposed for two or more offences (a so-called 'aggregate sentence'),[17] but in which surrender for one of those offences cannot be allowed (*e.g.*, when that offence is not offence under the law of the executing Member State (Art. 2(4) jo. Art. 4(1) of FD 2002/584/JHA) or when that offence is time-barred according to the law of

[16] For the purposes of this project:
- an 'accessory offence' is an offence which does not meet the threshold of Art. 2(1) of FD 2002/584/JHA and for which surrender is sought together with one or more sentence and/or one or more offences which do meet that threshold; and
- an 'accessory sentence' is a sentence which does not meet the threshold of Art. 2(1) of FD 2002/584/JHA and for which surrender is sought together with one or more sentences and/or one or more offences which do meet that threshold.

[17] An 'aggregate sentence', therefore, is the antonym of an 'individual sentence'. An 'individual sentence' is a sentence imposed for each offence separately.

the executing Member State (Art. 4(4) of FD 2002/584/JHA), are problematic. Should surrender:

- be allowed for the execution of the sentence without any restriction;
- be allowed only for those offences which do meet the necessary requirements and, if so, is it necessary to know which part of the sentence relates to those offences (*i.e.* whether that part of the sentence is for four months);
- be refused surrender altogether?

Partial refusal of execution-EAWs: 'cumulative sentences'
In some Member States, two or more individual final sentences imposed on the same person may be replaced with a cumulative sentence in separate proceedings. In cumulative sentence proceedings, the court is bound by the individual judgments. The cumulative sentence cannot exceed and is usually less than the sum total of the individual sentences.
If an offence for which an individual sentence was imposed which is later replaced by a cumulative sentence does not meet the conditions for surrender, problems similar to those concerning aggregate sentences arise.

Penalty threshold for execution-EAWs: 'gross' or 'net'?
Does the four months requirement refer to the sentence as it was imposed or to that part of the imposed sentence which still remains to be executed (*e.g.* after deduction of time already served or of periods of remand)? In other words, does the requirement refer to the 'gross' sentence or the 'net' sentence?

Remaining sentence to be served
The remaining sentence to be served is not always mentioned.

18. Does the national law of your Member State allow for issuing and/or executing an EAW with regard to accessory offences/sentences?

No, it does not.

19. Does the national law of your Member State, as interpreted by the courts of your Member State, allow or require mentioning a single maximum sentence when a *prosecution*-EAW is issued for two or more offences?

The national law is silent on the issue. In practice both situations could occur (mentioning the most severe penalty (which is the most likely to happen) or mentioning the penalty for each offence). It could also occur that in Box C only the most severe penalty is mentioned but that the legal text of each offence, with its specific level of penalty, is added in box E(2).

20. Concerning an *execution*-EAW for separate imposed sentences, does the national law of your Member State, as interpreted by the courts of your Member State, allow or require 'adding up' those sentences in order to cross the threshold of Art. 2(1) of FD 2002/584/JHA when deciding on issuing or executing that EAW?

No, it does not. Adding sentences that each cross the threshold of Article 2(1), to cross the threshold of 3 years (national level to issue an EAW) is however allowed.

With regard to the threshold of 3 years: see the answer to question 9c (page 20 of this report): "Execution of sentences: given the limited margin of discretion following an effective conviction and in the interests of legal certainty and uniformity of practices throughout Belgium, the Board of Prosecutor Generals has drawn up guidelines setting out the conditions governing the issue of such EAW's. In principle, this type of EAW can be issued only for one or more prison sentences as principal sentences totalling at least three years and where at least two years remain to be executed). Three categories of exceptions are included:
1) The nature of the offence: if the person concerned has been convicted of an offence defined as a priority under the criminal policy guidelines. This includes e.g. terrorism, hostage-taking, organised crime, murder, torture or sex crimes.
2) Special circumstances: if the person concerned has escaped from a prison facility. An escape will mean that all still to be served sentences of at least four months will be the subject of an EAW.
3) Specific circumstances related to the person concerned: if the person is dangerous or violent or a repeat or persistent offender."

21. Regarding the requirement of a sentence of at least four months, does the national law of your Member State, as interpreted by the courts of your Member State, refer to the duration of the sentence as it was imposed or to the duration of that part of the sentence which remains to be enforced?

Duration of the sentence as it was imposed.

22. If an 'aggregate sentence' or a 'cumulative sentence' was imposed for multiple offences and one of those offences does not meet the requirements for surrender, does the law of your Member State allow or require the executing judicial authority to surrender without any restriction, to surrender for only those offences which meet the necessary requirements and, if so, is it necessary to know which part of the sentence relates to those offences (*i.e.* whether that part of the sentence is for four months) or to refuse surrender altogether?

If one sentence is imposed, it's the duration of that sentence that will be taken into account for assessing if the threshold to issue an EAW has been met regardless of the maximum penalty that could be imposed for the separate offences. The duration of the sentence must be at least 4 months.

The surrender will however be refused for offences for which surrender is not possible e.g. because the acts are not punishable under Belgian law. It will be up to the issuing Member State to determine what consequences, if any, this partial refusal has. It is therefore not required to know to what part of the sentence those offences could relate.

23. Have the issuing judicial authorities of your Member State experienced any difficulties with regard to section (c)? If so, please describe those difficulties and how they were resolved.

The question of the penalty remnant in case of a partial refusal on surrender should be addressed according to the Court of Cassation's doctrine on the lawful sentence: the sentence imposed is legitimated by an (other) offence that has been legally proven (meaning that the maximum penalty for the other offence allowed for the penalty imposed). If the penalty for the offence for which surrender was not allowed exceeds the maximum penalty for the offence(s) for which surrender was allowed, the execution of the sentence should accordingly be limited (which I

believe to be the competence of the sentence implementation court – such a case has not occurred yet).

When offenders are conditionally released from prison, a part of the prison sentence is not executed in prison. However, in case of revocation of the conditional release – and the re-incarceration of the released person –, the sentence implementation court must decide which part of the 'sentence remnant' is put into force again. The legislator and the Court of Cassation did, however, not specify how this calculation has to be done. As a consequence, the sentence implementation court has de facto the full appreciation in determining the sentence remnant. In case of a partial refusal on surrender the case can therefore be brought back before the sentence implementation court.

24. Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (c)? If so, please describe those difficulties and how they were resolved.

Determining for which offences and what judgments a cumulative sentence has been imposed can be a long and arduous journey with an indistinct outcome.

Polish EAW's based on cumulative sentences usually relate to judgments pronounced in the early years of 2000. The requested person often left Poland years ago and established a new and steady life in the executing State. The question whether or not the Polish subject could serve the remainder of his sentence in Belgium, usually got a negative reply due to time limitations thwarting the taking over and further execution of those olden judgments. The Brussels' indictment chamber however recently (14.05.2021) referred to the definition of judgment as laid down in Article 1 (a) of FD 2008/909/JHA ('judgment' shall mean a final decision or order of a court of the issuing State imposing a sentence on a natural person), stating that this definition does not entail that the final decision imposing the sentence should also be the one that finally determined the guilt of the person concerned. The date of the cumulative sentence then becomes the starting date in the calculation of time limitations (and makes an application of Article 4 (6) FD EAW possible).

D. Appearance in person at the trial resulting in the decision

Section (d) of the EAW-form was exhaustively dealt with in the *InAbsentiEAW* project. As far as we are aware, there are no new developments which would justify further questions concerning *in absentia* convictions.

The Belgian authorities note recurrent difficulties with the EAWs issued by Italy following a conviction in absentia where the person was represented by a lawyer assigned directly by the State. Since the person concerned was represented by a lawyer at their trial, even if the person concerned did not appoint the lawyer themselves, the judgment is considered to be final. According to the Belgian interpretation, under Article 4a of FD 584 and Article 8 of Directive (EU) 2016/343 on the strengthening of the presumption of innocence and the right to be present at the trial, the person must have given a mandate to a lawyer, who may be appointed by that person or by the state. In the absence of a mandate from the person concerned, the Belgian judicial authorities have already refused a surrender based on an EAW issued by the Italian authorities.

See also Court of Cassation 26.05.2021 (P.21.0665.F): the circumstance that the summons was notified to the lawyer at whose address the defendant elected domicile and who subsequently represented the defendant at the trial does not entail by itself that it is unequivocally established that the defendant was 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 was informed that a decision may be handed down if he or she does not appear for the trial.

E. Offences

Explanation

Section (e) is intended 'to provide details of the offence for the purposes of applying Article 2' (opinion of A-G M. Bobek of 26 November 2019, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2019:1011, paragraph 59).

Section (e) covers the information referred to in Art. 8(1)(d)-(e) of FD 2002/584/JHA ('the nature and legal classification of the offence, particularly in respect of Article 2' and 'a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person').

Besides providing a basis for checking whether the conditions of Art. 2 are met, the information required by section (e) also serves the purposes of:

- informing the requested person of the offence(s) for which surrender is sought (see Art. 6 of the Charter in conjunction with Art. 5(2) of the ECHR);
- enabling the executing judicial authority to check whether there are grounds for refusal (*e.g. ne bis in idem* (Art. 3(2)), double criminality (Art. 4(1)), prescription (Art. 4(4));
- (together with the decision to execute the EAW) enabling the authorities of the issuing Member State to comply with the speciality rule (Art. 27 and 28 of FD 2002/584/JHA) and enabling the surrendered person to monitor compliance with that rule.

The structure of section (e) leaves something to be desired. Section (e) requires a description of the offences at two different places: at the top of section (e) and under point II. As point II clearly refers to non-listed offences, the implication seems to be that listed offences should be described at the top of section (e) and non-listed offences under point II.

The EAW-form seems to differentiate its requirements as to the description of the offence(s): regarding a non-listed offence a 'full' description is required (point II of section (e)).

With regard to the listed offences of Art. 2(2) of FD 2002/584/JHA, in conjunction with section (e)(I), it should be remembered that 'the actual definition of those offences and the penalties applicable are those which follow from the law of 'the issuing Member State'', as is apparent

from the wording of Art. 2(2). After all, FD 2002/584/JHA 'does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract'. Consequently, the vagueness of some of the listed offences does not support the conclusion that Art. 2(2) infringes the principle of legality of criminal offences and penalties (ECJ, judgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, ECLI:EU:C:2007:261, paragraphs 51-54). Concerning the role of the executing judicial authority in checking compliance with Art. 2(2), if any, according to A-G M. Bobek the FD
'relies on a system of self-declaration, where only a minimum and prima facie review by the executing judicial authority is provided for' (opinion of 26 November 2019, *X (European arrest warrant – Double criminality)*, C-717/18, ECLI:EU:C:2019:1011, paragraph 70).[18]

Some grounds for refusal refer to the 'act' or the 'acts' on which the EAW is based. See, *e.g.*, Art. 3(2) ('the same acts'), Art. 4(1) ('the act'), Art. 4(2) ('the same act') and Art. 4(4) ('the acts'). Section (e) identifies the 'act(s)' on which the EAW is based.

Conceivably, the way in which the executing judicial authorities assess whether:

- there was a final judgment for 'the same acts' (Art. 3(2));
- 'the act' constitutes an offence under the law of the executing Member State (Art. 4(1));
- the requested person is being prosecuted in the executed Member State for 'the same act' (Art. 4(2)); and
- whether the prosecution of the punishment for 'the acts' is statute-barred under the law of the executing Member State (Art. 4(4)),

influences the decision whether the information about 'the act(s)', provided in section (e), is sufficient to decide on the execution of the EAW.

The Court of Justice has held that the concept of 'the same acts' both in Art. 54 CISA and in Art. 3(2) of FD 2002/584/JHA refers 'only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected' (ECJ, judgment of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683, paragraphs 39-40).

In the context of FD 2008/909/JHA the Court of Justice has held that assessing double criminality entails verifying whether 'the factual elements underlying the offence (…), would also, per se, be subject to a criminal sanction in the territory of the executing State if they were present in that State' (ECJ, judgment of 11 January 2017, *Grundza*, C-289/15, ECLI:EU:C:2017:4, paragraph 38).

Issues concerning section (e)

[18] A recent preliminary reference questions whether the executing judicial authority has any discretion in this regard: C-120/20 (*LU*), with regard to Art. 5(1) of FD Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties (*OJ*, L 76/16).

Meaning of the term "offence"
Neither FD 2002/584/JHA nor the EAW-form contains a definition of the term "offence".

Incomplete description of the offence
The description of the offence (whether listed or non-listed) does not always mention the time, place and/or the degree of participation of the requested person in the offence.

Description of the investigation instead of description of the offence
In prosecution-cases, section (e) regularly describes the investigation of the offence, detailing *why* the requested person is suspected of having committed an offence instead of simply describing *which offence* he is suspected of having committed.

Detailing the number of offences (and numbering them separately)
In case of multiple offences, the number of offences is not always given and the offences are not always presented and numbered separately.

Divergence between number of offences described and the applicable legal classifications
In case of multiple offences, the offences described in section (e) are not always clearly linked to the applicable legal classifications. The number of offences described does not always correspond to the number of legal classifications mentioned.

Vague designations of listed offences
Some of the designated listed offences are so vague that it is hard to determine what is covered by that designation and to distinguish one listed offence from the other (*e.g.* 'fraud' and 'swindling').

Divergent designations of listed offences
The order of listed offences sometimes deviates from the official order in FD 2002/584/JHA. Designations of listed offences are sometimes used which deviate from the official designations in FD 2002/584/JHA.

Non-listed offence(s) not described under point II
Non-listed offences are not always described under point II of section (e).

Offences described both as listed and as non-listed
Offences are sometimes described both as listed and as non-listed, meaning that one of the categories of point I is ticked regarding a particular offence, while at the same time that offence is described under point II.

25. Have the issuing judicial authorities of your Member State experienced any difficulties with regard to section (e)? If so, please describe those difficulties and how they were resolved.

A too in-depth description of the investigation has led in the past to difficulties for the Dutch authorities in surrender proceedings (contacts with an undercover agent led to unnecessary discussions related to the legality of the undercover techniques used.
Translations can result in unforeseen comprehension issues.

26. Have the executing judicial authorities of your Member State experienced any difficulties with regard to section (e)? If so, please describe those difficulties and how they were resolved.

A too limited description of the facts can cause issues when checking double criminality (surrender was granted). An extensive and in-depth description of the facts describing a number of possible offences led to the question why primarily corruption was ticked as the relevant offence and whether the rule of speciality would be respected after a positive decision on surrender (surrender was refused).

27. How do the executing judicial authorities of your Member State assess whether:

a) the requested person is the subject of a final judgment in respect of the same acts on which the EAW is based;

The information that is present or (easily) accessible but it is up to the person sought to bring forward the judgment or at least provide sufficient information allowing for a timely procurement of the judgment. The assessment whether the acts are the same will be done in accordance with the jurisprudence of the CJEU in relation to article 54 of the Convention implementing the Schengen Agreement.

b) the acts on which the EAW is based constitute an offence under the law of the executing Member State? Does such an assessment take place:

- *ex tunc – i.e.* according to law at the time the acts were committed –;

- according to the law at the time of issuing the EAW; or

- *ex nunc – i.e.* according to law at the time of the decision on the execution of the EAW –?

The assessment of double criminality will be done in the same way as described in the CJEU ruling of 11 January 2017, *Grundza*, C-289/15.

An *ex nunc* assessment is made based on the *nulla poena* principle but Article 2(4) FD EAW allows the executing authority to look only at what is provided for in its legal order at the time of the decision on surrender when performing this assessment (the scope of the assessment is in fact limited to this specific ground of refusal of surrender).

See also the ruling of 3 March 2020 in the (Belgian) case C-717/18 in which this point of view was defended with reference to N. KEIJZER, 'The Double Criminality Requirement', in R. BLEKXTOON and W. Van BALLEGOOIJ (eds.), Handbook on the European Arrest Warrant, Den Haag, T.M.C. Asser Press, 2005, 146 ; A. KLIP, European Criminal Law, An Integrative Approach, Cambridge-Antwerpen-Portland, Intersentia, 2012, 308 ; and J. VAN GAEVER, Het Europees aanhoudingsbevel in de praktijk (*The European arrest warrant in practice*), Mechelen, Kluwer, 2013, 32. The language argument made by the previously quoted authors was however not accepted by the Court nor by the Advocate General.
In his opinion, Advocate General Bobek wrote:

"*44. The Procureur-Generaal (Prosecutor General) advanced an additional systemic argument at the hearing, namely, that Article 2(4) of the Framework Decision leads the executing Member State to carry out the examination of the requirement of double criminality according to what is provided for in its legal order at the time of execution of the EAW.*

45. That argument is certainly valid in the framework of the assessment required under Article 2(4) with regard to the executing Member State (…)

47. It is one thing for an executing Member State to verify double criminality on the basis of an assessment of the moral standards conveyed by its criminal legislation at the time of execution of an EAW. It is an entirely different matter for an issuing Member State to issue an EAW under a specific simplified regime by reference to legislation that is not applicable to the offences at issue and that contains a different assessment of the seriousness of the offence in the form of a higher penalty than the one imposed by the judgment underlying the EAW."

In extradition cases, the most classical approach in the check of double criminality will be applied: the Belgian Court of Cassation stated in a ruling of 18 May 2020 that extradition cannot be authorized if the facts were not punishable under Belgian law at the time the acts were committed (*and of course the acts must still be punishable under Belgian law at the time of the decision on extradition*).

Have the executing judicial authorities of your Member State actually refused to execute an EAW, because the acts on which the EAW was based did not constitute an offender under the law of your Member State? If so, please give some examples;

Yes. Leaving the country without authorisation; escaping from prison (no violence or other offences incurred), skipping bail; not respecting the rulings of the Constitutional Court.

c) the act for which the requested person is being prosecuted in the executing Member State are the same acts on which the EAW is based;

The assessment whether the acts are the same will be done in accordance with the jurisprudence of the CJEU in relation to article 54 of the Convention implementing the Schengen Agreement, but will be on the basis of the information available at that time and stage of the proceedings in the Belgian case file, compared to what is mentioned in the EAW. In case of doubt, the issuing authority will be contacted.

d) the prosecution or punishment of the acts on which the EAW is based is statute-barred according to the law of the executing Member State? Does such an assessment take place:

- *ex tunc – i.e.* according to law at the time the acts were committed –;
- according to the law at the time of issuing the EAW; or
- *ex nunc – i.e.* according to law at the time of the decision on the execution of the EAW –?

Ex nunc for the period of limitation (refusal ground of Article 4(6) FD) but the legal extra condition of jurisdiction of the national courts (refusal ground of Article 4(4) FD) requires an examination ***ex tunc*** (jurisdiction requires that the facts are punishable under Belgian law at the time the acts were committed – *nulla poena* principle), so the answer to the question under d) is *ex tunc*. Regarding list offences: see the CJEU judgment of 03.03.2020 in C-717/18.
In extradition cases an *ex tunc* approach is always applied.

27a. Regarding listed offences,

- (a) have the issuing judicial authorities of your Member State had any difficulties in deciding whether a certain offence constitutes a listed offence? If so, please describe those difficulties and how they were resolved;

  It may occur that a listed offence is ticked where it shouldn't have been (facts that have been committed while being part of an association of criminals do not necessarily constitute the listed offence of 'participation in a criminal organisation'). The executing authority should in such circumstances perform a check on double criminality of the facts instead of simply refusing the surrender for the listed offence.

- (b) do the executing judicial authorities of your Member State assess whether the issuing judicial authority correctly ticked the box of a listed offence? If so,

  - (i) please describe how they assess that;

  - (ii) are there instances in which the executing judicial authorities actually found that a listed offence was not applicable; if so, which listed offence(s) and did those listed offence(s) constitute an offence under the law of your Member State?

  Belgian law requires that a check is performed when a listed offence is ticked. It is a marginal control holding an assessment that the acts/offence described correspond or not with the ticked listed offence. It should be limited to a *prima facie* check. This check is usually quickly and in a positive way performed. This was however not the case in the surrender proceedings of a Catalan ex-politician where the offence described was not accepted by the court as falling within the scope of the listed offence (of corruption) (contrary to the opinion of the public prosecutor's office) but with a positive outcome regarding the check on double criminality (contrary to the opinion of the defence attorneys).

  If a listed offence is ticked and it is clear that it does not correspond to the facts mentioned, a check on double criminality will be performed (e.g. arson is ticked where the facts relate to rape). It also occurs that the translated EAW does not reproduce the list offence ticked in the original EAW; in such cases attention must be paid to the original EAW.

F. Other circumstances relevant to the case (optional information)

Explanation

Section (f) covers the information indicated in by Art. 8(1)(g) ('if possible, other consequences of the offence'). By way of example, section (f) refers to 'remarks on extraterritoriality, interruption of periods of time limitation and other consequences of the offence'.

As is clear from the wording of Art. 8(1)(g) and the heading of section (f), the issuing judicial authority is *not* required to provide such information.

Extraterritoriality (Art. 4(7)(b) of FD 2002/584/JHA)

According to Advocate-General J. Kokott:

- the 'spirit and purpose' of Art. 4(7)(b) is 'to enable the executing judicial authority, when executing the European arrest warrant, to take into consideration key decisions of the requested Member State on the scope of its own criminal jurisdiction' (opinion of 17 September 2020, *Minister for Justice and Equality v JR (Conviction by an EEA third State)*, C-488/19, ECLI:EU:C:2020:738, paragraph 70);

- that ground for refusal 'applies only if the offence was committed *entirely* outside the requesting State, whereas it is not sufficient if only part of it took place there' (opinion of 17 September 2020, *Minister for Justice and Equality v JR (Conviction by an EEA third State)*, C-488/19, ECLI:EU:C:2020:738, paragraph 78);

- that ground for refusal 'applies not only to the enforcement of a prison sentence (…), but also to criminal prosecution' (opinion of 17 September 2020, *Minister for Justice and Equality v JR (Conviction by an EEA third State)*, C-488/19, ECLI:EU:C:2020:738, paragraph 79);

- 'when determining the criminal offence committed, focus has to be on the actual act. The specific circumstances which are inextricably linked together are decisive' (opinion of 17 September 2020, *Minister for Justice and Equality v JR (Conviction by an EEA third State)*, C-488/19, ECLI:EU:C:2020:738, paragraph 82).

Interruption of periods of time limitation

Time limitations according to the law of the *issuing* Member State do not constitute a ground for refusal (cf. Art. 4(4) of FD 2002/584/JHA). The existence of an *enforceable* national judicial decision (section (b)) implies that the prosecution or execution is not statute-barred according to the law of the *issuing* Member State. If the offence was committed or if the judgment was rendered a long time ago, to pre-empt requests for supplementary information (Art. 15(2) of FD 2002/584/JHA) it may be advisable to mention that the period of time limitation was interrupted.

Issues concerning section (f)

Extraterritoriality
Section (f) is only seldom completed. For the executing judicial authorities of Member States which transposed the optional ground for refusal concerning Art. 4(7)(b) of FD 2002/584/JHA, it would be helpful if the EAW contained a statement whether the offence(s) was/were committed wholly outside of the territory of the issuing Member State and, if so, which form of extraterritorial jurisdiction is claimed.

28. What kind of information do the issuing judicial authorities of your Member State usually provide in section (f)?

Normally none. In addition to what has been mentioned in the above introduction to this series of questions, the existence and relation to an EIO or a previous (or an additional) EAW will be mentioned.
Other possibilities of provided information are:
- the reason why there is such a long lapse of time between the sentence and the issuing of an EAW
- the circumstance that the convicted person did not re-integrate the prison after a period of prison leave
- the fact that the EAW will be used as basis for a temporary surrender
- the demand for a hearing by videoconference
- Information about possible whereabouts of the requested person or other information that could be helpful in finding the requested person (e.g. whereabouts of a girlfriend)

29. What kind of information do the executing judicial authorities of your Member State usually encounter in section (f)? What kind of information would they like to see in section (f)?

See question 28 for examples. In addition: the request to send a proof of the formal notification of the EAW or a proof that the requested person actually was informed of the content of the EAW.

29a. Did the issuing and/or executing judicial authorities of your Member State encounter any problems regarding the exercise of extraterritorial jurisdiction in the sense of Art. 4(7)(b) of FD 2002/584/JHA? If so, please describe those problems and how they were resolved.

As executing authority: prosecution EAW's: I have no knowledge of refusals of surrender based solely on the ground of extraterritorial jurisdiction. Execution EAW's: extraterritorial jurisdiction will not be used as a ground for refusal unless it coincides with another ground for refusal (in such cases refusal will be with the purpose of taking over the execution of the sentence and will as such be based on the ground of article 4, 6 FD).

As issuing authority: frequently with some countries e.g. Italy: surrender will be refused for the prosecution but surrender is also refused for the execution of the sentence and Italian authorities refuse on the same grounds of (extra)territorial competence the taking over of the execution of the foreign sentence, leaving nothing but a perfect situation of impunity for the sentenced person as long as he/she stays in Italy or travels between his/her state of nationality (e.g. Albania) and Italy.

With regard to the additional question what test is applied when determining whether there is extra-territorial jurisdiction: hypothetical test whereby Belgium takes the position of the issuing member state after which the rules of law regarding extra-territorial jurisdiction (universal competence, competence with regard to the nationality or the place where the offender can be found, …) will be applied.

G. The seizure and handing over of property

Explanation

Section (g) relates to Art. 29 of FD 2002/584/JHA. According to Art. 29(1), the executing judicial authority must in accordance with national law, either on its own initiative or at the request of the issuing judicial authority, seize and hand over two categories of property:

- property which may be required as evidence, and
- property which has been acquired by the requested person as a result of the offence.

Section (g) of the EAW-form affords the issuing judicial authority to indicate a request for seizure and handing over of property.

Issues concerning section (g)

Divergent language version of Art. 29(1) and section (g)
Regarding category (b) ('property which has been acquired by the requested person as a result of the offence') the Dutch language version of FD 2002/584/JHA contains a restriction which is not in the English, German and French language versions. The Dutch language version restricts category (b) to property acquired as a result of the offence *which is in the possession of the requested person* ('zich in het bezit van de gezochte persoon bevinden'). The Dutch transposition of Art. 29 generally restricts the possibility of seizing and handing over property to property *found in the possession of the requested person* ('aangetroffen in het bezit van de opgeëiste persoon'). This term is to be understood as 'on his person or carrying with him', thereby excluding the possibility of seizing and handing over property which requires a search in a place of residence or in a place of business.

30. Does the national law of your Member State, as interpreted by the courts of your Member State, contain restrictions similar to the restriction contained in Dutch law (see the explanation) or other restrictions? If so, describe the restriction(s).

No. Article 26 of the Belgian transposition law mentions two categories of objects that can be seized and transferred to the issuing authority: objects that can be required as evidence or have been acquired by the requested person as a result of the offence ("*1° die kunnen dienen als overtuigingsstuk of 2° die de betrokken persoon heeft verkregen door het strafbare feit*"). There

must be a link between the object found and the offence and the required objects must be clearly described in section G of the EAW (e.g. weapon, identity documents, travel documents, a laptop, a smartphone, …). Seizing and transferring of personal belongings or objects found by chance on the person (on his person or carrying with him) is not possible on the sole basis of this section. Either they are personal belongings and will accompany him/her in case of surrender or they are an object of interest for the issuing authority in which case this authority will be asked to issue an EIO.

31. Have the issuing judicial authorities of your Member State experienced any difficulties when requesting the seizure and handing over of property pursuant to section (g)? If so, please describe those difficulties and how they were resolved.

No information available.

32. Have the executing judicial authorities of your Member State experienced any difficulties when confronted with a request for seizure and handing over of property pursuant to section (g)? If so, please describe those difficulties and how they were resolved.

If the issuing judicial authority requests a house search in section G, a practical solution is to seize an investigating judge with the execution of the EAW before the person sought is found. The investigating judge has full competence to decide whether or not a house search is needed. If the investigating judge decides to perform a house search, the decision will be made according to national law and not on the basis of the request made in section G.

H. Guarantees concerning life sentences

Explanation

Section (h) covers the guarantees of Art. 5(2) of FD 2002/584/JHA upon which the execution of an EAW may be made dependent, when the EAW concerns an offence which carries a life sentence in the issuing Member State (prosecution-EAW) or when the EAW concerns a life sentence which was imposed in that Member State (execution-EAW).

Issues concerning section (h)

Not clear when applicable and, if so, which guarantee

Because section (g) uses indents instead of boxes, it is not always clear if the issuing judicial authority intended to declare this section applicable and, if so, which of the guarantees. (Compare *Handbook on how to issue and execute a European arrest warrant*, C(2017) 6389 final, p. 108).

Art. 5(2) and section (h) do not fully reflect the case-law of the ECtHR
To be compatible with Article 3 of the ECHR – which corresponds to Art. 4 of the Charter –, a life sentence must be reducible *de jure* and *de facto*, meaning that there must be both a prospect of release for the prisoner and a possibility of review, both of which must exist from the moment

of imposition of the sentence (see, *e.g.*, ECtHR, judgment of 26 April 2016 [GC], *Murray v. the Netherlands*, ECLI:CE:ECHR:2016:0426JUD001051110, § 99). This line of case-law also applies to extradition (see, *e.g.*, ECtHR, judgment of 4 September 2014, *Trabelsi v. Belgium*, ECLI:CE:ECHR:2014:0904JUD000014010, § 131) and to surrender.

The imposition of a life sentence already is incompatible with Art. 3 of the ECHR where at the moment of imposition of that life sentence national law 'does not provide any mechanism or possibility for review of a whole life sentence'(ECtHR, judgment of 9 July 2013 [GC], *Vinter v. the United Kingdom*, ECLI:CE:ECHR:2013:0709JUD006606909, § 122).

The right to a review of a person sentenced to a life sentence 'entails an actual assessment of the relevant information whether his or her continued imprisonment is justified on legitimate penological grounds (…), and the review must also be surrounded by sufficient procedural guarantees (…). To the extent necessary for the prisoner to know what he or she must do to be considered for release and under what conditions, it may be required that reasons be provided (…)' (see, *e.g.*, ECtHR, judgment of 23 May 2017, *Matiošaitis v. Lithuania*, ECLI:CE:ECHR:2017:0523JUD002266213, § 174)

A person sentenced to a life sentence must have access to that review mechanism no later than 25 years after the imposition of the life sentence (see, *e.g.*, ECtHR, judgment of 26 April 2016 [GC], *Murray v. the Netherlands*, ECLI:CE:ECHR:2016:0426JUD001051110, § 99).

It is clear that the wording of Art. 5(2) of FD 2002/584/JHA and of section (h) does not fully reflect this case-law, *e.g.*, the conditions concerning the mechanism of review, which is not surprising because the adoption of the EAW predates this case-law. In the experience of Dutch issuing judicial authorities, section (h) often leads to requests for clarification by the executing judicial authority (the fact that the Dutch language version of Art. 5(2) and section (h) differs from other language versions (see below) could explain this).

Divergent language versions
In some language versions of FD 2002/584/JHA, the review of the life sentence must be possible *at least* after 20 years (ES ('al meno'); NL ('ten minste')), instead of 'at the latest after 20 years'.

33. Have the issuing judicial authorities of your Member State experienced any difficulties when applying section (h)? If so, please describe those difficulties and how they were resolved.

No information available. In training sessions it is advised to circle the second indent if surrender is asked for a life sentence or for acts for which a life sentence could be pronounced. This is not completely accurate as the sentence implementation courts are competent for measures of provisional and definite release (law of 17 May 2006) but then again, the FD and the form do not provide for the possibility of early release neither. Section H is not adapted to the jurisprudence of the ECHR with regard to life sentences.

34. Have the executing judicial authorities of your Member State experienced any difficulties when confronted with EAW's in which section (h) was applicable? If so, please describe those difficulties and how they were resolved.

No information available.

I. Information about the issuing judicial authority and the Central Authority, signature

Explanation

Section (i) partly covers the information required by Art. 8(1)(b) of FD 2002/584/JHA ('the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority'). The information in this part of section (i) enables the executing judicial authority to identify the issuing judicial authority, and to contact it, if need be.

Further, section (i) requires contact information about the Central Authority of the issuing Member State, if that Member State designated such an authority, thus enabling the executing judicial authority to contact the Central Authority, if need be.

Lastly, section (i) requires information about (the 'representative' of) the issuing judicial authority, and a signature by or on behalf of (the 'representative' of) the issuing judicial authority.

Issues concerning section (i)

Distinction between the authority and its representative
Sometimes, under 'official name' the name and surname of the issuing judge or public prosecutor are given, whereas the term 'official name' – obviously – refers to the official name of the *authority* to which the issuing judge or public prosecutor belongs, *e.g.* the Court of X or the Public Prosecutor's Office in X. The name and surname of the issuing judge or public prosecutor should be mentioned under 'Name of its representative'.

Representative not a judge or a public prosecutor?
German EAWs are sometimes issued by a representative of the issuing Local Court (*Amtsgericht*) whose 'title/grade' is that of 'Direktor', which could be translated as 'manager', thus raising the question whether the representative of the issuing judicial authority is actually a judge.

35. Have the issuing judicial authorities of your Member State experienced any problems regarding section (i)? If so, please describe those difficulties and how they were resolved.

Not to my knowledge. An EAW is signed by a magistrate. His/her name and function are mentioned.

36. Have the executing judicial authorities of your Member State experienced any problems regarding section (i)? If so, please describe those difficulties and how they were resolved.

Not to my knowledge.

Part 4: problems not directly related to the EAW-form

Explanation

Part 4 concerns problems not directly related to the EAW-form. A common feature of the subjects dealt with in this part of the questionnaire is that they concern or are linked to providing information (either to decide on the execution of an EAW or on the issuing of an EAW or as a basis for measures after surrender).

These subjects are:

- supplementary/additional information necessary or useful for the decision on the execution of the EAW (Art. 15(2)-(3) of FD 2002/584/JHA);
- the time limits for deciding on the execution of the EAW (Art. 17 of FD 2002/584/JHA);
- the guarantee of return (Art. 5(3) of FD 2002/584/JHA);
- information about detention conditions and deficiencies in the judicial system in the issuing Member State;
- surrender to and from Iceland or Norway;
- (analogous) application of the *Petruhhin* judgment; and
- the speciality rule.

A. Supplementary/additional information (Art. 15(2)-(3))

Explanation

Part. 4A concerns information not included in the EAW but necessary or useful for deciding on the execution of that EAW. Art. 15(2) of FD 2002/584/JHA concerns providing supplementary information ('in particular with respect to Articles 3 to 5 and Article 8') at the request of the executing judicial authority, whereas Art. 15(3) of FD 2002/584/JHA concerns forwarding 'additional useful information' by the issuing judicial authority *proprio motu*. When requesting supplementary information, the executing judicial authority 'may' fix a time limit for the receipt of that information, given the need to observe the time limits for deciding on the EAW set out in Art. 17 of FD 2002/584/JHA.

Art. 15(2) affords the executing judicial authority the 'option' to request that the necessary supplementary information be furnished as a matter of urgency, if it finds 'that the information disclosed by the issuing Member State is insufficient to enable [it] to adopt a decision on surrender'. However, 'recourse may be had to that option only as 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' (ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/16, ECLI:EU:C:2018:27, paragraphs 60-61).

In some situations, the 'option' is actually an *obligation* to request supplementary information (before deciding to refuse to execute the EAW):

- when examining whether the EAW meets the requirements of lawfulness set out in Art. 8(1) (ECJ, judgment of 1 June 2016, *Bob-Dogi*, C-241/15, ECLI:EU:C:2016:385, paragraph 65;

- when examining whether the requirements of Art. 4a(1)(a)-(d) of FD 2002/584/JHA are met (ECJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paragraphs 101-103);

- when examining whether there is a real risk for the requested person of a violation of Art. 4 of the Charter or of a violation of the essence of the right to a fair trial as guaranteed by Art. 47(2) of the Charter (ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paragraph 95; ECJ, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)*, C-216/18 PPU, ECLI:EU:C:2018:586, paragraph 77).

The issuing judicial authority is obliged to provide the requested information (ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paragraph 97, with regard to information about detention conditions). That obligation derives from the duty of sincere cooperation (Art. 4(3) TEU), which 'informs' the 'dialogue' between the issuing and judicial authorities when applying Art. 15(2)-(3) (ECJ, judgment of 25 July 2018, *Generalstaatsanwaltschaft (Detention conditions in Hungary)*, C-220/18, ECLI:EU:C:2018:589, paragraph 104).

Issues concerning Art. 15(2)-(3)

Information provided by another authority
Sometimes, requests for supplementary information pursuant to Art. 15(2) of FD 2002/584/JHA are answered by an authority other than the issuing judicial authority. Equally, sometimes such requests are answered by the Central Authority of the issuing Member State, without it being clear who actually provided the answer: the Central Authority itself, the issuing judicial authority or yet another authority.
A recent preliminary reference questions whether, if the EAW was issued by a judicial authority and supplementary information is provided by another authority (in this case a member of the Public Prosecutor's Office) which substantially supplements, or possibly changes the content of the EAW, that other authority should also meet the requirements of Art. 6(1) of FD 2002/584/JHA for being an 'issuing judicial authority' (*Generálna prokuratura Slovenskej republiky*, C-78/20).

Irrelevant information/standard questionnaires
Sometimes executing authorities ask additional specific questions or even submit a standard list of questions with regard to information that is not relevant. Sometimes issuing judicial authorities submit irrelevant information.

37. Did your Member State confer the competence to provide supplementary information – either at the request of the executing judicial authority or on its own initiative (see Art. 15(2)-(3) of FD 2002/584/JHA) – on another authority than the issuing judicial authority? If so, which authority?

Supplementary information will usually be provided by the public prosecutor's office but in prosecution-EAW's the investigating judge can as issuing authority also give additional information. The public prosecutor's office will also transfer or incorporate information send by other authorities e.g. concerning the prison facility and prison conditions (as the PPO is not competent to decide in what prison a surrendered person will be detained). In prosecution EAW's the investigating judge is competent to decide in what prison the requested person will be detained but that prison will usually be the prison closed to the office of the investigating judge.

38. When the (issuing judicial) authorities of your Member State are asked to provide supplementary information, what kind of information are they usually asked for?[19]

Depends on the country. Common are questions related to detention conditions, judgments in absentia or regarding the ongoing investigation. Also: requests for the person concerned to be heard in the context of a supplementary EAW for the purpose of extending the EAW when the person is already in Belgium.
Some countries are however renowned for sending endless lists of questions or their ingenuity in the "need" for additional information (or simply stalling a surrender).

39. When the (issuing judicial) authorities of your Member State provide supplementary information *proprio motu*, what kind of information do they usually provide?

Relation with an EIO, other EAW's or ongoing investigations in the executing member state or other member states .

40. What kind of supplementary information do the executing judicial authorities of your Member State usually ask for?

The information strictly required to decide on the surrender and especially information that can help solve raised issues that might hinder or prevent surrender. Examples: clarification of the description of the facts, period of limitation of the execution of the sentence, period of detention already served in the issuing state, guarantee of return, information about in absentia proceedings, …

41. When requesting supplementary information, do the executing judicial authorities of your Member State fix any time limit for the receipt of that information?

[19] With regard to requests for supplementary information concerning *in absentia* decisions you could refer to the *InAbsentiEAW* project, unless there are developments which justify expressly dealing with such requests in this project.

In most cases a time limit will be set which will differ according to the circumstances of the case: whether the requested person is detained or not, the possibilities of the court's agenda, the nature and the complexity of the requested information, … In general, short or reasonable time limits are set for the issuing state/judicial authority to produce the missing elements, thereby making it possible to respect the deadlines laid down in Article 17. If the surrender case is already dealt with at court level the issuing authority will be informed of the date of the next court hearing (as ultimate deadline).

Examples of some cases in Brussels:

- 5 days to provide an answer to the defence lawyer's statement that the national arrest warrant and the EAW was retracted by the Polish court: the case had to be adjourned for an additional 14 days as the answer that the EAW was indeed retracted, came in late (case of 2013).
- 1 month to give an answer to several questions related to the proceedings in Poland (in absentia or not, summons, mandated lawyer, …)
- 2-3 days to 1 week to give a guarantee regarding detention conditions (in cases where the requested person is detained)
- also 1-3 days in case where the intervention of Eurojust (Romanian desk) was asked (questions related to the Romanian legislation – before the entry into force of FD 299)

No deadline will be imposed if additional information (to clarify the EAW or to locate the requested person) is asked for before the requested person has been found.

41a. Have the issuing judicial authorities of your Member State experienced receiving irrelevant questions and requests for irrelevant information? If so, please specify what questions and information.

See question 38. e.g. information on conditional release in a case where the EAW was issued for prosecution purposes.

41b. Have the executing judicial authorities of your Member State experienced receiving irrelevant information? If so, please specify what information.

/ (what is relevant to some may be irrelevant to others and vice versa; imprecise or open questions can cause answers to differ from what was expected hence making the given information not relevant)

B. Time limits (Art. 17)

Explanation

Part 4B concerns observance of the time limits of Art. 17(3) and (4) of FD 2002/584/JHA in cases in which the information in the EAW-form is insufficient to decide on the execution of the EAW.

The final decision on the execution of the EAW must, in principle, be taken with the time limits of Art. 17(3) and (4) FD 2002/584/JHA (ECJ, judgment of 16 July 2015, *Lanigan*, C-237/15 PPU, ECLI:EU:C:2015:474, paragraph 32), *i.e.* within 60 or 90 days.

When ‘in exceptional circumstances’ the executing judicial authority cannot observe the time limit of 90 days, its Member State must inform Eurojust thereof and give reasons for the delay (Art. 17(6) of FD 2002/584/JHA).

Such exceptional circumstances may occur when

- the executing judicial authority assesses whether there is a real risk that the requested person will, if surrendered to the issuing judicial authority, suffer inhuman or degrading treatment, within the meaning of Article 4 of the Charter, or a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 of the Charter or

- proceedings are stayed pending a decision of the Court of Justice in response to a request for a preliminary ruling made by an executing judicial authority, on the basis of Article 267 TFEU (ECJ, judgment of 12 February 2019, *TC*, C-492/18 PPU, ECLI:EU:C:2019:108, paragraph 43).

42.

a) Have the executing judicial authorities of your Member State had any cases in which the time limits of 60 and/or 90 days could not be observed, because the information contained in the EAW was insufficient to decide on the execution of the EAW? If so, please state the decision taken by the executing judicial authority.

Yes. The non-respect of the time limits of Article 17 FD will never lead to a refusal of surrender nor to stopping the proceedings.

Respecting the time limits of article 17 will not always be possible when presented with a challenging case. To give a random example: in a surrender case with Sweden in which the independency of the Swedish public ministry was challenged by the joint team of Belgian and Swedish defence counsels (this was after the ruling of the CJEU of 12 December 2019) and arguments were presented with respect to the detention conditions in Sweden and the Swedish legislation regarding pre-trial detention, the requested person (who was a Belgian national) was released by the investigating judge on 25 November 2019. The first instance court allowed the surrender by decision of 21 January 2020 after an assessment of the information provided by the Swedish authorities. The decision of the Court of Appeal of 9 March 2020 was quashed by the Court of Cassation on 31 March 2020. Additional questions were put forward to the Swedish authorities along with a request for clarification of previous answers. After reception of the answers the case was once again presented to the Court of Appeal who allowed for the surrender in its decision of 16 November 2020. The Court of Cassation rejected the second appeal in cassation in its decision of 1 December 2020. The person was surrendered to Sweden in January 2021.

With regard to the additional question whether article 17 or the time limits should be altered: as exceeding the time limits of Article 17 FD is not sanctioned (nor should it be), there is no

need to change this article. Exceeding the time limits should remain exceptional but in some cases it is impossible to deal with the case within the set time limits. Time limits may not be used to infringe on the rights of the defence.

b) Is recent statistical data available concerning compliance with the time limits by the authorities of your Member State?

No.

c) Pursuant to Art. 17(7) of FD 2002/584/JHA, does your Member State inform Eurojust when it cannot observe the time limits and does your Member State give the reasons for the delay?

Informing Eurojust might happen but it will be rare. Article 17(4) was transposed in the Belgian EAW law but informing the issuing state of the delay will not happen often (it does happen in cases in which there is a contact between the public prosecution services of Belgium and the issuing state.

C. Guarantee of return (Art. 5(3))

Explanation

Part 4C concerns the guarantee of return.

The system of FD 2002/584/JHA, as evidenced, *inter alia*, by Art. 5(3) of FD 2002/584/JHA, 'makes it possible for the Member States to allow the competent judicial authorities, in specific situations, to decide that a sentence must be executed on the territory of the executing Member State' (ECJ, judgment of 21 October 2010, *B.*, C-306/09, ECLI:EU:C:2010:626, paragraph 51).

That provision refers to a guarantee, to be given by the issuing Member State, that a national or resident of the executing Member State who is the subject of a prosecution-EAW, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order to be imposed on him in the issuing Member State.

The object of that provision is to increase 'the chances of social reintegration of the national or resident of the executing Member State by allowing him to serve, in its territory, the custodial sentence or detention order which, after his surrender, under [an EAW], would be imposed in the issuing Member State' (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 48).

Art. 5(3) does not require that the guarantee be given by the issuing judicial authority. Compare Art. 27(4) and Art. 28(3) of FD 2002/584/JHA which state that the issuing *Member State* must give the guarantees provided for in Art. 5(3) for the situations mentioned in that provision and ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 41: '(…) a guarantee to be given by the issuing Member State in particular cases (…)'.

If the executing judicial authority so requests, the issuing Member State *must* provide the guarantee. Compare, again, Art. 27(4) and Art. 28(3) and *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 41.

The return of the surrendered person should occur as soon as possible after the sentence in the issuing Member States has become final (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 58).

However, if the surrendered person 'is required to be present in that Member State by reason of other procedural steps forming part of the criminal proceedings relating to the offence underlying the [EAW], such as the determination of a penalty or an additional measure' the issuing judicial authority must balance 'the objective of facilitating the social rehabilitation of the person concerned' against 'both the effectiveness of the criminal prosecution for the purpose of ensuring a complete and effective punishment of the offence underlying the [EAW] and the safeguarding of the procedural rights of the person concerned' (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 56). The issuing judicial authority must, therefore, 'assess whether concrete grounds relating to the safeguarding of the rights of defence of the person concerned or the proper administration of justice make his presence essential in the issuing Member State, after the sentencing decision has become final and until such time as a final decision has been taken on any other procedural steps coming within the scope of the criminal proceedings relating to the offence underlying the [EAW]' (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 59). It must 'take into account, for the purposes of the balancing exercise that it is required to carry out, the possibility of applying cooperation and mutual assistance mechanisms provided for in the criminal field under EU law' (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 61).

Once the sentenced person is returned, 'an adaptation of the sentence by the executing Member State outside of the situations contemplated under Article 8 of [FD 2008/909/JHA] cannot be accepted' (ECJ, judgment of 11 March 2020, *SF (European arrest warrant – Guarantee of return)*, ECLI:EU:C:2020:191, paragraph 66).

43. According to the national law of your Member State, as interpreted by the courts of your Member State, is the decision to subject surrender to the condition that the issuing Member State give a guarantee of return *dependent* on whether the requested person expressly states that he wishes to undergo any sentence in the executing Member State? If so, does your national law distinguish between nationals and residents of your Member State in this regard?

The requested person must consent. A court may not impose ex officio a guarantee of return.

44. Which authority of your Member State is competent to give the guarantee of return?

Public prosecutor's office.

45.

a) Do the issuing judicial authorities of your Member State use a uniform text for the guarantee of return? If so, what text?

Overeenkomstig artikel 5, § 3 van het kaderbesluit 2002/584/JBZ betreffende het Europees aanhoudingsbevel bied ik u de garantie voor de terugkeer naar … (land invullen) van de door u overgeleverde persoon, …(identiteitsgegevens van de betrokken persoon invullen). Deze garantie houdt in dat, eens betrokkene in België onherroepelijk tot een vrijheidsbenemende straf of maatregel is veroordeeld, deze persoon naar … (land invullen) wordt overgebracht teneinde deze straf of maatregel daar te ondergaan in overeenstemming met de bepalingen van het kaderbesluit 2008/909/JBZ.

A guarantee is given in accordance with article 5, § 3 of the framework decision 2002/584/JHA for the return to (fill in the country) of (fill in the identity of the person concerned) who will be surrendered to Belgium. This guarantee entails that the person concerned, after a final decision imposing a custodial sentence or measure involving deprivation of liberty has been given, will be returned to (fill in the country) in order to serve there the custodial sentence or detention order passed against him according to the dispositions of framework decision 2008/909/JHA.

b) Does a guarantee of return given by the competent authority of your Member State refer to 'other procedural steps forming part of the criminal proceedings relating to the offence underlying the [EAW], such as the determination of a penalty or an additional measure'?

No (this question relates to the CJEU ruling of 11 March 2020 in *SF*, C-314/18).

c) Does the national law of your Member State, as interpreted by the courts of your Member State:

- (i) either require the consent of the surrendered person with his return to the executing Member State in order to undergo his sentence there, or, at least, allow him to express his views on a such a return;

  The person concerned must ask for his/her return and therefore must consent to be returned to Belgium (see also the answer to question 43)

  When Belgium is the issuing state for the EAW and the surrender was made dependent on a guarantee of return, the Belgian authorities will execute the guarantee of return regardless of the desire of the surrendered person to stay in Belgium but the transfer back to the EAW executing state can be challenged before the competent Belgian courts (judge competent for interim proceedings so any reason permitting issuing interim measures can be used) and the transfer will not be executed pending those proceedings. Article 39, par. 1 of the Belgian law of 15 May 2012 stipulates that the dispositions regarding the consent of the surrendered person (article 6 of the FD 2008/909) are not applicable.

- (ii) prohibits the return to the executing Member State to undergo the sentence there, if the answer to question (i) is in the affirmative and the surrendered person withholds consent to a return or is opposed to a return;

No. Consent to be returned cannot be revoked and the Brussels public prosecutor (competent authority) will therefore not inquire if the person still wants to return to Belgium after a final judgment has been given imposing a custodial sentence. The consent given remains therefore valid also under the FD 2008/909, meaning that

- in our view, article 6 FD 2008/909 is not applicable when the person concerned asked for a guarantee of return
- if one thinks that article 6 FD 2008/909 could still be applicable: consent to be returned entails that the condition set by article 6(1) of FD 2008/909, if applicable – see the exceptions in 6(2) –, is already fulfilled. The member state in which the judgment is delivered cannot block the execution of the guarantee of return – condition that was imposed for a valid surrender – stating that only the consent given by the convicted person in the issuing state (according to the definition of article 1(c) of FD 2008/909) and in accordance with the law of the issuing state is valid. The execution of a guarantee of return is to be considered as a *lex specialis* according to article 25 of FD 2008/909 and the provisions of the latter FD are only applicable in so far that they are compatible with the provisions of the EAW FD.

It is however possible that the return to Belgium is challenged in the (EAW) issuing state. If the person concerned has solid reasons to remain in the issuing state to serve there (the remainder of) his sentence and the issuing state agrees with this request, the Brussels public prosecutor will not insist on a return.

When Belgium is the issuing state for the EAW and the surrender was made dependent on a guarantee of return, the Belgian authorities (public prosecutor of the place of final conviction) will execute the guarantee of return regardless of the desire of the surrendered person to stay in Belgium but the transfer back to the (EAW) executing state can be challenged before the competent Belgian courts (judge competent for interim proceedings so any reason permitting issuing interim measures can be used) and the transfer will not be executed pending those proceedings. Article 39, par. 1 of the Belgian law of 15 May 2012 stipulates that the dispositions regarding the consent of the surrendered person (article 6 of the FD 2008/909) are not applicable in such a situation.

- (iii) differentiate between nationals of the executing Member State and residents of that Member State in this regard?

  no

d) When is the surrendered person returned to the executing Member State to undergo his sentence there? Which authority of your Member State determines when the surrendered person is to be returned and according to which procedure?

The public prosecutor's office of the place of conviction has to execute the guarantee of return as soon as the sentence is final.

46. Have the (issuing judicial) authorities of your Member State experienced any difficulties when they provided a guarantee of return? If so, please describe those difficulties and how they were resolved.

The Belgian judicial authorities do encounter certain difficulties in following up information, in particular with regard to the enforcement of the guarantee of return by the issuing State (also establishing contact with a service competent to execute the return). When asking for a guarantee of return complementary questions could be added with regard to the enforcement of the guarantee of return: who is the competent authority, how to contact and from what moment on, when will the guarantee be carried out, …

47. Have the executing judicial authorities of your Member State experienced any difficulties with a guarantee of return? If so, please describe those difficulties and how they were resolved.

When Belgium is the executing state for a transfer request (situation in which the surrender was ordered by a Belgian court but with a guarantee of return so the sentenced person has to come back to Belgium to serve here his sentence – procedure of FD 909 will be followed), in principle all the public prosecutor's offices must inform the Brussels public prosecutor of a guarantee of return together with a request for follow-up of this procedure. However, in practice we recognise that there is little awareness and acknowledgement of the need to forward the information to the Brussels public prosecutor's office for follow-up. This is an issue that has to be addressed at national level.

D. Detention conditions/deficiencies in the judicial system

Explanation

Part 4D concerns information about detention conditions in the issuing Member State and deficiencies in the judicial system of the issuing Member State.

Detention conditions
In the *Aranyosi and Căldăraru* judgment, the Court of Justice devised a two-step test for assessing a real risk of a breach of Art. 4 of the Charter by reason of inhuman or degrading detention conditions in the issuing Member State.

The first step of the test aims at establishing whether detainees in the issuing Member State in general run a real risk of being subjected to inhuman or degrading detention conditions on account of 'deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention'. In doing so, the executing judicial authority must, initially, 'rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State'.

If the executing judicial authority finds that 'there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member', it must then take the second step of the test and assess, specifically and precisely, 'whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State'.

To that end, the executing judicial authority must engage in a dialogue with the issuing judicial authority and request pursuant to Art. 15(2) of FD 2002/584/JHA 'supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State'. The issuing judicial authority is obliged to carry out such a request, if need be, with assistance of the central authority (Art. 7 of FD 2002/584/JHA) of its Member State.

If that assessment results in a funding of a real risk for the requested person if surrendered, the executing judicial authority must postpone the execution of the EAW 'until it obtains the supplementary information that allows it to discount the existence of such a risk', but 'if the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end' (ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 & C-659/15 PPU, ECLI:EU:C:2016:198, paragraphs 88-104).

Deficiencies in the judicial system

In the *Minister for Justice and Equality (Deficiencies in the judicial system)* judgment, the Court of Justice essentially adapted the two-step *Aranyosi and Căldăraru* test and turned it into a test for assessing a real risk of a breach of the right to an independent tribunal, a right which belongs to the essence of the right to a fair trial as guaranteed by Art. 47(2) of the Charter.

Accordingly, the executing judicial authority must 'assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State (…), whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached'.

A finding of the existence of such a risk, necessitates a further assessment, *viz.* whether there are substantial grounds to believe that the requested person will be exposed to that risk if surrendered.

That further assessment consists of two distinct steps. First, the executing judicial authority must, in particular, 'examine to what extent the systemic or generalised deficiencies, as regards the independence of the issuing Member State's courts, (…) are liable to have an impact at the level of that State's courts with jurisdiction over the proceedings to which the requested person will be subject'. Second, if it finds that those deficiencies are indeed 'liable to affect those courts', it must also 'assess, in the light of the specific concerns expressed by the individual concerned and any information provided by him, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the [EAW]'.

Furthermore, the executing judicial authority engage in a dialogue with the issuing judicial authority and 'must, pursuant to Article 15(2) of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk'. As with requests about detention conditions, the issuing judicial authority is obliged to carry out such a request, if need be, with assistance of the central authority (Art. 7 of FD 2002/584/JHA) of its Member State.

If the executing judicial authority cannot 'discount the existence of a real risk that the individual concerned will suffer in the issuing Member State a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial', it must 'refrain from giving effect' to the EAW (ECJ, judgment of 25 July 2018, *Minister for*

Justice and Equality (Deficiencies in the judicial system), C-216/18 PPU, ECLI:EU:C:2018:586, paragraphs 60-61 and 68-78).

Issues

Issuing judicial authority not competent
Sometimes, when the issuing judicial authority is not competent under national law to provide information and/or a guarantee, it will content itself with reporting this to the executing judicial authority instead of referring the matter to the competent national authority of engaging the services of its national central authority.

Detention conditions

48. Have the executing judicial authorities of your Member State had any cases in which they established that detainees in general would run a real risk of being subjected to inhuman or degrading detention conditions in the issuing Member State on account of systemic or generalised deficiencies, deficiencies which may affect certain groups of people, or deficiencies which may affect certain places of detention (the first step of the *Aranyosi and Căldăraru* test)? If so:

- with respect to which Member State(s);

  Romania (sources: ECHR Rezmives et al./Romania 25.04.2017, CPT report of 19.03.2019);
  Italy (sources: ECHR Torreggiani et al./Italy 08.01.2013

- on the basis of which sources;

  see above (Belgian courts will not rely exclusively on the ECHR case law, all relevant and objective information can be considered but in practice it is usually ECHR case law that defence lawyers refer to)

- did the executing judicial authorities use the database of the Fundamental Rights Agency[20] in stablishing that risk;

  unknown

- what role, if any, did (measures to combat) COVID-19 play in establishing that risk?

  none

49. Having established a real risk as referred to in the previous question:

- what kind of information did the executing judicial authorities of your Member State request from the issuing judicial authorities in order to assess whether the requested

[20] The 'Criminal Detention Database 2015-2019': https://fra.europa.eu/en/databases/criminal-detention/criminal-detention.

person would run such a risk if surrendered (the second step of the *Aranyosi and Căldăraru* test);

The Court wanted to know what steps Romania had undertaken to remedy the deficiencies mentioned in the ECHR ruling of 25.04.2017 and wanted to know in what prison(s) the person concerned would be incarcerated following surrender (analogous formulation for Italy).

The Commission made in the meantime a draft template for information requests on detention conditions that contains the following:
"Please provide supplementary information on the conditions in which it is envisaged that the requested person will be detained in relation to the ticked boxes below:

1. Prison cells:
   - o Minimum personal space for single-occupancy and multi-occupancy cells (in m2)
   - o Cell's measurements (height and width)
   - o Equipment (heating, ventilation) and facilities (lighting, windows, washbasin, toilet, shower, furniture) in cell
   - o Cleanliness and hygienic conditions in cell
   - o Video-surveillance of cells

2. Sanitary conditions:
   - o Access to sanitary facilities (frequency)
   - o Structural separation requirements for in-cell sanitary facilities
   - o Hygienic conditions (disinfection and cleaning, provision of sanitary products to detainees)
   - o Access to shower/bathing facilities and hot water

3. Time out of cell
   - o Time per day/week spent by detainees outdoors in open air
   - o Sport facilities outdoors and indoors
   - o Time per day/week spent by detainees in common areas
   - o Activities/programmes available to detainees outside of their cells (education and recreational activities)

4. Solitary confinement
   - o Standards for the application of solitary confinement
   - o Monitoring of detainees while in solitary confinement

5. Access to healthcare
   - o Access to medical services and emergency care in prison
   - o Timing on medical intervention
   - o Availability of qualified medical and nursing personnel in prison facilities
   - o Availability of specialist care (e.g. for long-term diseases, for sick and elderly detainees, mental illnesses, drug addictions)
   - o Medical examination upon arrival in detention facilities
   - o Medical treatment of own choosing

6. Vulnerable prisoners
   - o Special measures for young detainees
   - o Special measures for women in detention
   - o Special measures for pregnant women
   - o Special measures for LGBTI prisoners

7. Special measures in place to protect detainees from violence
   - o Staff supervision
   - o Facility arrangements to prevent inter-prisoner violence (emergency button in cells, video-monitoring,…)
   - o Guards trainings

8. Nutrition
   - o Frequency of provision of meals
   - o General nutrition standards

9. Legal remedies
   - o Legal remedies available to the detainee in case of violation of national standards on detention conditions

Please also provide additional information on the above-mentioned topics: …"

- did the executing judicial authorities of your Member State actually conclude that a requested person would run such a real risk, if surrendered;

  yes, see the examples given above

- if so, was such a real risk excluded within a reasonable delay? If not, what was the decision taken by the executing judicial authorities of your Member State? If a (judicial) authority of the issuing Member State gave a guarantee that the detention conditions would comply with Art. 4 of the Charter, did the executing judicial authorities of your Member State rely on that guarantee? If not, why not?

  Surrender was refused.
  If a guarantee is given, the court will examine the wordings of the guarantee and see if the guarantee suffices to exclude the real and personal risk.

49a. In case of a refusal to execute an EAW on account of detention conditions, what steps did your Member State take, as issuing or executing Member State, to prevent impunity (*e.g.* in case of an execution-EAW, initiating proceedings to recognise the judgment and enforce the custodial sentence in the executing Member State on the basis of FD 2008/909/JHA)?

As stated in the question: execution-EAW: asking for a certificate on the basis of FD 909.

Prosecution EAW: proposing to make surrender subject if possible to a guarantee of return; asking to apply FD 2009/829 on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention or in accordance with the law of the other Member State, denunciation for the purpose of prosecution under

Article 21 of the (Council of Europe) European Convention on Mutual Assistance in Criminal Matters of 21 May 1959

50. Have the issuing judicial authorities of your Member State experienced any difficulties when requested to provide additional information in application of the *Aranyosi and Căldăraru* test? If so, please describe those difficulties and how they were resolved.

Belgian authorities have received requests for supplementary information concerning detention conditions in Belgium, roughly 40 of which have been received since 2016. The Belgian judicial authorities reply systematically and within the prescribed period to these requests for supplementary information. We have already encountered a refusal to surrender because of a failure to provide supplementary information on detention conditions in Belgium. In this isolated case, the Italian judicial authority had issued a decision requesting additional information within a certain period and at the same time fixing a subsequent hearing for a decision on the substance of the case, but they had never forwarded the decision, with the result that the Belgian authorities were not given the opportunity to reply to the request.

51. Have the executing judicial authorities of your Member State experienced any difficulties when applying the *Aranyosi and Căldăraru* test? If so, please describe those difficulties and how they were resolved.

Not really. The Italian ministry of Justice however always restricts itself to the simple reply that there are no problems in Italy regarding detention conditions.

Concerning the test: see also ECHR Bivolaru and Moldovan v. France (40324/16 and 12623/17 judgment 25.03.2021): only one step
(Surrender of an applicant to the Romanian authorities under a European arrest warrant where there was a real risk of inadequate conditions of detention: violation
Surrender of an applicant, recognised as a refugee by the Swedish authorities, to the Romanian authorities under a European arrest warrant in the absence of a real risk of persecution or inadequate conditions of detention: no violation)

Deficiencies in the judicial system

52. Have the executing judicial authorities of your Member State had any cases in which they established that there is a real risk of a violation of the right to an independent tribunal in the issuing Member State on account of systemic or generalised deficiencies liable to affect the independence of the judiciary (the first step of the *Minister for Justice and Equality (Deficiencies in the judicial system)* test)? If so:

- with respect to which Member State(s);

- on the basis of which sources?

Not to my knowledge. Apparently there has not been a case yet in which the conditions to refuse a surrender to Poland (or another country) based on systemic or generalised deficiencies liable to affect the independence of the judiciary were met. In a case with Poland, the Belgian Court of Cassation stated in a ruling of 25 August 2021 with reference to the ruling of the CJEU in the joint cases C-354/20 and C-412/20 that there still must be

substantial grounds for believing that the requested person will run a real, concrete and personal risk (condition that was not met in this case).

53. Having established a real risk as referred to in the previous question:

- what kind of information did the executing judicial authorities of your Member State request from the issuing judicial authorities in order to assess whether the requested person would run such a risk if surrendered (the second step of the *Minister for Justice and Equality (Deficiencies in the judicial system)* test);

- did the executing judicial authorities of your Member State actually conclude that a requested person would run such a real risk, if surrendered;

- if so, was such a real risk excluded within a reasonable delay? If not, what was the decision taken by the executing judicial authorities of your Member State?

54. Have the issuing judicial authorities of your Member State experienced any difficulties when requested to provide additional information in application of the *Minister for Justice and Equality (Deficiencies in the judicial system)* test? If so, please describe those difficulties and how they were resolved.

/

55. Have the executing judicial authorities of your Member State experienced any difficulties when applying the *Minister for Justice and Equality (Deficiencies in the judicial system)* test? If so, please describe those difficulties and how they were resolved.

/

55BIS
Did your courts consider to refer questions to the Court of Justice? If so, on which issues? Why did they not do so in the end?

There is no (confirmed) information available. It is therefore not possible to give an objective answer to the question why no jurisprudence (in particular with Poland) is available. One could however argue that apparently there has not been a case yet in which the conditions to refuse a surrender to Poland (or another country) based on systemic or generalised deficiencies liable to affect the independence of the judiciary were met nor where it appeared necessary to refer questions to the Court of Justice. In this regard reference could also be made to par. 62-64 of the ruling of 17 December 2020 in the joint cases *L* (C-354/20) and *P* (C-412/20).

E. Surrender to and from Iceland and Norway

Explanation

Part 4E concerns the application of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, *OJ* 2006, L 292/2.

The Agreement entered into force on 1 November 2019 (*OJ* 2019, L 230/1). It 'seeks to improve judicial cooperation in criminal matters between, on the one hand, the Member States of the European Union and, on the other hand, the Republic of Iceland and the Kingdom of Norway, in so far as the current relationships among the contracting parties, characterised in particular by the fact that the Republic of Iceland and the Kingdom of Norway are part of the EEA, require close cooperation in the fight against crime' (ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, paragraph 72).

According to the preamble to the Agreement, the contracting parties 'have expressed their mutual confidence in the structure and functioning of their legal systems and their capacity to guarantee a fair trial'.

The provisions of the Agreement 'are very similar to the corresponding provisions of Framework Decision 2002/584' (ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, paragraph 74). Equally, the Arrest Warrant-form, set out in the Annex to the Agreement, is very similar to the EAW-form.

56. Have the issuing judicial authorities of your Member State issued any Arrest Warrants under the EU Agreement with Iceland and Norway? If so, have they experienced any difficulties? If so, please describe those difficulties and how they were resolved.

No, not yet.

57. Have the executing judicial authorities of your Member State been confronted with any Arrest Warrants under the EU Agreement with Iceland and Norway? If so, have they experienced any difficulties? If so, please describe those difficulties and how they were resolved.

No, not yet.

57BIS
How would you answer questions 56 and 57 in relation to the United Kingdom?

(Regarding the UK—EU Trade and Cooperation Agreement, Belgium made no declaration so extradition of nationals is possible). Apparently two extradition proceedings with the UK were treated in application of this Agreement (two persons in the same case and for the same offences) and led to a positive decision on surrender. A quick examination of the rulings showed no particular legal points of interest.

57TERTIUS
Does your Member State's legislation provide for executing EAWs issued by the EPPO?

Article 156/1 of the Belgian Judicial Code and article 47quaterdecies of the Code of Criminal Procedure provide that the (Belgian) European prosecutor and the delegated European prosecutors have the same competencies as a Belgian prosecutor so in cases of the competency of the EPPO and dealt with in Belgium, it would be the specialised investigating judge (article 79 of the Belgian Judicial Code) that would issue the prosecution-EAW. Belgian legislation has not given competence to the EPPO magistrates to issue an execution- EAW (as a result those EAW's will be issued by Belgian prosecutors).

F. (Analogous) application of the *Petruhhin* judgment

Explanation

Part 4F concerns the (analogous) application of the *Petruhhin* judgment.

***Petruhhin* judgment**
Some Member States do not extradite their own nationals, but do extradite nationals of other Member States. If such a Member State, to which a national of another Member State has moved (and thus exercised his right of free movement (Art. 21 TFEU)), receives an extradition request from a third State, it must inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it, in accordance with the provisions of Framework Decision 2002/584/JHA, *provided that*:

- that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory, and

- in order to safeguard the objective of preventing the risk of impunity, the EAW must, at least, relate to the same offences as the extradition request (ECJ, judgment of 6 September 2016, *Petruhhin*, C-182/15, ECLI:EU:C:2016:630, paragraph 50; ECJ, judgment of 10 April 2018, *Pisciotti*, C-191/16, ECLI:EU:C:2018:222, paragraph 54).

***Ruska Federacija* judgment**
In the *Ruska Federacija* judgment, the Court of Justice held that the *Petruhhin* judgment is applicable by analogy to unequal treatment regarding extradition of own nationals and nationals of a European Economic Area (EEA) State who in exercise of their EEA free movement rights have moved to the requested Member State. (The EEA consists of the EU Member States, Iceland, Liechtenstein and Norway.)

Thus, the requested Member State must inform the EEA State of which the requested person is a national and, should that State so request, surrender the requested person to it, in accordance with the provisions of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, under the provisos described above (ECJ, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, paragraphs 75-77). (Liechtenstein is not a party to the aforementioned agreement on surrender. Therefore, the *Ruska Federacija* judgment only seems relevant for nationals of Iceland and Norway.)

***Petruhhin* judgment**

58. Does the national law of your Member State, as interpreted by the courts of your Member State, prohibit the extradition of nationals, but allow the extradition of nationals of other Member States?

Belgium does not extradite its nationals but allows for the extradition of nationals of other Member States. The extradition of a national for prosecution purposes subject to the condition of being returned after a final conviction (the so-called Dutch clause) is therefore also not possible.

If so:

- have the competent authorities of your Member State applied the *Petruhhin*-mechanism (*i.e.* informed the Member State of which the requested person is a national) and to what effect;

  The Petruhhin judgment is applied, i.e. the MS of the nationality of the person sought – who is a national of an EU MS - is informed about the existence of the third States' extradition request.

  Conversely, Belgium was confronted with very few Petruhhin notifications regarding Belgian nationals.

  All "Petruhhin notifications" are done by the Central Authority (Ministry of Justice) who handles all incoming and outgoing extradition requests. Incoming Petruhhin notifications are transmitted to the Federal Prosecutor's Office for consideration as to the actual exercise of extra-territorial jurisdiction regarding the Belgian national.

  In none of these cases, the notified EU MS, nor Belgium have decided to actually prosecute the person sought for the offences (allegedly) committed in the requesting third State in lieu of extraditing the person sought to the third State.

- what kind of information was provided to the competent authorities of the Member State of which the requested person is a national?

  The information provided is a one or two page letter summarizing the essential elements of the extradition request. Belgium does not provide the extradition request received by the third State to the EU MS of nationality. This would at least require the explicit consent of the requesting state.

  The summary information has always been proved sufficient since none of the outgoing Petruhhin notifications, have required the EU MS of the nationality of the person sought to request supplemental information, let alone a copy of the extradition request and the documents in support. The time limit set for the other MS' reaction is usually 10 days.

  As stated above, none of the Patruhhin notification has provoked the prosecution of the person sought, a EU-national, by the EU MS of the nationality.

59. Have the competent authorities of your Member State been notified by another Member State of requests for extradition concerning nationals of your Member State, pursuant to the *Petruhhin* judgment? If so:

- was the information provided by that Member State sufficient to decide on issuing an EAW? If not, why not;

  No. In none of the cases: the notification made by other EU MS following a third state's extradition request regarding a Belgian national, were brief notifications that did not warrant the start of a Belgian prosecution and the issuing of a EAW.

  As indicated above the Belgian central authority is part of the Ministry of Justice and lacks prosecutorial powers. An incoming Petruhhin notification is analysed and passed on to the Federal Prosecutor's Office for consideration. In none of the cases, the start of a Belgian prosecution was considered.

  It should be underlined that the Petruhhin notification is always checked with police and judicial data bases in order to verify whether the Belgian national is wanted for (other) Belgian charges.

  In answer to the additional question: "Do you think (or could you conclude from the cases) that the fact that they did not result in issuing an EAW is related to the brief/lack of information, or not necessarily?": My understanding is that EU Member States of the nationality of the person sought simply do not want to start an investigation/prosecution for offences that were committed in the requesting state. I would assume that in the end, it is a matter of capacity. The exact same applies in Belgium. The fact that the information provided is insufficient to start a prosecution is a secondary reason.

- did the competent issuing judicial authority of your Member State actually issue an EAW; and

  No

- if so, did the EAW actually result in surrender to your Member State?

  Not applicable

***Ruska Federacija* judgment**

60. Does the national law of your Member State prohibit the extradition of nationals, but allow the extradition of nationals of EEA States? If so:

- have the competent authorities of your Member State applied the *Petruhhin*-mechanism by analogy (*i.e.* informed the Member State of which the requested person is a national) and to what effect;

  No. Thus far, Belgium was not confronted with an extradition request of a third state regarding an Icelandic, Norwegian national (or a Liechtensteiner national for that matter).

- what kind of information was provided to the competent authorities of the EEA State of which the requested person is a national?

  Not applicable. The kind of information would not differ from any other Petruhhin notification, i.e. a brief summary of the extradition request.

G. Speciality rule

Explanation

Part 4G concerns a subject relating to the *consequences* of surrender: the speciality rule (Art. 27 of FD 2002/584/JHA).

Except when both the issuing Member State and the executing Member State do not apply the speciality rule on a reciprocal basis (Art. 27(1)),[21] the speciality rule prohibits prosecuting, sentencing or depriving the person concerned of his or her liberty for 'an offence committed prior to his or her surrender other than that for which he or she was surrendered' (Art. 27(2). This rule is subject to a number of exceptions with regard to 'other offences' than those for which surrender took place (Art. 27(3)). Of particular practical importance is the exception relating to an explicit renunciation by the requested person of his or her entitlement to the speciality rule (Art. 13(1) in combination with Art. 27(3)(e)).

This subject has a firm link with the EAW-form. When establishing whether a prosecution, a sentence or a deprivation of liberty concerns the same offence for which the person concerned was surrendered or rather another offence, the description of the offence on which the EAW is based (in section (e) thereof) together, of course, with the decision to execute the EAW – which may contain restrictions, *e.g.*, the exclusion of one or more offences from surrender – is determinative.

The description of the offence in the [EAW] must be compared with the description in a 'later procedural document', such as the charge against the defendant. The competent authority of the issuing Member State must 'ascertain whether the constituent elements of the offence, according to the legal description given by the issuing State, are those for which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document. Modifications concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 of the Framework Decision' (ECJ, judgment of 1 December 2008, *Leymann and Pustovarov*, C-388/08 PPU, ECLI:EU:C:2008:661, paragraphs 55 and 57).

Issues concerning speciality

Missing EAW/decision on surrender

[21] Only Austria, Estonia, and Romania are prepared to renounce the speciality rule on a reciprocal basis.

Sometimes, the case-file concerning a surrendered person does not contain the EAW and/or the decision on the execution of the EAW, thus leaving uncertain for which offence the person concerned was surrendered and whether he renounced his entitlement to the speciality rule.

61. Does a decision to execute the EAW state:

- a) for which offence(s) the surrender of the requested person is allowed and, if so, how;

  Surrender is allowed for facts, not for offences or legal qualifications. The decision to execute the EAW will refer to the EAW (and thus to the facts contained in this EAW). If surrender is partially refused, the decision on surrender will mention the facts for which surrender has not been allowed (e.g. the facts described as constituting the offence of non-compliance with the rulings of the Constitutional Court).

- b) whether the requested person renounced his entitlement to the speciality rule?

  Only if the person consents to his surrender shall the public prosecutor in the decision on surrender make a specific reference to the waiver or not of the benefice of the speciality rule. Every decision allowing surrender made by the investigating chamber of the penal courts will mention that the speciality rule must be respected.

62. Are the issuing judicial authority and the requested person provided with a copy of the (translated) decision to execute the EAW?

Both the issuing judicial authority and the requested person will be given a copy of the non-translated final decision on surrender.

63. How does the national law of your Member State, as interpreted by the courts of your Member State, ensure that the speciality rule is complied with after surrender to your Member State?

The Belgian law does not differ from the provisions in Article 27 FD EAW. Unfortunately, the decision on surrender is not always included in the criminal file. The decision will normally be added in the criminal file when surrender takes place in the pre-trial phase. The decision will usually not be included in the criminal file when surrender is based on the execution of a conviction (in absentia or pronounced by a first instance court) as different administrations or sections are usually involved. A time-consuming check must therefore be performed when the conviction is the subject of opposition or appeal.
If surrender was only partially allowed or if there is a problem with the rule of speciality, the defence counsel will usually signal this very quickly.

64. Have the authorities of your Member State as issuing Member State experienced any difficulties with the application of the speciality rule? If so, please describe those difficulties and how they were resolved.

In narcotic cases where the facts are qualified as possession and sale of narcotics with the aggravating circumstance that the acts constitute activities of a (common) association of

criminals (to be translated as criminal conspiracy or gang activity and differing from a criminal organisation) the Amsterdam Court used to refuse the surrender for the association of criminals because this legal aggravating circumstance and the specific crime of forming a gang does not exist (or seems to exist) under Dutch law (the jurisprudence of the Amsterdam Court changed in 2019). As surrender is granted for facts and not for legal qualifications, the Belgian authorities disregarded such a refusal. The facts for which the surrender has been allowed do indeed not alter by adding the aggravating circumstance and this practice is allowed for by the *Leymann and Pustovarov* ruling.

64BIS
What is the position of your country regarding the basis of requests for additional surrender (art. 27 (4) of FD 2002/584/JHA): should these be based on a specific national arrest warrant or could it be possible that the request is not based on a national arrest warrant if the issuing authority states that the additional surrender will not bring about an additional deprivation of liberty?"

The question is limited to requests for additional surrender in the pre-trial phase (prosecution-EAW's) and focuses both on the competent authority to request as on the procedure to follow. What should be used: EAW (in Belgium to be made up by the investigating judge) or simple request (could be made up by the prosecutor)? Requests for additional surrender with the purpose of executing sentences will in Belgium be the subject of an EAW and are made up by the prosecutor.

Comparing the request for additional surrender of article 27(4) FD with the request for surrender to a member state other than the executing member state (subsequent surrender) of article 28(3) FD is unconstructive as it is clear that a the request for subsequent surrender is always based on an existing EAW. Furthermore, article 28(3)(a) FD holds a condition, referring to article 9 FD, that is not included in article 27(4) FD.

Article 27(4) of the FD states that 'a request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision…'

In the textbox at the beginning of Part 3 of this questionnaire it is stated that

> ' Art. 8(1) of FD 2002/584/JHA lists the information which an EAW must contain. The purpose of that information is 'to provide the minimum official information required to enable the executing judicial authorities to give effect to the European arrest warrant swiftly by adopting their decision on the surrender as a matter of urgency'(ECJ, judgment of 23 January 2018, Piotrowski, C-367/17, ECLI:EU:C:2018:27, paragraph 59). Each section of the EAW-form covers one or more of the requirements set out in Art. 8(1).
>
> The issuing judicial authorities 'are required to complete [the EAW-form contained in the Annex to FD 2002/584/JHA], furnishing the specific information requested' (ECJ, judgment of 23 January 2018, Piotrowski, C-367/17, ECLI:EU:C:2018:27, paragraph 57).

> Art. 8(1) lays down requirements as to lawfulness 'which must be obeyed if the [EAW] is to be valid' (ECJ, judgment of 1 June 2016, Bob-Dogi, C-241/15, ECLI:EU:C:2016:385, paragraph 64; ECJ, judgment of 6 December 2018, Piotrowski, C-551/18 PPU, ECLI:EU:C:2018:991, paragraph 43).'

The handbook on how to issue and execute a European arrest warrant states on page 19 that

> 'The request for consent must be submitted by the same procedure and must contain the same information as a normal EAW. Thus the competent judicial authority transmits the request for consent directly to the executing judicial authority which surrendered the person. The information contained in the request, as provided in Article 8(1) of the Framework Decision on EAW, must be translated under the same rules as an EAW…'

One can therefore assume that the request for additional surrender must be made by using the form of the EAW.

Is it required that this EAW complies with all the requirements of Article 8(1) or it is sufficient that it contains the information mentioned in Article 8(1)? Article 8(1)(c) requires giving the evidence of an enforceable judgment, an arrest warrant or any other enforceable decision having the same effect, coming within the scope of Articles 1 and 2. In other words, is it mandatory that a national arrest warrant (and different from the one at the basis of the original EAW) is at the basis of the request for additional surrender? Is the *Bob-Dogi* ruling applicable?

The Belgian Court of Cassation makes a distinction between surrender and additional surrender. In a ruling of 6 May 2014 (https://juportal.be/zoekmachine/zoekformulier, case number P.14.0054.N) it stated that:

- the request for additional surrender can be made up by a public prosecutor even if the investigating judge is still examining the case (in Belgium, the EAW must be made up by the investigating judge in the pre-trial phase)
- when asking for an additional surrender it is not necessary to launch an EAW (meaning that a simple request without underlying national arrest warrant suffices)

In this case the request for additional surrender was not based on a specific national arrest warrant (in the decision that lead to the cassation procedure the Ghent Court of Appeal stated that the additional surrender did not bring about an additional deprivation of liberty, that the request expressed the intention to additionally prosecute the suspect for 2 other offences and that the suspect was already indicted for those other offences).

Original text of the ruling:

> "*Artikel 37, § 2, tweede lid, Wet Europees aanhoudingsbevel bepaalt met betrekking tot een inverdenkinggestelde die geniet van het specialiteitsbeginsel (dat voor vervolging voor andere feiten … een verzoek tot toestemming moet worden gericht aan de uitvoerende rechterlijke autoriteit). Die bepaling vereist niet dat voor een bijkomende overlevering (…) de met het bijkomende feit gelaste onderzoeksrechter steeds een Europees aanhoudingsbevel zou uitvaardigen tegen de reeds overgeleverde verdachte.*
> *Evenmin brengt enige wettelijke of verdragsrechtelijke bepaling mee dat alleen de met dat feit gelaste onderzoeksrechter het vermelde verzoek tot toestemming aan de uitvoerende rechterlijke autoriteit zou kunnen richten.*
> *Wanneer het verzoek tot toestemming ertoe strekt een reeds overgeleverde verdachte te kunnen vervolgen voor een bijkomend feit, dan kan het openbaar ministerie, in het kader van zijn opdracht tot uitoefening van de strafvordering, dat verzoek richten aan de*

uitvoerende rechterlijke autoriteit, ook al is het gerechtelijk onderzoek betreffende dat feit nog niet afgesloten".

I'm not convinced that the ruling of the Belgian Court of Cassation is correct. In my opinion an EAW is needed for an additional surrender hence requiring the existence of a national arrest warrant for the same facts for which an additional surrender is asked.

The ruling of the Court of Cassation is however very interesting as it draws attention to an ongoing discussion, namely: what do you do to prosecute offences allegedly (as (s)he is not found guilty yet) committed by the requested person, for which no national arrest warrant was issued or could be issued? And would it make a difference whether the requested person was already charged with (by the prosecutor) or indicted (by the investigating judge or the investigation court at the end of the pre-trial phase) for those offences?
At least the following actions are possible:

- limit the scope of the prosecution (only charge the suspect with the most serious crimes)
- no request for additional surrender and rely on one or more of the exceptions of article 27(3)
- no request for additional surrender, await the final sentence and then ask for an additional surrender in order to be able to execute the custodial sentence
- no request for additional surrender and execute the final custodial sentence if the penalty given is equal to or less than the maximum penalty imposable for an offence for which surrender was allowed
- during the pre-trial phase ask for an additional national arrest warrant (in so far as possible) and issue (in Belgium ask the investigating judge to also issue) an EAW on which basis an additional surrender is asked for

But: what to do with accessory offences (those that do not meet the threshold)? Belgium does not allow surrender for accessory offences and the FD remains mute on this topic

Article 1(1) FD establishes that the EAW is aimed solely at the arrest of the requested person in a member state other than the issuing member state with a view to his surrender to the latter state (see also AG Bot, opinion in C-241/15, *Bob-Dogi*, par. 45). The EAW was therefore not set up nor intended to facilitate the prosecution (which could be included if the FD were to be revised). If an additional surrender is not possible without an EAW and an underlying national arrest warrant, one could however argue that this is a major weakness of the EAW FD and only leads to more creativity in assessing that the benefice of the rule of speciality does not apply.

65. Have the authorities of your Member State as executing Member State experienced any difficulties with the application of the speciality rule? If so, please describe those difficulties and how they were resolved.

There is no check on how the issuing judicial authority respects the decision on surrender and the speciality rule. Even if a non-compliance would be reported, the executing judicial authority is powerless to remedy it.

Part 5: conclusions, opinions *et cetera*

66. Do requests for supplementary information by the executing judicial authority have an impact on the trust which should exist between the cooperating judicial authorities?

Yes, a lot. Question in the nature of "we will refuse surrender unless you provide us with …" are a source for frictions and unease. Too short time frames within which the answers must be given, capacity shortages and a very high workload only exacerbate this feeling.
The EAW has also become very complicated which makes fresh practitioners reluctant to invest the scarce time at their disposal to the study of international cooperation instruments.

67. What kind of questions should an executing judicial authority ask when requesting supplementary information?

Any information helpful to solve issues that stand in the way of a positive decision on surrender, provided that the question is related to the case or the EAW itself and is relevant and precise. The question must be formulated in a way that clarifies both the issue at hand and what information is expected from the executing authority. Generic questions on law as well as repetitive or comprehensive standard lists of questions should be banned. With regard to repetitive questions, one could argue that the creation of a database would be helpful to avoid this (see e.g. the Covid-19 database or the database on independence of the public prosecutor).

If an executing court (or any party stating that it acts on behalf of the executing court) asks questions that, due to their number and nature, jeopardize the timely completion of the EAW proceedings within the time limits set in Article 17 FD, it breaches not only the duty of sincere cooperation laid down in the first subparagraph of Article 4(3) TEU but it could in fact substantially delay the individual's surrender (and accordingly render the operation of the EAW system wholly ineffective) and may also result in a risk of impunity for the requested person (see C-220/18, *ML*, par. 79, 84-86 and 104).

68. Do executing judicial authorities occasionally ask too much supplementary information? If so, on what issues?

Not all countries have a same approach. Some countries inquire a lot, ask repetitive questions (repeated in each EAW case), use standard lists or are surprisingly inventive in the "need" for additional information. Questions will usually relate to the proceedings in the whole (date of the facts, nature and description of the facts, fair trial, probable cause, pre-trial proceedings, modalities of execution of sentences, possibilities for early release, …).

69. In your opinion, do issuing and executing judicial authorities adequately inform each other about the progress in answering a request for additional information in the issuing Member State and the progress in the proceedings in the executing Member State?

Only in specific or high sensitive cases that usually also include involvement of Eurojust.

70. In your opinion, would designating focal points for swift communications within the organisations of both issuing and executing judicial authorities enhance the quality of communications between issuing and executing judicial authorities?

The EJN-contactpoints are designated focal points (and have the advantage of being in a network, knowing each other, easy access and availability allowing for fast and expedient contacts) but are not always called upon or able to solve the issue at hand.
Eurojust country desks have the same advantages but are not meant to be used for contacts between less than three countries (although for reasons of creating a single point of contact, the Eurojust channel (Spanish desk and Belgian desk) was used in the cases concerning the Catalan ex-ministers). Eurojust national desks have also been used if the information required concerned the interpretation of legal texts of the issuing state or if an answer to a specific question had to be given in an extreme short amount of time).
Designating focal points in each public prosecutor's office is easy as each public prosecutor's office has a magistrate specialised in international cooperation. This does not entail that those magistrates also issue EAW's. Contacting this magistrate would however make it also easier to explain or understand what the issue at hand is (given the specialised character of the EAW).
Centralizing the execution or even the issuing of EAW's on a national level appears to be not an option in Belgium (also taking into consideration the fact that Belgium has 3 different language regimes). In some judicial districts there is however already a centralisation within the public prosecutor's office for the issuing and (also within the court for) the execution of EAW's (see for instance the judicial district of Antwerp)

71. Are there Member States whose EAW's and/or whose decisions on the execution of EAW's are particularly problematic in your experience? if so, what are the problems that emerge?

EAW's from Romania (detention conditions that are not in conformity with the EU rules or not being able to indicate in what prison the requested person will be incarcerated after surrender) and Italy (plain refusal to give a guarantee on detention conditions and simply denying that there are issues regarding detention conditions) seldom lead to a positive decision on surrender.

The collaboration with the Netherlands is problematic with regard to:

- additional surrender (no competent judicial authority) - Dutch legislation changed in the meantime, making the Amsterdam Court the competent authority for (only ongoing or new) cases from 01.04.2021 on
- temporary surrender: article 36 of the Dutch law on surrender
  Before the change in Dutch legislation in 2021, it was mandatory for the Dutch authorities to postpone a surrender if the requested person had ongoing procedures in the Netherlands (a prosecution for a traffic offence was already sufficient even if the person concerned was wanted for serious crimes)

  According to Article 24(1) FD, postponing a surrender is only possible after a positive decision on execution of the EAW. The decision on surrender is not executed because the requested person is still needed in the executing state (for purposes of prosecution or execution of a sentence: "*so that he or she may be prosecuted in the executing Member State or, if he or she has already been sentenced, so that he or she may serve, in its territory, a sentence passed for an act other than that referred to in the European arrest warrant*").

  Article 24(2) FD holds that the executing authority, instead of postponing the surrender, may temporarily surrender the requested person to the issuing member state under conditions to be determined by mutual agreement between the executing and the issuing

judicial authorities. The agreement shall be made in writing and the conditions shall be binding on all the authorities in the issuing member state.

Stating that a temporary surrender is an alternative to postponing a surrender is however not correct as a temporary surrender is a mere modality of a postponed surrender. In a postponed surrender,

- two situations are possible: the requested person is detained or is not detained; and
- two modalities are possible:
  - the requested person stays in the executing state until the decision on surrender is executed or is no longer valid;
  - or the (detained) requested person is temporarily transferred (article 22 directive EIO) or temporarily surrendered (article 24/2 FD EAW) to the issuing state but must be returned to the executing state.

The difference between a (final) surrender and a temporarily surrender is that in the latter the requested person is not conceded to the issuing state but is merely temporarily handed over to the issuing state for specific purposes.

A temporary surrender is a coercive measure with a restriction of the freedom of movement of the requested person and entails as such that the requested person is in detention in the executing state, either for prosecution purposes or for the execution of a sentence (a detention of the requested person in the surrender proceedings serves only the purpose of being able to execute the positive decision on surrender and that situation of detention cannot as such be used as a basis for postponing a surrender – the period of detention in the surrender proceedings must also be attributed in the issuing state and in case of conviction be deducted from the sentence to be served – neither can the decision to postpone a surrender be used as a title to warrant a detention). A temporary surrender will also not be allowed if the issuing state does not agree to incarcerate the surrendered person for the period of the temporary surrender (this incarceration serves only the purpose of being able to execute the given guarantee that the temporarily surrendered person will be returned to the executing state at the end of the period of temporary surrender and at any time his or her presence is required in the executing state).

The temporarily surrendered person remains therefore under the judicial control of the executing state and is not at the disposal of the authorities of the issuing state. As a consequence:

- the national arrest warrant at the basis of the EAW cannot be executed in the issuing state and the issuing of a new national arrest warrant (related to the same acts for which surrender was asked) is also not possible
- the execution in the issuing state of any title of detention or even the notification of any judgment condemning the requested person (in order to start the period within which legal recourses must be used) is not possible
- a judicial control of the necessity of (maintaining) the detention and the modalities of detention (in prison or not in prison but with a monitoring device) cannot be performed by the courts in the issuing state as they have no jurisdiction

The conditions of the temporarily surrender will be agreed upon by the Belgian public prosecutor and the competent authority in the executing state. This usually entails an agreement:
- on the reason for the temporary surrender,
- on the duration of the temporary surrender,
- on the incarceration of the temporarily surrendered person for the entire duration of the temporary surrender (possibly in a specific prison if detention conditions would be discussed during the negotiations)
- and on the return of that detained person to the executing state at the end of the period of temporary surrender and at any time his or her presence is required in the executing state (the return will be executed by the Belgian police).

Article 24(2) FD holds however that the conditions to be determined must be made by mutual agreement between the executing and the issuing judicial authorities, meaning that **a non-judicial authority such as a non- independent prosecutor or a ministry (see in this context article 36(2 and 3) of the new Dutch law on surrender that entered into force on 7 May 2021) cannot intervene**.

The temporarily surrendered person will be incarcerated on the basis of the agreement on temporarily surrender (the denominator being the detention title in the executing state) where the period of detention must be attributed in the executing state to the remaining sentence to be served or added to the duration of the pre-trial detention. In Belgium the temporarily surrendered person will be incarcerated in the prison on the basis of "een bevel tot bewaring" which I believe has no equivalent in English but could be translated as an 'order to retain the person concerned in a detention centre' (the term goes back to the time when horse-drawn carriages where used for transferring detainees; if the journey took more than 1 day, the detainee spent the night in a local house of arrest on the basis of an – so translated – "order to retain" – it was as such a temporary title of detention).

Reference can also be made to article 22 of the EIO Directive concerning the temporary transfer to the issuing state, that holds the same principles (but holds a possible ground of refusal if the person concerned does not consent):
"5. The practical arrangements regarding the temporary transfer of the person including the details of his custody conditions in the issuing State, and the dates by which he must be transferred from and returned to the territory of the executing State shall be agreed between the issuing State and the executing State, ensuring that the physical and mental condition of the person concerned, as well as the level of security required in the issuing State, are taken into account.
6. The transferred person shall remain in custody in the territory of the issuing State and, where applicable, in the territory of the Member State of transit, for the acts or convictions for which he has been kept in custody in the executing State, unless the executing State applies for his release.
7. The period of custody in the territory of the issuing State shall be deducted from the period of detention which the person concerned is or will be obliged to undergo in the territory of the executing State.
8. Without prejudice to paragraph 6, a transferred person shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the issuing State

for acts committed or convictions handed down before his departure from the territory of the executing State and which are not specified in the EIO.
9. The **immunity** referred to in paragraph 8 shall cease to exist if the transferred person, having had an opportunity to leave for a period of 15 consecutive days from the date when his presence is no longer required by the issuing authorities, has either:
(a) nevertheless remained in the territory; or
(b) having left it, has returned."

The Dutch authorities (public prosecutor and the Ministry of Justice) are of the opinion that

- the detention in a surrender procedure is a possible basis for organising a temporary surrender even if there is no other detention title in the Netherlands
- the temporarily surrendered person (to Belgium) must remain incarcerated in Belgium for the period of the temporary surrender and this on the basis of a BELGIAN title of detention (which is a clear violation of the rule of immunity – which rule has the same content as the rule of speciality). If that Belgian title of detention is no longer valid, the person shall not be set free in Belgium but most be brought back to the Netherlands (on what basis? – if there is no detention title in Belgium and neither in the Netherlands…)
- the person must be brought back to the Netherlands (as a detainee) at the first request and whenever his/her presence is necessary and at the latest when a final sentence has passed (he will then be detained in the Netherlands, not on a Dutch title of detention but on a Belgian title…)
- if the person escapes from the Belgium prison, it is up to the Belgian authorities to take responsibility and to take the first steps in order to arrest and detain the person once again (SIS alert, EAW, …) (while it is clear that the Belgian authorities only temporarily keep the surrendered person in prison and have no power to take steps to execute a foreign title of detention)

Belgian authorities have since 2013, but to no avail, objected against this practice, which is considered in Belgium to be illegal and in contradiction with the rules on temporary surrender (also with regard to the dispositions on temporarily transfer). A recent meeting between the ministers of Justice of both countries did not solve the problem as the 2021 change in Dutch surrender law slightly changed its article 36 (possibility to postpone instead of mandatory postponing) but did not address the problematic issues (see for instance the new text of article 36, 3).

Cases in which a Belgian prosecutor went along with this practice and agreed to the conditions imposed by the Dutch authorities, have had serious consequences; the latest in this line is a Europol coordinated case concerning an international drug trafficking network in which the temporarily surrendered suspect Dekan E. had to be released due to the lack of a detention title (see https://www.crimesite.nl/nederlandse-verdachte-belgische-megazaak-door-fout-op-vrije-voeten)

- (not) detaining the requested person: Belgian investigating judges urge that in sensitive (and mostly international) cases when deciding on detention in surrender proceedings the risk of collusion would also be considered instead of only taking into account the risk of flight, which appears in their opinion to be seldom present in the Netherlands. If a coordinated police intervention took place in different countries, it would not be

illogical to take the necessities (the needs) of the investigation into consideration when deciding on detention in surrender proceedings.

- The long duration of the Dutch proceedings on surrender. In cases in which an investigating judge leads the pre-trial investigation and other suspects have been put in pre-trial detention, Belgian investigating judges hesitate or avoid sending EAW's to the Netherlands because it takes too long before a suspect found or arrested in the Netherlands is transferred to Belgium. Pre-trial investigations have to be brought before the trial court without the requested surrender having occurred. There are cases in which EAW's are withdrawn because of this reason. The situation should however be different after the change in Dutch legislation in 2021.
- The long duration of the execution of the surrender; example: a suspect was arrested in the Netherlands on 30.07.2019 and consented to his surrender. It took to 23.09.2019 to schedule the surrender, which was then postponed to 30.09.2019 for reason that he still had to be heard in a Dutch case.

72. Do you have any suggestions to improve FD 2002/584/JHA. If so, which suggestions?

Envisage a new instrument, sole basis for implementing changes. Remedy mutual trust. In light of all the issues arisen around the implementation of the FD and even the interaction between FD's, would it not be time to renegotiate, remedy mutual trust, define autonomous concepts of Union law, … and maybe incorporate the international cooperation in penal cases in one instrument that could take the form of a regulation? It would be easier to apply 1 European law than having to take into consideration different national laws and several exceptions.
The EAW was not set up nor intended to facilitate the prosecution. Suppose however that the EAW and the EIO were combined in a single instrument, …

The finding that 19 years after its publication, daily debates are still held with regard to the interpretation and the application of the FD, already proves that the instrument ought to be revised. Some fear the outcome of new discussions stating that it would be opening Pandora's box, but concern could equally be expressed over the future of the EAW FD and the route the application of the EAW FD is following.

73. In particular:

- a) in your opinion, should one or more grounds for refusal and/or guarantees: /
    - (i) be totally abolished or amended? If so, which ground(s) and/or guarantee(s) and why;

      /

    - (ii) be introduced? If so, which ground(s) and/or guarantee(s) and why?

      No new grounds for refusal should be introduced

- b) given that surrender proceedings are increasingly becoming more complex and protracted, what, in your opinion, is the effect on mutual trust? The mere fact that mutual trust may not be blind already indicates the existence of boundaries to the trust

and respect member states and their authorities ought to have in and for one another, casting a shadow on the very instrument that was meant to be the show of force of an united Europe. Added complexity can undermine confidence that the instrument is used as it was meant to be and can lead to uncertainty. Adding checks and balances are by nature not a means to boost confidence and undermine the true force of given guarantees.

- c) in your opinion, should the speciality rule be maintained, amended or abolished? Please explain.

  It should be abolished or at least redefined. It is an old concept with so much exceptions that its practicality and added value really need to be reconsidered. It's a bubble ready to burst.

74. What is your opinion on the usability of the *HANDBOOK ON HOW TO ISSUE AND EXECUTE A EUROPEAN ARREST WARRANT* (COM(2017) 6389 final) for judicial practitioners? If, in your opinion, the *Handbook* does not live up to expectations, how could it be improved?

The handbook is not up to date anymore but one should keep in mind the disclaimer on pag. 6 of the handbook. The handbook should be replaced with a database that is kept up to date.

75. Do the issuing and/or executing judicial authorities of your Member State use the *Handbook* in the performance of their duties? If not, why not?

As the handbook is outdated, I would not recommend using only the handbook as a guideline for issuing or excuting an EAW.

76.

a) What is your opinion on the relationship between the EIO and the ESO on the one hand and the EAW on the other, in particular with regard to the proportionality of a decision to issue a prosecution-EAW?

The EIO, the ESO and the EAW serve different purposes (investigate, supervise/control and arrest). They can be used together but not in a way that the one should or must precede the other. Although I have no data available, I'm convinced that Belgian authorities launch a lot more EIO's than EAW's.
The same goes for EAW and summoning. They serve different purposes (arrest – inform of the place and time of a trial). Belgian legislation allows for summoning in another member state but a summons is not an alternative for and neither a prerequisite to an EAW.

b) What is your opinion on the relationship between FD 2008/909/JHA and the EAW, in particular with regard to the proportionality of a decision to issue an execution-EAW?

see the answers to previous questions 6 (b) and 45 (c) in this questionnaire.

c) Should the FD's and/or the directive establishing the instruments concerning the EAW, the transfer of the execution of custodial sentences, the EIO and the ESO be amended in this regard and, if so, in what way?

Create a single (new) instrument on legal cooperation (also see the answer to question 72).

77. What relevance, if any, do your answers to Parts 2-4 have for other framework decisions or directives concerning mutual recognition of decisions in criminal matters?

/

78. What consequences, if any, do measures to combat COVID-19 have on the operation of the EAW-system?

Belgian authorities gave the following answers to the COVID-19 questionnaire (in relation to the EAW):

Impact on the issuing of EAWs

In March 2020, some decisions to temporarily suspend the issuing of EAWs have been taken on a case-by-case basis.
By the end of March 2020, specific guidelines in relation to COVID-19 have been given by the Board of General Prosecutors to the national prosecutors in the field of cross-border judicial cooperation in criminal matters. According to these guidelines, national prosecutors have been asked to put on hold non priority new EAWs and to wait before introducing them in the SIS system. These guidelines have been abrogated end of June 2020.
As a consequence, the issuing of EAWs resumed without restrictions, taking duly into account obvious considerations in relation to health and security. Priority is given to persons in detention.
A risk assessment is required before any mission of police officers outside Belgium can be granted (for instance to ensure the physical surrender/transfer of the person concerned to Belgium). Some difficulties / delays may occur due to reductions of air traffic or restrictions imposed by Air Carriers.

Impact on the execution of EAWs and postponement of the actual surrender

The execution of some ongoing EAWs had been suspended on the basis of Art. 23 par. 4 of the Framework Decision,. Only the effective surrender was considered to be suspended, meaning that the execution procedure itself (hearing of the person, decision on the execution, etc.) could in principle be handled normally (no videoconferencing was done nor hearing by phone).
Since the summer (of 2020), effective surrenders have resumed taking duly into account obvious considerations in relation to health and security. Priority is given to persons in detention. Some difficulties / delays may occur due to reductions of air traffic or restrictions imposed by Air Carriers.

Legal basis for postponing the actual surrender

Both legal basis – Articles 23 par. 3 and para. 4 of the Framework Decision - are considered to be applicable to temporary suspend surrender. The execution of some ongoing EAWs has been suspended on the basis of Art. 23 par. 4 of the Framework Decision.

Releases of requested persons following the postponement of the surrender

To this day, no persons have been released on the basis of non-compliance with the deadlines. To our knowledge, there has been one case in which the EAW has been revoked by the issuing authorities.

Transits

Transit requests may be addressed to the Central Authority of the Ministry of Justice. On a more practical level, prior consultation with the Belgian police will be necessary to set out the modalities of the transit and required intervention of the Belgian police services.
The transit will only be allowed if an agreement can be reached on the practical modalities. This summer, Belgium has received a more than the average number of transit requests. Recently, and following the resurgence of the pandemic in Europe, the number of transit requests addressed by Belgium to other countries is on the rise.

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