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.

The questionnaire was completed by Dr hab. Małgorzata Wąsek-Wiaderek, professor of the John Paul II Catholic University of Lublin (Head of Department of Criminal Procedure) and judge of the Supreme Court (Criminal Chamber).

All research done for the purpose of filling in the questionnaire was conducted together by **prof. Małgorzata Wąsek-Wiaderek and dr Adrian Zbiciak**.
Adrian Zbiciak is the assistant in the Department of Criminal Procedure of the Faculty of Law of the John Paul II Catholic University of Lublin and also a judge of the District Court in Chełm.

Małgorzata Wąsek-Wiaderek has no experience as issuing/executing authority; she has experience in dealing with cases concerning EAW's procedure and extradition procedure at the level of the Polish Supreme Court (examination of cassation appeals against decision on EAWs brought by the General Public Prosecutor or the Commissioner for Human Rights).
Dr Adrian Zbiciak has no experience in acting as issuing/executing authorities.

Answers to the questionnaire are elaborated based on the following information:

1) In order to provide reliable information about the practice on issuing and executing the EAWs, the special questionnaire was elaborated in Polish, based on the general questionnaire, and sent to all 46 regional courts in Poland, competent to issue/execute the EAWs. Unfortunately, only 14 judges from 10 regional courts decided to fill in this questionnaire. All references to "opinions of judges" made in this report are based on replies to this internal questionnaire (which all were anonymous) or interviews with judges.

2) In order to provide objective reliable about the practice concerning refusals to issue or to execute EAWs, we asked the regional courts in Poland for copies of decisions: on refusals to issue the EAWs and on refusals to execute the EAWs. We obtained and analyzed altogether 594 decisions from all 46 regional courts in Poland (551 refusals to issue EAWs and 43 refusals to execute EAWs) issued in 2020 (this are not all decisions issued by the Polish courts but all which we received; other decisions (over a dozen, less than 20) were mentioned by one court but we did not have access to them until the date of finalizing the report;-all decisions were anonymized before giving access to them):
    - 551 refusals to issue the EAW (528 refusals concerning requests to issue the EAW in order to execute the sentence of imprisonment; 23 refusals concerning requests to issue the EAW for prosecution purposes).
    - 43 decision refusing execution of the EAW (30 decisions refusing execution of EAWs issued for the purpose of enforcement of a penalty; 13 decisions refusing execution of prosecution-EAWs).

3) In order to provide objective information about the practice, we decided to analyze casefiles of the EAWs issued/executed in 2020 in two Polish courts: the Regional Court in Lublin (116 cases; including only 13 cases concerning execution of the EAWs) and

the Warszawa-Praga Regional Court in Warsaw. The President of the Warszawa-Praga Regional Court granted access to altogether 51 cases. After analyzing them it appeared that only 39 cases could be classified as involving EAW procedure *sensu stricto*, while the remaining cases concerned, *inter alia*, requests for consent to extend prosecution or execution of penalties also to other cases, covered by the speciality principle. Only 8 out of 39 cases examined in the Warszawa-Praga Regional Court concerned the execution of the EAWs. 31 cases concerned issuing the EAWs.

4) In order to gather objective information, we asked the Ministry of Justice for data concerning extradition of EU citizens (with reference to questions concerning *Petruhhin* case).
   We received some general information on the number of extraditions and about the procedure which should be followed by public prosecutors in case of obtaining the extradition request concerning the EU citizen.

5) We have conducted two interviews with judges responsible for conducting EAW procedure.

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.

The EAW-form (supplemented by the new part D following the FD 2009/299/JHA) was published as an attachment to the Ordinance of the Ministry of Justice of 24 February 2012 on establishing the template of the EAW-form (Journal of Laws of 2012, item 266).

In principle the Annex to FD was transposed correctly. However, part E of the EAW form is not as precise as the original EAW form**.** Point E.2. of the Polish EAW form states simply: "Circumstances of committing an offence (offences)" while the EAW form, as provided in FD 2002/584/JHA, states that the description of the circumstances of an offence shall include "time, place and degree of participation in the offence(s) by the requested person". On the other hand, in explanations how to fill in the EAW form included into the Ordinance (directly below the template of the EAW form) it is stated that "Section E.2. shall contain information on time (day and hour) and place of commission of an offence and the form of participation in such offence by the requested person".

Thus, in practice all EAWs analyzed for the purpose of elaborating this report contained the above information; However, sometimes it was included in Section F and not in Section E.2.

Additionally, it should be mentioned that the order of offences listed in Section E.I. of the Polish EAW-form is different than this provided in the original EAW-form.

There was a debate concerning transposition of the FD 2002/584/JHA, however it did not concern the EAW- form.

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?

Yes, as transpires from the information available at the website of the Commission, on 3 December 2020 the Commission decided to initiate the infringement procedure against Czechia, Estonia, Italy, Lithuania, Austria, and Poland for failure to implement the FD properly, "for example by treating their nationals favourably in comparison to EU citizens from other Member States or providing additional grounds for refusal of warrants not provided for in the Framework Decision." The letter of formal notice concerning this issue was sent to Poland and other MS indicated above.

See, the information available at:
https://ec.europa.eu/commission/presscorner/detail/EN/INF_20_2142

https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=false&active_only=0&noncom=0&r_dossier=&decision_date_from=&decision_date_to=&EM=PL&DG=JUST&title=&submit=Search

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)?

Yes. All grounds for refusal, as indicated in Article 3-4a of the FD, were transposed into the Polish Code of Criminal Procedure (thereafter referred to as "the CCP").

Mandatory grounds:

The judicial authority of the Member State of execution […] shall refuse to execute the EAW in the following cases:

"1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law" – transposed into Article 607p § 1 (1) of the CCP.

"2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State" – transposed into Article 607p § 1 (2) of the CCP.
It is worth mentioning that Article 607p § 1 (2) of the CCP extends the obligatory ground for refusal to execute the EAW to final adjudication for the same acts in "another state", not only "Member State". Thus, the Polish legislator decided to transpose the optional ground for refusal, as indicated in Article 4 (5) FD EAW, as mandatory ground for refusal. Some Authors argue that despite the wording of Article 607p § 1 (2) of the CCP this provision should be applied

only in case of final adjudication in another Member State of the EU (see: A. Górski, A. Sakowicz, in: *Kodeks postepowania karnego. Komentarz*, ed. A. Sakowicz, Warszawa 2020, p. 1650). However, such interpretation would be contrary to the clear wording of this provision (see, A. Lach, *Problemy funkcjonowania europejskiego nakazu aresztowania*, Europejski Przegląd Sądowy 2006, no. 11, p. 25; S. Steinborn, *Komentarz do artykułu 607p kodeksu postępowania karnego*, Lex/el. 2015, para. 8; B. Nita-Światłowska, in: *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka, Warszawa 2020, p. 1815-1816).

3. "if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State" – this provision was transposed into Article 607p § 1 (4) of the CCP.

In Poland, persons over 17 years of age are subject to criminal liability. However, persons over 15 years may be criminally responsible for certain most serious offences listed in Article 10 § 2 of the Criminal Code but under certain conditions. There was some discrepancy in the literature as to whether the Polish courts acting as the executing judicial authority have competence to verify those conditions for criminal responsibility in Poland. Some authors argued that the executing judicial authority should only establish whether *in abstracto* such person could be held criminally liable in Poland for the offence indicated in the EAW (see, S. Steinborn, Commentary to Article 607p of the CCP, Lex/el. 2015, para. 13). Others reasoned that the Polish court shall verify conditions for criminal liability mentioned in Article 10 § 2 of the Criminal Code with the assistance of the judicial authority of the issuing state (see, T. Ostropolski, in: *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz do Działu XIII KPK*, Warszawa 2016, p. 806). It seems that the judgment of the Court of Justice of 23 January 2018 in the case C-367/16 *Dawid Piotrowski* clarified this issue with the preference for the first interpretation. The ECJ's interpretation given in *Dawid Piotrowski case* is also underlined in commentaries to the CCP (see, M. Janicz, in: *Kodeks postępowania karnego. Komentarz*, ed. K. Dudka, Warszawa 2021, p. 1500).

Optional grounds of refusal:

1. double criminality (in cases referred to in Article 2(4) of the FD EAW) – transposed into Article 607r § 1 (1) and in Article 607r § 2 of the CCP (the latter provision states that the optional ground for refusal in case of lack of double criminality does not apply if the act does not constitute an offence because Polish law does not impose the same kind of tax or duty or does not regulate taxes or customs duties in the same way as in the issuing state; see however answer to question 6.
2. prosecution in the executing Member State for the same act – transposed into Article 607r § 1 (2) of the CCP.
3. optional ground of refusal indicated in Article 4 (3) of the FD EAW - transposed into Article 607r § 1 (3) of the CCP.
4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law – transposed into Article 607r § 1 (4) of the CCP.[2]

[2] Article 607r § 1 (1)-(4) reads as follows:

5. if the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country – as was mentioned above, this provision was transposed as mandatory ground of refusal into Article 607p § 1 (2) of the CCP.
6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law – this provision was transposed into Article 607s §§ 1 and 2 of the CCP. However, the Polish law regulates differently the situation of Polish citizens and persons granted the right of asylum on the one hand and residents and persons permanently staying in Poland on the other hand. The first group, i.e., Polish citizens and persons granted the right to asylum, **shall not be surrendered** unless they consent to surrender. With reference to residents and persons staying permanently in Poland, the executing judicial authority **may refuse** to execute the EAW.
7. where the European arrest warrant relates to offences which:
    (a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or
    (b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory – the first part of this provision (Article 4 (7)(a) was transposed into Article 607r § 1 (5) of the CCP which provides that execution of the EAW may be refused if it relates to an offence which, according to Polish law, was committed in whole or in part in the territory of the Republic of Poland, or on a Polish aircraft or vessel. The second part of this provision (Article 4 (7) (b) of the FD EAW) is not reflected *expressis verbis* in the CCP, However, in such cases execution of the EAW could be refused relying on the lack of double criminality.

With reference to optional grounds for refusal indicated in Article 4a of the FD EAW – see detailed report elaborated within the framework of InAbsentiEAW project.

The optional ground of refusal indicated in Article 4a of the FD EAW was transposed into Article 607r § 3 of the CCP which reads as follows:

The execution of the EAW may be refused if:
1) offence being the basis for issuance of the EAW, other than those enumerated in Article 607w, is not an offence under the Polish law;
2) in the Republic of Poland there are criminal proceedings conducted against the requested person, to whom the EAW applies, with regard to the offence that is the basis for the EAW;
3) valid and final ruling on refusal to institute proceedings, on discontinuance of the proceedings, or another ruling on completing the proceedings into the case has been issued against the requested person in connection with the act being the basis for the EAW.
4) under the Polish law, the prosecution or execution of the penalty for an offence being a subject of the EAW became statute-barred and the criminal offence concerned was subject to jurisdiction of Polish courts.

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

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

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

Guarantees indicated in Article 5 of the FD EAW were also transposed into the Polish law.

- Article 5 (2) FD EAW: EAWs concerning the custodial life sentence or life-time detention order: in the CCP it constitutes the optional ground for refusal (Article 607r § 1 (6) of the CCP). This provision states as follows: "The judicial authority may refuse to execute the EAW, if the offence to which the EAW relates is punishable in the issuing State with a penalty of life imprisonment or other measure involving deprivation of liberty without the possibility of applying for reduction."[3]
- Article 5 (3) FD EAW: with reference to EAWs issued for prosecution concerning a person who is a national or resident of the executing Member State - surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State – this guarantee was transposed into Article 607t § 1 of the CCP. This provision states as follows: "If the EAW is issued for the

[3] However, Article 607r § 1 (6) of the CCP does not provide for a surrender "subject to the condition" but simply regulates the optional ground for refusal with reference to the penalty indicated in Article 5 (2) FD 2002/584/JHA. Furthermore, the CCP is more general in wording and does not precise that a review of the penalty or measure imposed shall be available on request or at the latest after 20 years.

purpose of prosecuting a Polish citizen or a person who was granted the right of asylum in Poland, this person may be surrendered upon the condition that he will be returned to the territory of Poland after the proceedings in the issuing State were finally concluded, if such person expresses his/her consent [to return]."

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?

See answer to question 3. In general grounds for refusal were transposed in accordance with the FD EAW. However, some additional mandatory grounds for refusal were added to the CCP – for details – see answer to question 6.

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)?

There is no specific legal provision in the CCP regulating this issue. However, a risk of violation of human rights forms an obligatory ground for refusing the execution of the EAW – see answer to question 6.

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?

Poland as the issuing state (with reference to EAWs issued for prosecution purposes)
In Poland both decisions, i.e., a decision on detention on remand and a subsequent decision to issue an EAW based on such detention order are taken by a court. Thus, the requested person is offered a judicial protection at all stages of the proceedings aimed at issuing the EAW.

Poland as the executing state
In Poland the competence to execute the EAWs was granted to all 46 regional courts. The recent case-law of the CJEU concerning "dual level of protection" did not result in any changes of the CCP. However, while deciding on the execution of EAW, the competent court shall examine whether it was issued by "the judicial organ" of the MS, i.e., an organ notified by the Member State pursuant to Article 6 (3) of the FD EAW as "the competent judicial authority". While interpreting the notion of "the competent judicial organ" Polish courts shall consider the jurisprudence of the CJEU on this issue.

Furthermore, pursuant to Article 607k § 3 of the CCP, if the public prosecutor applies for detention of a requested person, a decision on deprivation of liberty rendered against the requested person in the issuing Member State constitutes a separate and autonomous ground for imposing detention on remand in Poland. In accordance with this provision the Polish court, while imposing detention on remand on the requested person, shall rely entirely on the decision on detention of the judicial organ of the issuing state. For the Polish court such decision constitutes a prove that there exists "high probability that the requested person committed the offence" within the meaning of Article 249 § 1 of the CCP, i.e., the general ground for detention

under the Polish law. Thus, in order to provide adequate protection of the right to liberty of the requested person, such decision should be issued by a court or at least the EAW based on this decision shall be issued by the court of the issuing state. While executing the EAW issued without any involvement of a court in the issuing state, the Polish court may refuse imposing detention on the requested person or even refuse execution of the EAW relying on the "protection of human rights" clause (Article 607 § 1 (5) of the CCP stating that surrender shall be refused if it would violate human and citizen freedoms and rights).

It is worth mentioning that even in the context of ordinary extradition procedure (from Poland to Belarus) the Supreme Court stated the following:

"Extradition of a person against whom the decision on pre-trial detention in the requesting state was issued by a non-judicial organ would mean a transfer of such person to the procedural organs of that state in violation of human right and freedoms protected by international conventions on human rights. Such extradition means a transfer of a requested person to a state in which this person will be deprived of liberty not on the basis of a decision of a judicial authority, but an authority which is not a court. This effect, although it is a future event, is at the same time certain since it will occur at the moment of transferring the person to the requesting state" (decision of the Supreme Court of 20 May 2020, I KO 6/19).

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.

The CCP provides four additional mandatory grounds for refusal, not indicated in the FD EAW.

1. Pursuant to Article 607p § 1 (5) of the CCP the execution of the EAW shall be denied if "it would violate human and citizens' rights".

2. Pursuant to Article 607p § 1 (6) of the CCP the execution of the EAW shall be denied if the EAW was issued in connection with a political offence committed without the use of violence.

   The above-mentioned grounds for refusal were introduced due to constitutional requirements. Article 55 (4) of the Polish Constitution states that "The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens."

It seems that the mandatory ground for refusal as indicated in Article 607p § 1 (5) of the CCP does reflect correctly the recent case-law of the Court of Justice concerning execution of EAWs in case of risk of violation of Article 4 or 47 of the Charter of Fundamental Rights (thereafter referred to as "the Charter") – see: cases: C-404/15 and C-659/15 PPU – *Aranyosi and Căldăraru*; C-128/18 – *Dorobandu*; C-216/18 PPU *LM*).

The ground for refusal based on the risk of violation of human rights is interpreted narrowly. For example, in the decision of 28 December 2017, II AKz 549/17, the Kraków Court of Appeal stated that refusal of surrender based on Article 607p § 1 (5) of the CCP may take place only in case of very high probability of violation of human right after surrender. While deciding to refuse the execution of the EAW, the executing judicial authority must be almost sure that violation of human rights would take place in case of surrender. Another, more flexible interpretation of this provision, would undermine confidence forming a basis for mutual recognition of decisions in the EU.

It is also underlined in the case-law of the Polish courts, that this ground for refusal may be applied in case of new information obtained after issuing the EAW and not available to the issuing judicial authority if such information (important for the assessment of criminal responsibility of a requested person) proves that execution of the EAW is not justified (see, a decision of the Wrocław Court of Appeal of 4 February 2014, II AKz 50/14).

Article 607p § 1 (5) of the CCP was also subject to constitutional control. The Constitutional Tribunal stated as follows (judgment of 5 October 2010, SK 26/08):

"Article 607p § (5) of the […] Code of Criminal Procedure […], insofar as it contains a ground for refusal to execute a European arrest warrant issued against a Polish citizen for the purpose of conducting a criminal prosecution, in the case where:

a) it is obvious for the court adjudicating on the execution of the European arrest warrant that a person who is the subject of the said warrant has not committed an act with reference to which the European arrest warrant has been issued,

b) the description of the act on the basis of which the European arrest warrant has been issued makes it impossible to carry out the legal classification of the act,

is consistent with Article 45(1) and Article 42(2) in conjunction with Article 55(4) of the Constitution of the Republic of Poland."

See the full text of the judgment in English:
https://trybunal.gov.pl/fileadmin/content/omowienia/SK_26_08_EN.pdf

3. Pursuant to Article 607p § 2 of the CCP, in case of the EAW concerning Polish citizen surrender may take place only if the condition of double criminality is fulfilled and if an offence was committed outside the territory of Poland. This provision reads as follows: "if the EAW was issued against a requested person who is a Polish citizen, it may be executed only upon the condition that the act on which it is based has not been committed in the territory of the Republic of Poland or on a Polish aircraft or vessel and that it constitutes an offence under the law of the Republic of Poland or that it would constitute an offence under the law of the Republic of Poland had it been committed in the territory of the Republic of Poland, both at the time of its perpetration and at the time, when the EAW was submitted."

This provision reflects the content of Article 55 of the Polish Constitution, as amended in 2006 upon the judgment of 27 April 2005, P 1/05. In this judgment the Constitutional Court stated that surrender based on EAW is a type of extradition and, for this reason, constrains

concerning extradition proceedings applicable to Polish citizens are valid also in the surrender procedure (full text of the judgment available at:
https://trybunal.gov.pl/fileadmin/content/omowienia/P_1_05_full_GB.pdf)

Article 55 (2) of the Constitution, as amended in 2006, reads as follows:

"Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition:

1) was committed outside the territory of the Republic of Poland, and

2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request."

Summarizing, a Polish citizen may be surrendered only is an offence indicated in the EAW was committed outside the Polish territory. However, then surrender is dependent on the following conditions:

That the requirement of "special" double criminality was fulfilled and

- In case of an EAW issued for execution purposes – he/she consents to surrender (Article 607s § 1 of the CCP);
- In case of an EAW issued for prosecution purposes – upon the condition of return to Poland after being judged in the issuing Member State (Article 607t § 1 of the CCP).

It is a common view expressed in the literature, that Article 607p § 2 of the CCP is contrary to the FD EAW (see, *inter alia*, A. Górski, A. Sakowicz, *Kodeks postepowania karnego. Komentarz*, ed. A. Sakowicz, Warszawa 2020, p. 1654-1655; T. Ostropolski, in: *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz do Działu XIII KPK*, Warszawa 2016, p. 819; B. Nita-Światłowska, in: *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka, Warszawa 2020, p. 1825).

4. Article 607p § 1 (4) of the CCP provides that the execution of the EAW will be denied if a final and binding decision on surrender to a different Member State of the EU was issued against a requested person.

Additionally, as was mentioned above (see answer to question 3), the optional ground of refusal indicated in Article 4 (6) of FD EAW was transposed as mandatory ground in case of lack of consent of the requested person to surrender.

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?

Yes, Poland transposed Article 4(6) of FD EAW and national legislation differentiates the situation of citizens and non-citizens of Poland in the following way:

- With reference to citizens and persons granted the right to asylum the EAW issued for the purpose of enforcement of a sentence cannot be executed without their consent – Article 607s § 1 of the CCP.
- With reference to persons "residing or permanently staying in the territory of Poland" the judicial authority "may refuse to execute an EAW" – Article 607s § 2 of the CCP.

- (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 execution of a foreign sentence is guaranteed by Article 607s § 3 of the CCP which reads as follows: "while denying the surrender for the reasons indicated in § 1 or § 2, the court decides on the execution of a penalty or measure imposed by the judicial authority of the issuing State". Thus, issuing this decision is obligatory.

This is rightly underlined in the case-law by saying that while denying surrender based on Article 607s § 1 or § 2 of the CCP, the court, in the same decision, shall order the execution of penalty imposed in the issuing state. The court is obliged to order execution of such sentence (decision of the Kraków Court of Appeal of 15 February 2017, II AKz 34/17; decision of the Katowice Court of Appeal of 4 January 2013, II AKa 776/12).

The analyses of cases (done for the purpose of this report) prove that the practice follows the requirement of Article 607s § 3 of the CCP. Almost all decisions refusing the execution of the EAW issued with reference to Polish citizens contained three paragraphs: 1) refusal to execute the EAW; 2) a decision to execute the sentence imposed by the court of another MS; 3) a decision to classify the offence for which the sentence was imposed under the Polish criminal law and to indicate the exact penalty to be executed **(such practice was followed in 16 out of 20[4]** analyzed decision provided by all regional courts in Poland; in four remaining cases the situation was as follows:

- In one case the court decided only that "the execution of the penalty shall be initiated"; without transposing the penalty imposed in another MS into the penalty executed under the Polish law.
- In one case the foreign sentence could not be executed since it was a penalty of imprisonment imposed for unpaid fine.
- In one case no decision on execution of the penalty was taken together with a decision refusing to execute the EAW. The court argued that prior to deciding on the execution

[4] As previously mentioned (see, Part 1 of the questionnaire), for the purpose of this project we analysed 43 decisions refusing to execute an EAW. 30 decisions concerned EAWs issued for the purpose of executing a penalty of imprisonment. 20 out of 30 decisions were based on the grounds for refusal indicated in Article 607s § 1 of the CCP.

of penalty in Poland, the issuing judicial authorities shall submit additional documents necessary for execution of the penalty.

- In one case there was no decision on execution of the penalty; no reasons for this are stemming from the decision of the court refusing the execution of the EAW.

The analyses of practice of two Regional Courts also confirm that while refusing execution of an EAW (issued for execution of a sentence) due to citizenship of a requested person, courts decide on execution in Poland of a penalty imposed in another Member State.

In accordance with Article 607s § 4 of the CCP while deciding on execution of a foreign sentence, the court shall determine the legal qualification of the act pursuant to Polish law. Furthermore, if the penalty or measure imposed by the issuing state exceeds the prescribed upper threshold of the penalty for the offence under Polish law, the court determines the penalty or measure to be executed according to Polish law to the extend corresponding to this threshold, taking into account the period of the actual deprivation of liberty abroad and the period of the penalty or measure executed abroad (*adiustatur* principle). If documents or information necessary for execution of a penalty in Poland have not been attached to the EAW, the court shall adjourn the hearing and request the issuing authority to provide such documents or information.

The penalty shall be executed pursuant to Polish law. The CCP clearly states that the execution of such a penalty shall be governed by the provisions of the CCP transposing the FD 2008/909/JHA, i.e., Chapter 66g of the CCP. However, Articles: 611tg (regulating procedure of examination of a motion for the enforcement of a penalty of imprisonment), 611ti § 2 and 3 (concerning consent of a convict for transfer of a penalty for execution), 611tk (regulating grounds for refusal to execute the penalty), 611tm (concerning the protection stemming from speciality principle), 611to § 2 (supplementary information for the purpose of applying detention on remand) and 611tp of the CCP (concerning permission for a transfer of the requested person) shall not apply.

As transpires from the case-law of the Supreme Court, Article 607s § 4 in conjunction with Article 607t § 2 of the CCP shall be interpreted as meaning that the penalty transferred for the execution from the issuing state can be modified by the Polish court only as to its length and only if the penalty exceeds the upper threshold of the penalty for a given offence under Polish law. Thus, if such a "foreign penalty" is exceeding this threshold, the Polish court shall order the maximum penalty provided for this offence under the Polish law. Any other modification of this penalty, also with reference to the way of execution of this penalty, is inadmissible (resolution of the Polish Supreme Court of 30 November 2011, I KZP 15/11, OSNKW 2011, vol. 12, item 106).

Pursuant to Article 85 § 2 of the Polish Criminal Code, a cumulative penalty cannot be issued with reference to judgments indicated in Article 114a of the Criminal Code. The latter provision concerns judgments issued by the judicial authorities of other Member States of the EU. Hence, the "foreign penalty" enforced under Article 607s of the CCP cannot be covered by a cumulative penalty and cumulative judgment.

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?

See answer to question 6 above.

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?

In Poland all 46 Regional Courts are competent to act as issuing judicial authorities. Public prosecutors do not have such competence. However, at the investigative stage of criminal proceedings public prosecutors are entitled to submit to a competent regional court a motion for issuing an EAW for prosecution purposes. Such a motion must be accompanied by the national arrest warrant issued by the competent court.

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;

- (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;

- (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;

- (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?

As mentioned above, public prosecutors in Poland do not have competence to issue the EAW. At the investigative stage of the proceedings, they may only request issuing the EAW. Such request shall be submitted to the regional court having territorial jurisdiction over the place where the investigation is being conducted.

Pursuant to § 292 of the Ordinance of the Ministry of Justice of the 7 April 2016 (rules on the functioning of public prosecutors' organizational units), a request for issuing an EAW shall be submitted to the regional court by: the Director of the Department for Organized Crime and Corruption of the State Public Prosecution Office; Head of Department of Internal Affairs of the State Public Prosecution Office, Head of Branch Office of the State Public Prosecution Office; Regional Public Prosecutor or District Public Prosecutor.

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?

As transpires from replies to the questionnaire submitted by judges, the EAW forms are filled in by judges or judge's assistants (he/she prepares the draft of the EAW form which is accepted by a judge). Some judges mentioned also a clerk of the court's registry as a person who fills in the EAW's form. The decision (with written reasons) on issuing the EAW must be given by the regional court. However, the draft of written reasons may also be prepared by a judge's assistant.

b) What are the formalities for issuing an EAW? Does your Member State have a (digital) template of the EAW-form?[5] If so, please attach a hardcopy of the template to the questionnaire.

Yes, the new EAW-form (supplemented by new part D following the FD 2009/299/JHA) was published as attachment to the Ordinance of the Ministry of Justice of 24 February 2012 on establishing the template of the EAW-form (Journal of Laws of 2012, item 266).
See: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20120000266/O/D20120266.pdf

An EAW may be issued upon the motion of another procedural organ or *ex officio*.

- An EAW for prosecution purposes at the investigative stage of the proceedings is issued upon the motion of the public prosecutor. He/she shall attach the national arrest warrant to the motion for issuing such EAW unless the regional court competent to issue the

[5] Compare the consolidated EAW-form in word format at:
https://www.ejn-crimjust.europa.eu/ejn/libcategories/EN/5/-1/0.

EAW is also competent to issue a national arrest warrant (see, S. Steinborn, *Komentarz do artykułu 607c kodeksu postępowania karnego*, Lex/el. 2015, para. 5).

- An EAW for prosecution purposes at the judicial stage of the proceedings is issued upon the motion of a court before which the case is pending; if the case is pending before the regional court, then the EAW is issued *ex officio* by this court.
- An EAW for enforcement purposes is issued upon the motion of the court responsible for execution of the penalty of imprisonment or *ex officio* – if the regional court is responsible for the execution of the penalty.

A decision to issue an EAW is not subject to appeal. However, a national arrest warrant which form the basis of issuing an EAW may be subject to appeal. See, resolution of the Supreme Court of 20 January 2005, I KZP 29/04, OSNKW 2005, no. 1, item 3; see also: A. Sakowicz, in: *Europejski nakaz aresztowania w teorii i praktyce państw członkowskich Unii Europejskiej*, red. P. Hofmański, Warszawa 2008, p. 132-133.

c) When deciding on issuing:

- a *national* arrest warrant,[6] 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;

    - (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;

    - (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 detention (*OJ*, L 294/20)[7], instead of issuing a national arrest warrant, expressly addressed in that examination, both in law[8] and in practice?

A national arrest warrant may be issued only if the statutory prerequisites/grounds for detention are fulfilled. The CCP provides for general grounds for detention and specific grounds for detention. In accordance with Article 257 § 1 of the CCP, detention on remand is not ordered if a different preventive measure is sufficient. On the other hand, Article 258 § 1 of the CCP allows for detention "if there is a justified concern that the accused may escape or go into hiding, especially if his identity cannot be established or he does not have a permanent place of residence in the country." These are specific grounds for detention which can be used very easily towards foreigners. Furthermore, it should be stressed that before bringing a bill of indictment to the court, a person must be heard as a suspect. For this reason, if a person is not

[6] *I.e.* a national judicial decision ordering the arrest and/or detention of a person.
[7] According to the information provided on the website of the European Judicial Network, only Ireland has not transposed FD 2008/829/JHA yet.
[8] *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?

present in Poland, usually the public prosecutor is requesting the court to issue detention order (i.e. national arrest warrant).

However, prior to initiating the EAW procedure, the prosecutorial organs shall exhaust other measures of establishing the whereabouts of the requested person and available ways to summon him/her to appear before the procedural organs. Otherwise, the court may refuse to issue the EAW. As already mentioned, for the purpose of this project we have analyzed 551 decisions of the regional courts refusing to issue the EAWs. 23 out of 551 decisions concerned the motions to issue the EAW for prosecution purposes. In 2 out of these 23 decisions refusal was reasoned by the lack of exhaustion of available measures to contact the requested person abroad. In one case (II Kop 2/20, a decision of the Regional Court in K.) the court explicitly relied on the possibility to use the EIO. In another case (II Kop 12/20, a decision of the Regional Court in C.) the court stated that the public prosecutor did not exhaust the opportunity to summon the requested person to his known address in UK or to contact with him through the intermediary of his defence counsel.

Poland implemented the directive 2014/41/JHA on EIO (Chapters 62c and 62d of the CCP). Thus, a suspect may be heard by using videoconference or other audiovisual transmission. However, he must consent to such hearing otherwise the execution of an EIO may be refused (see, Article 24(2)(a) of the directive).

On the possible use of EIO instead of the EAW – see answer to question 76 below.

The Framework Decision 2009/829/JHA was also implemented by Poland. However, in my opinion an ESO hardly can be an alternative to issuing of the EAW. The aim of both measures is different. The majority of prosecution-EAWs is issued in order to have the requested person available for bringing charges against him/her. This cannot be done using ESO.

We did not notice cases in which the fact that a requested person is a Union citizen who exercised his right to free movement, would play any role in that examination with reference to cases concerning prosecution-EAWs. Sometimes this fact was considered by the court deciding on issuing the EAW for the purpose of execution of the penalty (see, answer to question 76).

- 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;
    - (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;
    - (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)[9], in particular the possibility of issuing

[9] This directive does not apply to Ireland.

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,[10] by videoconference or other audiovisual transmission,[11] or otherwise,[12] 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 an execution-EAW, expressly addressed in that examination, both in law[13] and in practice?

Article 607b of the CCP provides that it is not possible to issue an EAW, even if formal prerequisites for issuing are fulfilled, if this is not required by "the interest of justice". Such wording of this provision was introduced into the CCP in 2015 (in force since 1 July 2015) as a measure limiting extensive use of EAW's procedure by the Polish issuing authorities, also in cases concerning offences of low severity.

However, even prior to this amendment some courts underlined that since issuing of the EAW is not mandatory, before issuing the court shall consider whether engaging foreign judicial authorities is necessary taking into account the severity of an offence and the penalty which may be imposed for this offence (decision of the Regional Court in Tarnów of 26 October 2004, II Kop 17/04).

The Regional Court in Tarnobrzeg in its decision of 16 July 2015 (II Kop 14/15) refused to issue the EAW for execution of the penalty of 8 months imprisonment which was imposed as suspended sentence in 2012 and afterwards ordered to be executed in 2014. The Court stressed that „having regard to the number of judgments issued in Poland, for obvious reasons it is not possible and justified to initiate the EAW procedure in every case in which the penalty of more than 4 months of imprisonment is imposed and a convict is staying in the territory of another EU state. Issuing EAWs in cases concerning minor offences would undermine the confidence in this procedure." The Court underlined the need to apply proportionality principle and relied on documents of the Council of the European Union: 8302/4/09 COPEN 68; 7361/10 COPEN 59; 8465/2/10 COPEN 95; 10630/1/10 Presses 161 s. 33.

In reply to the questionnaire, judges mentioned the following examples of Article 607b of the CCP being applied: cases concerning minor offences (of minor severity); execution of a penalty of 6 months while after deduction of detention on remand applied in the case the

[10] 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).
[11] 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).
[12] 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 audio-visual transmission (see Art. 10(2)(c) of Directive 2014/41/EU).
[13] *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?

part of penalty which should be enforced amounts to just over 4 months; requests concerning issuing the EAW with reference to an offence of not paying required support to a next of kin or other persons (Article 209 of the Criminal Code); requests concerning issuing the EAW with reference to an offence whose prosecution will be statute-barred soon.

Sometimes courts rely directly on the Polish Constitution and the European Convention on Human Rights while refusing to issue an EAW:

The Regional Court in Płock in its decision denying issuing the EAW (decision of 25 April 2017, II Kop 25/16) stated as follows:
A significant delay in execution of a penalty diminishes the superiority of public interest over a private interest of a convict, his right to private and family life. Delay in applying legal measures causes disproportionate interference with the personal goods of a convict, which is contrary to Article 8 of the European Convention on Human Rights. Everybody, including sentenced persons, has a right to private and family life and every interference with this right, if not proportionate, is inadmissible. The same standard is stemming from Article 31 (2) first sentence and Article 31 (3) of the Constitution. Applying the above rules, the Court states that issuing the EAW 12 years after issuing the final judgment in case no. II K 494/02 and 18 years after commission of the offence, would violate the provision of Article 8 of the European Convention on Human Rights (which in accordance with Article 8 (2)(2) and Article 91 (2) of the Constitution has priority over the statutory law) and Article 31 (2)(3) of the Constitution."
The court underlined that financial interest of a victim in this case may be preserved by using European Enforcement Order (Polish: Europejski Tytuł Wykonawczy), since the place of residence of a convict and his employer abroad are known.

Conclusions stemming from the analyses of 551 decisions of Polish court refusing to issue the EAW, delivered in 2020.

In my opinion the proportionality principle is applied by the Polish court in adequate manner. As transpires from statistical data provided by the Ministry of Justice, in 2020 all Polish regional courts issued altogether 1795 EAWs. If we compare this data with the number of refusals (551 cases) and the fact that most of these refusals were reasoned by proportionality principle, one may argue that the proportionality principle is expressly addressed in the EAW procedure, both in law and in practice.

With reference to requests to issue an EAW for execution purposes (528 decisions)

The following reasons were invoked by courts as justification of refusal to issue the EAW:

- Lack of proportionality ("lack of interest of justice") due to **the severity of penalty** and **type of offence** for which such penalty was imposed (penalties slightly exceeding 4 months; penalties originally suspended; type of offence – usually requests for issuing the EAW in order to execute the penalty for not paying required support to a next of kin or other person (Article 209 of the Criminal Code) were refused with the reasoning that such acts are not offences *inter alia* in UK or Denmark; also some requests concerning offences against property or possession of cannabis; sometimes issuing the EAW was refused with reference to the penalty

imposed for insult of a public official (a police officer or a municipal guard) – the courts relied on their previous experience that such EAWs were not executed by other MS;

We discovered very interesting and divergent practice in cases where the imposed penalty was exceeding 4 months but the remaining part of penalty which should still be executed was not exceeding 4 months. Some courts argued that issuing the EAW with reference to such remaining penalty not exceeding 4 months is inadmissible. Other courts stated that the requirement concerning the amount of penalty applies to the penalty originally imposed and not this part of penalty which remained unexecuted. However, these courts refused to issue the EAW relying on proportionality principle.

- "proportionality test" was also applied in cases in which very long period expired between the commission of an offence and conviction to the penalty of imprisonment and submitting the motion for issuing the EAW for the purpose of its enforcement (in one case – such motion concerned the penalty imposed 21 years ago; in another case 10 years elapsed between the commission of an offence and submitting the motion for issuing the EAW).
- The lack of proportionality was also invoked as a reason for non-issuing the EAW in the following cases: 1) where the probation period of 5 years for which the penalty of imprisonment was suspended has expired[14]; the requested person was respecting the legal order during this time and the only reason for ordering execution of the suspended sentence was that the requested person has avoided contacting his probation officer; 2) the expiry of the time-limit within which the sentence may be executed is very distant, so there is a chance to enforce the sentence in the future once the requested person appears voluntary in Poland; 3) although the cumulative penalty of 2 years imprisonment cannot be assessed as insignificant, but due to very low severity of offences for which individual penalties were imposed the court found that issuing the EAW for the purpose of the execution of cumulative penalty would not be proportionate; 4) in some cases the courts refused issuing the EAWs with reference to execution of penalties of imprisonment imposed as substitute penalties for unpaid fine or for penalty of restriction of liberty which was not executed within the prescribed time-limit; in some cases requests for issuing an EAW with reference to substitute penalties of imprisonment were refused as inadmissible.
- In many cases the Polish courts refused to issue the EAW for the purpose of execution of a penalty relying on Article 4a of the FD EAW. The courts underlined that, having regard to previous experience, there is a little chance to have such EAW executed **since the judgment was delivered *in absentia*** (the courts argued that the so called "presumption of summoning" to the hearing is not equal to summoning required by FD EAW; they relied on the judgment of the Court of Justice in the case C-108/16 PPU, Dworzecki). Sometimes the "in absentia" argument was combined with the reasoning concerning proportionality and small amount of penalty to be executed.

  Example: in one case the court refused to issue the EAW for execution purposes with reference to the cumulative judgment issued in 2017 and imposing a cumulative penalty of 1 year imprisonment (initially suspended for a period of 3 years, its execution was ordered in 2018). A convict was obliged to remain under the

[14] In accordance with Article 75 § 4 of the Criminal Code, the execution of the suspended penalty may be ordered no later than within 6 months after expiry of the probation period.

supervision of the probation officer (Polish: dozór kuratora). The cumulative penalty was issued as a result of joining two individual penalties: 6 months imprisonment (suspended) for causing slight injury and 10 months imprisonment (suspended) for drunk driving. No supervision of a probatory officer was ordered in these individual cases. In 2018 a court ordered that the suspended cumulative penalty of 1 year imprisonment shall be executed since the convict avoided the supervision of a probation officer. It was established that a convict is staying in Portugal. However, the court refused to issue the EAW for the following reasons: 1) only one individual penalty subsequently joined into cumulative penalty was imposed for an offence of significant degree of social harmfulness; 2) the cumulative judgment was issued *ex officio* and the convict did not take part in these proceedings, neither was he summoned in person to the hearing. The court sent the summons only to the address indicated in the casefile of previous proceedings concerning individual offences. Since the summonses were delivered twice and not taken by the convict, the court applied the "presumption of proper summoning". The court deciding on the issuing the EAW underlined that the presumption of proper summoning could not be used in this case since the convict did not provide the court with the information about the current address since he/she did not know about the initiation of the cumulative proceedings (these proceedings were initiated *ex officio*). Furthermore, since in both individual criminal proceedings he was punished to the suspended penalty without applying the supervision of a probatory officer, he was not even obliged to inform the authorities about any change of his place of residence. Thus, he did not know about the imposition of the cumulative sentence and supervision of a probation officer with reference to execution of this sentence. The court underlined that taking into account all these circumstances and the practice of applying Article 4a of the FD EAW by EU courts, the EAW in this case, if issued, would not be executed.

- **Other reasons given by courts as justification for refusal**: sending an EAW to UK is inadmissible after BREXIT, so the interest of justice does not require issuing an EAW; lack of updated information which would confirm that the requested person is a fugitive; lack of verification whether sending a summons to a requested person at his/her address abroad would not suffice and would not result in his/her appearance for serving a sentence; lack of necessary documents proving the exact amount of individual penalties covered by cumulative penalty; the interest of justice does not require to issue an EAW during the Covid pandemic; possibility to use the EIO in order to summon the requested person for execution of the sentence.
- **In some cases the citizenship of the requested person played a role and influenced the decision on issuing an EAW for the purpose of execution of a penalty. Example:** in one case the motion to issue an EAW concerned the execution of the penalty of one year of imprisonment imposed by the Polish court on a French citizen. The penalty was orginally imposed as "suspended deprivation of liberty". However, since the convict had not compensated the damage casued by his offence (the offence of property damage), the enforcement of this penalty was ordered by the court. The court refused to issue the EAW arguing that it would be not in the interest of justice for the following purposes: 1) the penalty imposed is not very severe and additionally the penalty to be executed is shorter than the penlaty

imposed due to the need to deduct the period of almost two monts of detention. Thus, assuming that in the executing MS the requested person would be subject to detention pending surrender, the remaining period of penalty executed in Poland after surrender would be very short. 2) the damage casued by the offence is not very high taking into account European realities. 3) the requested persons has French citizenship, so there is a risk that the EAW would not be executed by French judicial authorities. 4) Since the wherabouts of the requested person in France are known, there is a possibility to request French authorities to execute this penalty in France.

- In a few cases courts refused to issue EAW **for enforcement of a cumulative judgment of one year** of imprisonment arguing that individual penalties covered by this judgment are symbolic. The court stated that it is highly probable that such an EAW would not be executed once the executing judicial authorities would be acquinted with the severity of individual penalties replaced by the cumulative judgment. The court underlined that even if an EAW refers to the cumulative judgment, the executing judicial authority is entitled to ask for information about individual penalties joined into the cumulative penalty in the cumulative judgment.

With reference to requests to issue an EAW for prosecution purposes (23 cases)

The following reasons were invoked as justification for refusing to issue prosecution-EAWs:

- Type of offence (for example the offence is subject to penalty for up to three years of imprisonment; the courts referred to the low severity of offences in cases concerning (the list is not exhaustive): a fraud causing insignificant damage; forgery of documents; making threats to another person to commit an offence detrimental to that person or detrimental to his next of kin, if the threat causes in the threatened person a justified fear that it will be carried out; the offence of not paying required support to a next of kin or other person, indicated in Article 209 of the CC).
- because of the type of offence there is no chance for execution of an EAW due to lack of double criminality (the offence of not paying required support to a next of kin or other person, indicated in Article 209 of the CC).
- Opportunity to use the EIO (examples of such cases are presented in the answer to question 76).
- Requested persons residing in another MS do not have the obligation to indicate the address for summoning in Poland, so the prosecutorial authorities shall first try to use the EIO (explanation: since 5 October 2019 defendants residing in another MS of the EU are not required to indicate the addresses for summoning in Poland, they can indicate also the address in another MS[15]).
- Divergence between legal classification of the offence in the decision to bring charges against a suspect and in the decision on detention (i.e., the national arrest warrant).

[15] Recently amended Article 138 of the CCP reads as follows: "A party to the proceedings, as well as a person not having a status of a party but whose rights were violated, if he/she is not residing in Poland or in another Member State of the European Union, is obliged to indicate the addressee for service [i.e. the person or institution which could take a summons] in Poland or in another Member State of the European Union. If he/she fails to do so, a summons sent to the last known address in Poland or in another state of the European Union and, if there in no such address, attached to the case-file, is treated as properly served."

- Lack of verification whether a requested person is a fugitive.
- A significant time lapse between bringing charges against a suspect and issuing a wanted notice (for example in one case charges were brought against a suspect in 1999 but the motion of a public prosecutor to issue an EAW for prosecution was submitted to the court in 2020. For this reason, the court refused to issue an EAW).

For examples of practice indicating non-application of proportionality principle, see: https://www.hfhr.pl/wp-content/uploads/2018/07/European-Arrest-Warrant-EN.pdf p. 29-30
See also: W. Klaus, J. Włodarczyk-Madejska, D. Wzorek, *In the Pursuit of Justice: (Ab)Use of the European Arrest Warrant in the Polish Criminal Justice System*, Central and Eastern European Migration Review, vol. 10, no. 1, 2021, p. 106-108.

With reference to the possible use of FD 2008/909/JHA:

The CCP offers the legal framework for the use of the mechanism provided for in the 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 the EAW mechanism.

Framework decision 2008/909/JHA was transposed to Polish law (Articles 611t-611ts of the CCP). However, transfer of the penalty of imprisonment imposed by Polish court on a Polish citizen to another Member State for execution may take place only if the judicial organs of this State consent to execution of this penalty (Article 4 § 1 (c) of the FD 2008/909/JHA). In practice a lot of EAWs issued for enforcement purposes concern Polish citizens sentenced in Poland to the penalty of imprisonment but residing abroad. Thus, the opportunity of using the mechanism provided for in the FD 2008/909/JHA instead of the EAW procedure depends on the consent of executing authorities of another Member State.

The analyses of cases conducted for the purpose of this report prove that quite often a procedure of transfer of the penalty to another Member State for execution is initiated by Polish citizens willing to have the sentence executed in another Member State.

In one case analyzed for the purpose of this report a defence counsel of a convict (sentenced in Poland to cumulative penalty of imprisonment for a few offences) submitted to the regional court a motion to transfer the cumulative sentence for execution to Germany where he claimed to have his place of residence. He relied also on family and business ties with Germany. However, these circumstances were not confirmed by German executing authorities and the consent to the forwarding of the judgment was refused.

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?

Under Article 7 of the FD EAW Poland designated "the central authority that can act as intermediary in transferring to the competent Polish prosecutors' offices EAWs issued by the authorities of other Member States, as well as all other official correspondence relating thereto" This authority is:
"Minister of Justice - Attorney General Address for correspondence: National Prosecutor's Office Bureau of International Legal Cooperation Al. Ujazdowskie 11 00-950 Warsaw, Poland"

The same central authority was designated under Article 25(2) of the Framework Decision as the authority responsible for receiving transit requests and the necessary documents, as well as any other official correspondence relating to transit requests.

See, https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=328
And revised declaration:
https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=329

However, in Poland there is no "central authority" responsible for issuing or executing EAWs. Issuing and executing EAWs remains within the exclusive competence of all regional courts.

All correspondence concerning supplementary information shall be exchanged directly between the Regional Courts acting as issuing and executing judicial authorities and judicial authorities of other UE Member States (see, A. Górski, A. Sakowicz, in: *Kodeks postepowania karnego. Komentarz*, ed. A. Sakowicz, Warszawa 2020, p. 1616). The Authors stress that upon the request for additional information the regional court shall promptly collect requested information and documents and transmit them to the executing authority). In case of the EAW issued at the pre-trial stage of the proceedings additional information upon the request of the executing judicial authority may be submitted by a public prosecutor. Exchange for information shall be conducted without involvement of the Minister of Justice (see, B. Nita-Światłowska, in: *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka, Warszawa 2020, p. 1754). However, copies of all EAWs issued by the Polish judicial authorities shall be submitted to the Ministry of Justice (Article 607d § 3 of the CCP).

Article 15 (2) and (3) of FD 2002/584/JHA was transposed into Article 607d §§ 2 and 3 of the CCP and Article 607z of the CCP. Pursuant to Article 607d §§ 2 and 3 of the CCP:
"§ 2. If the place of stay of the requested person is known or has been determined as a result of the search referred to in § 1, the public prosecutor, and in judicial and enforcement proceedings - the regional court that has issued the warrant, shall transmit it directly to the executing judicial authority; a copy of the warrant shall be transmitted to the Minister of Justice.
§ 3. The provision of § 2 shall apply accordingly if the executing state has requested additional information or documents.

With reference to Polish courts acting as executing judicial authorities Article 607z of the CCP reads as follows:
§ 1. If information transmitted by the issuing judicial authrity is not sufficient to take a decision on surrender of the requested person, the court shall call on the judicial authority that has issued the EAW to supplement the information within a specified time limit.
§ 2. In the event of failure to comply with the time limit referred to in § 1, the EAW shall be examined on the basis of the previously received information.

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?

All 46 regional courts in Poland act as executing judicial authorities.
In accordance with the notification of Poland made under Article 6(3) of the Framework Decision:

"The issuing judicial authority is the circuit court having territorial jurisdiction. The executing judicial authority is the circuit court having territorial jurisdiction, but the following circuit prosecutor's offices having territorial jurisdiction are competent to receive EAWs issued by the authorities of other Member States" (here is the list of several prosecution offices competent to receive EAWs).

See: https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=329

Explanation: in my opinion better translation for "sądy okręgowe" is "regional courts" than "circuit courts". In Poland we have three levels of courts: district courts (Polish: sądy rejonowe); regional courts (Polish: sądy okręgowe) and appellate courts (Polish: sądy apelacyjne).

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;

  No. In both cases the procedure is conducted before the competent regional court.

- 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)?

Public prosecutors do not have competence to decide on these issues.

In accordance with Article 607l § 1 of the CCP, a decision on surrender and on detention pending surrender is delivered at the hearing (session of the court) in which the public prosecutor and the defence counsel may participate.

A consent to surrender may be expressed only before the regional court competent to decide on the execution of an EAW. Even if such a consent is expressed earlier before the public prosecutor, it is not considered valid for the purpose of the EAW's proceedings. Article 607l § 2 of the CCP states that if a requested person expresses such a wish, the court will take from him and record in the minutes of the session a consent to surrender and the waiver of the speciality principle. Such consent and waiver cannot be withdrawn.

Pursuant to Article 607l § 4 of the CCP the Ministry of Justice issued an Ordinance on the template of "a letter of rights" which shall be given to every requested person prior to the hearing on the execution of an EAW (Journal of Laws of 2015, item 874).
In section 12 the letter of rights includes the information on the possibility to consent to surrender and to waive the speciality principle as well as an information that such consent and waiver cannot be withdrawn.

As transpires from Article 607l § 1a of the CCP, when notifying the requested person of the hearing of the court mentioned in Article 607l § 1 of the CCP, the court shall serve on him/her the EAW together with the translation obtained from the public prosecutor. If, due to particular circumstances, the translation cannot be obtained before the hearing, it is ordered by the court. In such a case the court may limit itself to informing the requested person about the content of the EAW, if it does not hinder the requested person's rights, including those relating to the opportunity to express the consent to surrender and the application of the speciality principle.

Decisions on postponed or conditional surrender are taken by the competent regional courts.

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:

There is no specific provision in the CCP which would oblige the executing authorities to take into account proportionality principle while deciding on the execution of EAWs. However, such a role may be played by Article 607p § 1 (5) of the CCP which provides that execution of the EAW shall be refused if surrender would violate human and citizens' rights and freedoms.

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

- (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;

- (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)[16], 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,[17] by videoconference or other audio-visual transmission,[18] or otherwise,[19] 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[20] and in practice?

As mentioned in the introductory part of this report, we analyzed 43 decisions refusing to execute the EAWs. 30 decisions concerned the EAWs issued for the purpose of executing a penalty. 13 decisions concerned prosecution-EAWs.

Analyses of decisions of Polish courts refusing the execution of EAWs as well as replies of judges to the questionnaire provide the following examples of reasons for refusal other than mandatory/optional grounds for refusal indicated in the FD EAW[21]:

- Courts refused execution of EAWs aimed at enforcement of the penalty of imprisonment imposed as the substitute sentence for unpaid fine.
- Sometimes courts refused execution of EAWs due to the fact that issuing judicial authorities do not respond to requests for supplementary information within the fixed time-limit;
- (in a few cases): a risk for protection of human rights – the lack of impartiality of the issuing authority; the issuing authority when deciding on the execution of EAW's issued by Polish judicial authorities is not objective, asks several irrelevant questions concernig salaries of judges; additionally such questions are not translated into Polish, ect. (case

[16] This directive does not apply to Ireland.
[17] 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).
[18] 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).
[19] 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 audio-visual transmission (see Art. 10(2)(c) of Directive 2014/41/EU).
[20] *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?
[21] 20 out of 30 decisions refusing execution of EAWs issued for enforcement purposes were based on Article 607s § 1 of the CCP (lack of consent of a Polish citizen for surrender). In 6 cases the courts negatively verified the condition of double criminality. In remainig cases other mandatory or optional grounds for refusal were found.

VIII Kop 180/20, a decision of 21 September 2020 of the Regional Court in W.; VIII Kop 181/20, a dcision of the Regional Court in W. of 21 September 2020);

- In another case the surrender under the prosecution-EAW was refused with reference to Swedish national accused of parental child abduction. The court stated that surrender would be contrary to the right to private and family life of the requested person and his son (case IV Kop 56/20, a decision of the Regional Court in G.).

No refusals of execution of an EAW justified directly by the proportionality principle or the possible use of EIO were found among decisions examined for the purpose of this project.

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

No. The public prosecutors may only receive EAWs and submit to the regional court a motion for their execution or a motion for non-execution of the EAW.

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

- (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.

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?

Yes, Poland designated a central authority. For details, see the answer to question 9d above. However, requests for additional information shall be submitted to the issuing judicial authorities directly by the Regional Courts competent to decide on the execution on an EAW (see, Article 607z of the CCP quoted in the answer to question 9d).
Moreover, pursuant to § 356 of the Ordinance on rules of functioning of common court of law, the regional courts are obliged to send to the Ministry of Justice:

a) a copy of a decision on execution of the EAW with the information on the time expiring between the arrest of the requested person and final examination of the EAW.
b) a copy of the EAW translated into Polish.
c) information on the time of execution of the EAW (until surrender).
d) copies of documents sent to the issuing judicial authorities containing information about reasons of non-compliance with the time-limit for examination of the EAW and surrender.

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?

A temporary surrender is regulated in Article 607o §§ 1 and 2 of the CCP which read as follows:

"§1. If criminal proceedings are conducted in Poland against a requested person for an offence other than that indicated in the EAW or this person is to serve the penalty of imprisonment for such an offence in Poland, the court, while issuing the decision on surrender, may postpone its execution until the criminal proceedings in Poland are concluded or penalty of imprisonment is served.
§2. In the situation referred to in § 1, the court, having notified the issuing authority thereof may, upon the motion of the issuing authority, temporarily surrender the requested person under conditions specified in an agreement concluded with this authority. Such an agreement is drawn up in writing and defines the conditions of surrender, and, in particular, the date on which the requested person is returned."

As clearly transpires from this provision, a decision on temporarily surrender is taken by a court having a general competence to decide on execution of an EAW. Furthermore, a decision on temporarily surrender is always optional and is subject to appeal under the same conditions as "ordinary" decision on surrender.

There are some doubts as to the relationship between the first and second paragraph of the cited provision. It is unclear whether the temporarily surrender must be preceded by a decision mentioned in paragraph 1, i.e., a decision to postpone the execution of an EAW, or not. It seems from the wording of this provision that both interpretations are possible. However, the preference is given by some authors to the first one, i.e. that first the court should postpone the surrender and subsequently decide on temporarily surrender, of course, if requested by the issuing judicial authority (see, T. Ostropolski, in: *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komantarz do Działu XIII KPK*, Warszawa 2016, p. 736).

Article 607o § 2 of the CCP does not indicate who is competent to conclude the agreement mentioned in this provision. Majority of commentator mentions the court competent to decide on the temporarily surrender, represented by its president (see, S. Steinborn, *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego*, Lex/el. 2015, komentarz do art. 607o, ed. L.K. Paprzycki, J. Grajewski, Lex/el 2015).

The CCP does not regulate special legal basis for detention in relation to a temporarily surrender. However, a temporarily surrender in practice is granted only if the court has already decided to surrender the requested person but postponed the execution of an EAW. In accordance with the jurisprudence, detention pending surrender may also be applied (on the basis of an EAW and a national arrest warrant) in case of postponed surrender, until the EAW is executed (see, a decision of the Court of Appeal in Katowice of 25 February 2009, II AKz 128/09). It is underlined that that the maximum time-limit for detention pending surrender indicated in Article 607k § 3 of the CCP (100 days) does not apply if execution of the EAW is postponed in accordance with Article 607o of the CCP (A. Górski, A. Sakowicz, in: *Kodeks postępowania karnego. Komentarz,* ed. A. Sakowicz, Warsawa 2020, p. 1646). Hence, the requested person subjected to temporarily surrender may be kept in "detention pending surrender" applied for the need to secure execution of the EAW.

However, usually the procedure of Article 607o of the CCP is used because the requested person is serving prison sentence in Poland or is detained with reference to other criminal proceedings pending in Poland. In such cases there is no need to detain a requested person specially for the purpose of temporarily surrender. As mentioned in the literature, in such cases the time of temporarily surrender shall be deducted from the time of penalty of imprisonment actually

executed or from the time of detention imposed in the criminal proceedings conducted in Poland. These issues may be subject of an agreement concluded between the Polish executing authorities and the issuing authority (see, S. Steinborn, *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego,* Lex/el. 2015, komentarz do art. 607o, ed. L.K. Paprzycki, J. Grajewski, para. 11-18).

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 answer to question 9b above.

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?

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

No, Poland did not make a declaration as provided in Article 8(2) FD EAW.[22]
As transpires from the information available at the website of the EJN, the EAW directed to Poland should be translated into the Polish language.[23]

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.

Judges do not indicate such problems.

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?

It is noticed by judges that in case of language problems they order translation of the original EAW into Polish. Such problems do not have impact on final decision on execution of an EAW.

One judge mentioned that additional questions coming from the Netherlands are quite often not translated into Polish. They are formulated in English. Moreover, it is not clear whether these questions were formulated by a judge.

[22] See: https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/3224
[23] https://www.ejn-crimjust.europa.eu/ejn/EJN_FichesBelgesResult/EN/901/351/-1
However, it should be mentioned that EAWs issued in Poland are translated into English in order to make appropriate alerts in SIS and initiate international search. See, B. Augustyniak, in: *Kodeks postępowania karnego. Komentarz aktualizowany, tom II*, ed. D. Świecki, Lex/el. 2022, para. 2.

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.

No. Judges did not indicate such difficulties.

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.

No. Judges did not indicate such difficulties.

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.

Judges expressed doubts concerning cumulative judgments: it is unclear whether apart from a cumulative judgment also all judgments covered by a cumulative judgments should be indicated in section B of the EAW form.

The analyses of the case-files made for the purpose of this report allow for the following conclusion:
Usually in case of EAWs issued for the purpose of execution of a cumulative sentence imposed by a cumulative judgment in section B of the EAW's form only the cumulative judgment is indicated. Furthermore, in section C usually only a cumulative penalty is indicated. On the other hand in Section E.1. the number of offences is provided corresponding with all penalties joined into the cumulative penalty. In section E.2. are also described offences for which individual penalties were imposed, joined into the cumulative penalty. Also in section F no information on the exact amount of individual penalties is indicated. Thus, in majority of analysed EAW forms no indication of the individual penalties, susbequently joined into the cumulative penalty in the cumulative judgment, was found. Sometimes the exact amount of indiviual penalties joined into the cumulative penalty tranpired from the decision of the court to issue an EAW for the purpose of execution of a cumulative penalty, but not from the EAW form itself.

However, it should be underlined that we analysed the practice of only 2 courts out of 46 regional courts competent to issue EAWs. Thus, only on the basis of our anlyses the above described practice may be assessed as prevailing. In some cases of EAW issued for the execution of a cumulative penalty Secitions B nad C of the EAW's form were filled-in with reference to individual penalties too.

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.

Only one judge stated that sometimes in section B are indicated both: a decision on detention (national arrest warrant) and also a judgment. This causes some difficulties in defining whether the EAW was issued for the purposes of prosecution or for enforcement of a sentence.

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, …).

Polish courts acting as issuing judicial authorities:

Polish law clearly regulates that an EAW for prosecution purposes may be issued only on the basis of "domestic" detention order, issued by a court. Article 607c § 1 (4) of the CCP provides that the EAW shall contain information on the case number, type and contents of the final and binding judicial decision in connection with which the EAW is issued.

In a few cases analyzed for the purpose of this research Polish courts did not accept motions of the public prosecutors and refused to issue an EAW at the investigative stage of the proceedings due to divergence between the scope and content of decision on detention on remand and the motion of the public prosecutor for issuing the EAW. In one case the court stated that the documents submitted by the public prosecutor are unclear with reference to the legal qualification of offences which form the basis for detention order and subsequent motion for issuing the EAW (in a decision on detention issued by a court the offences were qualified as participation in trafficking of significant amount of drugs and making this a permanent source of income [i.e. Article 56 § 3 of the Act of 29 July 2005 on counteracting drug addiction in conjunction with Article 65 of the Criminal Code], while other documents referred to granting somebody or facilitating the use or solicitation for the use of narcotics or psychotropic substances [Article 59 of the Act on counteracting drug addiction]). The court stated that it is unclear what are the exact allegations against the requested person and for this reason it refused to issue an EAW.

Polish courts acting as executing judicial authorities:

The analyses of cases in two Regional Courts conducted for the purpose of this project do not provide a clear answer to this question.

Furthermore, none of 13 analyzed decisions of the Polish courts refusing the execution of prosecution-EAW referred to the lack of conformity between the national arrest warrant and the EAW.

One of two interviewed judges stated that usually he is requesting the translated copy of a decision to issue an EAW for the purpose of examining whether this decision and the EAW-form are in conformity (Italy was mentioned in this context). In case of doubts, he is asking additional questions. Also, a copy of the national arrest warrant may be requested in order to

clarify the exact scope of the EAW. If no satisfactory clarification is provided, the EAW is executed only with reference to these offences which do not cause any doubts.

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,[24] whereas others do not.

[24] For the purposes of this project:

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'),[25] 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 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'?

- 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.

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

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?

Answer with reference to issuing the prosecution-EAWs:

First it should be underlined that the level of punitiveness of the Polish Criminal law is quite high. This means that the penalty of imprisonment for up to one year is not frequently provided in the Criminal Code. In majority of cases such penalty is not provided for a basic type of an offence but for privileged form of it. For example, a theft is subject to penalty for up to 5 years. However, if a theft if of "less significance" it is subject to penalty for up to one year (Article 278 § 3 of the CCP). The same applies to many other offences against property and other types of offences. Furthermore, very often at the investigative stage of the criminal proceedings the criminal act is classified as a basic type of an offence, but its legal classification may be altered during the judicial proceedings.
This is the reason why the issue of "accessory offences" does not appear as the practical problem for the issuing judicial authorities in Poland.

Pursuant to Article 607b of the CCP, an EAW for prosecution may be issued only if the offence is subject to the maximum penalty for more than 1 year. The CCP does not regulate the question of issuing EAWs with reference to accessory offences. However, due to clear wording of Article 607b of the CCP, it seems inadmissible to indicate accessory offences in the EAW's form. Moreover, this provision prohibits issuing the EAW if **the offence** "is subject to penalty not exceeding one year". Thus, the reference is made to **the penalty for one offence** but not to the penalty **for series of offences** (Polish: "ciąg przestępstw") regulated in Article 91 of the Criminal Code.[26]

[26] Pursuant to Article 91 of the Polish Criminal Code:
§ 1. If the perpetrator had committed, at short intervals and using the same opportunity, two or more offences before the first sentence was rendered even though not yet final, regarding to any of these offences, the court shall impose one penalty on the basis of the provision whose attributes each of these offences meet, up to the upper statutory limit increased by a half.
§ 2. If the perpetrator, in the conditions specified in Article 85 [this provision regulates prerequisites for imposing cumulative penalty], commits two or more of a series of offences specified in § 1, or a series of offences plus yet another offence, the court shall impose an aggregate penalty, applying the relevant provisions of this Chapter.
§ 3. If the perpetrator has been sentenced to two or more judgments for the offences belonging to a series of offences as specified in § 1, the penalty imposed in an aggregate sentence may not exceed the higher limit of the statutory penalty further increased by half as stipulated in the provisions, whose attributes each of these offences meet.

Summarising, Polish law does not allow for issuing EAWs for prosecution for accessory offences.[27]

Answer with reference to issuing the EAWs for execution purposes

The EAW for the purpose of enforcement may be issued only if the penalty imposed is more than 4 months. Article 607b (2) states as follows: "It is not admissible to issue the EAW if it is not required by the interest of justice. Moreover, it is not permissible to issue the EAW
[…]
(2) for the purpose of executing penalty of imprisonment of up to 4 months or any other measure involving deprivation of liberty not exceeding 4 months."

The situation is more complicated with reference to EAWs issued for the purpose of executing a cumulative sentence. Since the only penalty which is "enforceable" is a cumulative penalty (which is replacing individual penalties) it seems that the EAW for the purpose of execution may also be issued if one or more of the individual penalties covered by the cumulative sentence imposed in a cumulative judgment or in an "ordinary" judgment[28] are also penalties not exceeding 4 months. It is argued in the literature that by using the notion of "a penalty" Article 607b (2) makes reference also to a cumulative penalty since only this penalty may be executed (see, S. Steinborn, Komentarz do art. 607b kodeksu postępowania karnego, [Commentary to Article 607b of the CCP], Lex/el. 2015, para. 4; B. Nita-Światłowska, in: Kodeks postępowania karnego. Komentarz, [Code of Criminal Procedure. Commentary], ed. J. Skorupka, Warszawa 2020, p. 1750).

This standpoint was confirmed by two interviewed judges. They both stated that a cumulative penalty shall be taken into account while examining whether the threshold of penalty (4 months) was reached.

However, while analyzing EAW cases in two regional courts for 2020 we did not face such a legal situation (i.e. in which individual penalties joined into the cumulative penalty did not reach the threshold indicated in Article 607b (2) of the CCP).

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?

No, in accordance with the law (Article 607b of the CCP) the maximum sentence shall be indicated with reference to each offence.

[27] See also: *Handbook on how to issue and execute a European arrest warrant,* OJ C 335, 6.10.2017, p. 82 (Annex VIII).

[28] There are two procedural ways of issuing a cumulative penalty: in an "ordinary" judgement concerning more than one offence (the penalties are imposed for all individial offences and, once the prerequisites of Article 85 and 86 of the Criminal Code are fulfilled, also cumulative penalty is indicated); in a cumulative judgment – this is a special procedure initiate *ex officio* or upon a motion of a party to the proceedings if a convict was sentenced by at least two final judgments and the penalties imposed in such judgments fulfill the prerequisites of Article 85 and 86 of the Criminal Code.

In practice the EAW form contains all necessary information: about the maximum individual sentences for each offence and a single maximum sentence, if applicable. The latter applies to the so-called series of offences (see answer to question 18).

However, we noticed that in cases of the so-called cumulative qualification of the criminal act (i.e., one criminal act which fulfils the characteristic of more than one offence, for instance rape causing bodily harm), the maximum sentence was indicated in the EAW, i.e. the most severe sentence among all sentences provided in the provisions of the Criminal Code indicated in the cumulative qualification.

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, if the penalty is not a cumulative penalty. With reference to cumulative penalties – see answer to question 18.

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?

The wording of Article 607b (2) of the CCP is very clear on this issue: the reference is made to the duration of "the penalty imposed" by a court.

However, in practice three approaches are presented with reference to this issue:

1) If the penalty to be executed does not exceed 4 months of imprisonment, the EAW cannot be issued.
2) There are no formal obstacles to issue the execution-EAW with reference to remaining part of penalty shorter than 4 months of imprisonment if the penalty imposed exceeded 4 months. This is supported by the argument that both the FD EAW and the CCP refer to "the penalty imposed" and not "the penalty to be executed". However, issuing the execution-EAW for the purpose of execution of such symbolic penalty would not be "in the interest of justice". Thus, while analyzing the casefiles and courts' decision we did not find decisions on issuing the execution-EAW in order to execute the penalty not exceeding 4 months. Motions for issuing the EAW in such cases were simply refused on the ground of Article 607b of the CCP.
3) In practice EAWs are issued in order to execute the sentence of imprisonment exceeding 4 months if the part of this sentence which remained to be enforced is not exceeding 4 months. This is the case only if the same EAW relates also to execution of another judgment imposing a penalty of imprisonment exceeding 4 months.

It is argued in the literature, that although issuing the EAW for the purpose of execution of such remaining part of a penalty (not exceeding 4 months) is formally possible, it is not proportionate (not "in the interest of justice", as provided in Article 607b of the CCP). See, B. Nita-Światłowska, in: Kodeks postępowania karnego. Komentarz, [Code of Criminal Procedure. Commentary], ed. J. Skorupka, Warszawa 2020, p. 1750).

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?

In my opinion our law allows for surrender for only those offences which meet the necessary requirements. We did not find many cases concerning this issue.

However, in one case (IV Kop 49/20, a decision of the Regional Court in L.) the executing judicial authorities refused to execute an EAW from the Netherlands issued for the purpose of execution of the cumulative penalty of 6 months imprisonment imposed for a few offences. After requesting supplementary information, it appeared that only 2 offences out of 8 may be classified as "crimes" under Polish law. With reference to remaining offences the issuing judicial authority was not able to indicate the exact amount of value of stolen goods. Under Polish law stealing goods (things) constitutes an offence only if the value of that property exceeds 500 Polish zloty. If the value is 500 Polish zloty or less, than the act constitutes the so-called minor offence (Polish: wykroczenie) and using an EAW's procedure with reference to such minor offence is inadmissible. Since no exact value of stolen goods was indicated by the issuing judicial authorities, the court refused to execute the whole EAW. The court argued that since some of the offences covered by the EAW may constitute "minor offences" under the Polish law and the cumulative penalty of 6 months imprisonment was imposed for all these offences, the principle *in dubio pro reo* shall be applied and decided to refuse execution of the EAW with reference to all offences for which the cumulative penalty was imposed.

In another case (XIV Kop 79/20, a decision of the Regional Court in G.) the execution of the whole EAW was refused. The EAW was issued for the purpose of execution of a cumulative penalty of 4 years of imprisonment imposed for 19 offences. 6 out of 19 offences could not be classified as offences under the Polish law (lack of double criminality; these 6 offences could be classified in Poland only as "minor offences"). The court stated that since the penalty to be executed is a cumulative penalty, the execution of the whole EAW must be refused.

The same line of reasoning was applied in another case (III Kop 74/20, a decision of the Regional Court in J.G.) with reference to an EAW issued by German judicial authorities for the purpose of execution of a cumulative penalty of 9 months imprisonment.

Thus, as transpires from the above-mentioned examples, in case of an EAW issued with reference to cumulative (aggregate) sentence, the Polish courts acting as the executing judicial authorities refuse surrender with reference to the whole cumulative penalty. We did not notice examples of partial execution of an EAW in such cases.

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.

With reference to situation in which only part of the penalty shall be executed after surrender (since another part has already been executed), doubts were raised whether the penalty which shall be enforced after surrender shall be indicated in years, months and days or maybe only in days (number of days of penalty).

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.

Yes.
It was noticed by one judge that section C quite often does not contain necessary information on the period of deprivation of liberty deducted from the final penalty. This is important, *inter alia*, if the court refuses to execute the EAW and is obliged to order execution of foreign sentence in Poland.
Sometimes section C contains contradictory information. Both the statutory limits of the penalty for a given offence are indicated and the penalty actually imposed while in section B only the arrest warrant is mentioned as a basis for issuing the EAW.

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.

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).[29]

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

[29] 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).

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)

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.

Judges did not indicate any problems.
However, the analyses of the casefiles allow for the following conclusions:

1) Quite frequently supplementary questions concern individual penalties replaced by cumulative penalty.
2) Some executing authorities ask supplementary questions concerning details of the criminal offence; for example, the following question was asked: what words (exactly) were used by the defendant sentenced for insult of a public official.

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.

No, judges did not indicate any problems.

However, while analysing decision refusing execution of the EAWs we noticed one problem with regard to section (e) of the EAW's form. In one case there were doubts as to the exact number of offences to which the EAW relates. I section (e) only one offence was mentioned while from other sections it transpired that the number of offences was greater. The Polish court three times asked for a copy the judgment in order to verify the exact number of offences. Finally, such a copy was submitted only after intervention of Eurojust (case V Kop 45/20, a decision of the Regional Court in K.).

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 executing judicial authorities may obtain information on the requested person from the National Criminal Register. In practice quite often requested persons or they defence counsels inform the executing judicial authorities about previous conviction for the same act. Such information shall be verified by the executing judicial authorities.

Furthermore, in order to verify whether *ne bis in idem* obstacle to surrender occurs in the case, the executing judicial authorities ask the issuing judicial authorities some additional questions. While assessing whether "the same act" was the subject of a final judgment in Poland the courts rely on the case-law of the Court of Justice.

Example:
In the decision of 12 March 2013 (Kop 3/13), published in LEX, no. 1856153, the Elbląg Regional Court refused to surrender the requested person – a Polish citizen to Belgium in order

to conduct against her the criminal proceedings concerning parental child abduction (art. 432 § 2 i § 3 of the Belgian Criminal Code). Since the information presented in the EAW was not clear, the Polish court asked for additional information and the copy of the national arrest warrant. The information provided by the Belgian issuing judicial authority appeared to be insufficient since there was a difference between the content of the EAW and the national arrest warrant with reference to the number of charges brought against the requested person. For this reason the Polish court asked for further additional information. Additionally the court established that the requested person was prosecuted in Poland for child abduction under Article 211 of the Criminal Code, committed in Italy, and the proceedings against her was discontinued on the basis of Article 17 § 1 (3) of the CCP due to insignificant social effects of the committed act. Finally the court refused to surrender the requested person relying on two gounds: 1) with reference to the period of the requested person's stay in Poland – on the ground that the offence was committed in the territory of Poland which constituted the obligatory ground for refusal of surrender; 2) with reference to the period of her stay with a child in Italy – on the basis of the *ne bis in idem* prohibition. With regard to the second ground the court relied on the judgments of the Court of Justice delivered in the following cases: C-436/04 (*van Esbroeck*); C-150/05 (*van Straaten*); C-261/09 (*Mantello*).

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 –?

Verification of the requirement of double criminality is made on the basis of the description of an offence provided in section E of the EAW form. Sometimes requests for additional information are directed to the issuing judicial authorities.

Article 607r § 1 (1) of the CCP does not indicate the exact point of reference for assessing the requirement of double criminality. It is argued that such assesment shall be made according to the law in force at the time of the decision on the execution of the EAW (see, S. Steinborn, Komentarz do art. 607b kodeksu postępowania karnego, [Commentary to Article 607r of the CCP], Lex/el. 2015, para. 5; T. Ostropolski, in: Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz do Działu XIII KPK, Warszawa 2016, p. 813).

Judges who filled in the questionnaire indicated different points of reference for assessing double criminality condition:

- Three judges indicated the time, when the acts were committed.
- Seven judges indicated the time of the execution of the EAW.
- One judge indicated all three points of reference.
- One judge indicated two points of reference: the time when the act was committed and the time of execution of the EAW.
- Two questionnaires were not filled in with respect to this question.

Thus, the prevailing opinion of practitioners is consistent with the view of the doctrine. Also, in ordinary extradition procedure double criminality requirement is examined with regard to the time when extradition is decided by the court and subsequently by the Minister of Justice. Hence, if the act being subject to extradition procedure is no longer classified as criminal at the time of a decision made by the Minister of Justice, extradition should be refused even if at the time of the court's decision on extradition the act was classified as a crime.[30]

The analyzed case-law did not provide us with the answer to the question whether the choice of the point of reference for examining double criminality condition relates to the principle of *nullum crimen sine lege*.

As already mentioned, "qualified" test of double criminality is applied with reference to Polish citizens. If the requested person is a Polish citizen, such verification shall take place with reference to both: the time of commission of an offence and the time of submission of the EAW (see: Article 607p § 2 of the CCP; Article 55 of the Polish Constitution – see answer to question 6 above). However, the time of taking a decision on such EAW is irrelevant for checking double criminality requirement.

The "qualified" test of double criminality applied to Polish citizens relates to the *nullum crimen sine lege* principle regulated in Article 42 para. 1 of the Constitution (see B. Nita-Światłowska, *Ograniczenia ekstradycji po zmianie art. 55 Konstytucji RP a europejski nakaz aresztowania,* Przegląd Sejmowy 2008, no. 2, p. 100).

As transpires from the analyses of decisions refusing to execute EAWs due to the lack of double criminality (all of them concerned Polish citizens), the courts verified this requirement with reference to both: the date of commission of an offence and the date of deciding on the execution of the EAW.

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 offence under the law of your Member State? If so, please give some examples;

One judge noticed a refusal concerning an offence consisting of "possession of manual gas thrower". Another judge mentioned an EAW concerning a person accused of parental abduction while parental rights of a defendant were not limited by the court both according to the law applicable at the time when the act was committed and at the time of decision to issue an EAW.

The analyses made for the purpose of this project confirm that usually the EAWs concerning parental abduction are not executed by the Polish executing authorities on the ground of lack of double criminality. Such practice was noticed with reference to EAWs from the Netherlands and Spain (this issue has arisen in 4 out of 13 decisions refusing the execution of EAWs issued for the purpose of prosecution).

On 28 June 2021 the Polish Supreme Court (in the case no. IV KK 260/21) quashed the final decision on execution of an EAW issued by the judicial authorities of the Netherlands. The reason was the lack of double criminality. The Supreme Court underlined that Article 211 of

[30] S. Steinborn, *Komentarz do art. 604 kodeksu postępowania karnego*, Lex/el. 2015, para. 12.

the Polish Criminal Code may be a basis for prosecution for parental abduction only if a parent does not exercise full parental rights. Thus, the offence defined in Article 211 of the Polish Criminal Code cannot be considered equivalent to the offence defined in Article 279 para. 1 and 2 of the Criminal Code of the Netherlands.

As transpires from the analyses of decisions refusing to execute EAWs, quite frequently the condition of double criminality is found not to be fulfilled due to the fact that the offence is classified in Poland as "a minor offence" (Polish: wykroczenie). With reference to some offences against property, the value of this property (for example the value of stolen property) is decisive for the classification of an act as an offence or as "a minor offence".

As mentioned above, we have analyzed 30 decisions of the Polish courts refusing to execute of the EAWs issued for enforcement purposes. In 6 cases out of 30 the reason for refusal given for refusal was a lack of double criminality (EAWs were issued with reference to Polish citizens). I all 6 cases criminal acts classified in the issuing MS as offences were found to be only "minor offences" under Polish law. This concerned the following criminal acts: theft of cosmetics and another property; driving a car without the license[31], driving a car without the document confirming mandatory insurance; driving a car without original plates[32].

Out of 13 decisions refusing execution of the prosecution-EAWs, in 2 decisions the court identified the lack of double criminality since offences indicated in the EAWs could only be classified in Poland as "minor offences".

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;

In general, all criteria of the principle of *ne bis in idem*, as established in the case-law of the Court of Justice, are applied by the courts.

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 –?

Information on this issue was provided in replies to 13 questionnaires:
Some judges indicated two points of reference: time, when the acts were committed and time of the execution of the EAW.

[31] Depending on circumstances this act may constitute an offence (driving without the license being qware that it was witrdrawn – Article 180a of the Criminal Code)) or a minor offence (driving without the license since the person has never applied to have one – Article 94 § 1 of the Code of Minor Offences)).
[32] According to the settled case law, replacing the original plates (with unchanged content) and using them as authentic when using another car does not constitute an offence under Art. 270 § 1 of the Criminal Code, but may constitute a minor offence under Art. 94 § 2 of the Code of Minor Offences.

Some judges indicated other points of reference: time of issuing the EAW and time of deciding on its execution.
Some judges indicated all three options.
Some judges indicate the last option (time of deciding on execution the EAW).
In particular:

- 6 judges indicated the time of the decision on the execution of the EAW.
- 2 judges indicated the time of issuing the EAW.
- 2 judges indicated both: the time of issuing and the time of deciding on the EAW.
- 1 judge indicated the time the acts were committed.
- 1 judge indicated both: the time the acts were committed and the time of deciding on the EAW.
- 1 judge indicated all three options.

Article 607r § 1 (4) of the CCP does not indicate the time relevant for assessing whether the prosecution or punishment of the acts on which the EAW is based is statute-barred according to the Polish law. However, as transpires from the above-mentioned opinions of judges, "*ex nunc*" approach prevails in practice.

This approach is also confirmed by one decision refusing execution of the EAW issued for enforcement purposes (case II Kop 5/20, a decision of the Regional Court in O.). In this case the court asked the issuing authorities of the Netherlands about the period of limitation for execution of the penalty being the subject of the EAW. The issuing authorities answered that no time limitation for the execution of this penalty is provided in the law of the Netherlands. The EAW was issued in 2015. Under the Polish law execution of this penalty become statute-barred in 2019. The court refused to execute this EAW. Thus, the court examined whether the execution of the sentence is statute-barred according to law applicable at the time of the decision to execute an EAW.

The same approach is applied in extradition procedure.

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;

One judge informed about doubts how to classify "robbery with the use of another similarly dangerous item". The catalogue indicates "armed robbery". Under the Polish law robbery with the use of firearms or knife is *expressis verbis* classified as "armed robbery". However, Article 280 § 2 of the Criminal Code also mentions the use of "another similarly dangerous item". Thus, doubts concerned the interpretation of this notion with reference to "armed robbery", mentioned in the catalogue.

- (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;

No problems were indicated with reference to this issue in replies to the questionnaire. However, it seems obvious that the executing judicial authority shall compare the description of the offence as provided in the EAW with its classification as "listed offence". In case of doubts the procedure of requesting additional information may be used by the executing judicial authority.

- (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?

One judge mentioned the problem with classifying an offence described as "sexual intercourse without a consent" as a rape and the offence indicated in the catalogue. To clarify: under the Polish law rape means the use of violence, threat or deception. Unfortunately, this judge did not stated how these doubts were solved (whether he/she decided to execute the 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)?

Description of the offence subject to an EAW.
Information about Polish law.
Information on examination of the case.
Information on issuing the wanted notice.
Information concerning suspension of execution of the penalty.
Information when the prosecution or punishment of an offence is statute-barred.
Detailed information on the period of deprivation of liberty (for example provisional detention) deducted from the final penalty.
Warnings that the requested person may be aggressive or armed.

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)?

Judges indicate that they would welcome information on limitations periods for prosecution or execution of a sentence as well as information on provisions of domestic law regulating this issue.

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.

The optional grounds for refusal indicated in Article 4(7)(b) of FD 2002/584/JHA were not transposed as such to the CCP. However, as already mentioned, an EAW issued with reference to a Polish citizen, may be executed only it the offence was committed outside the territory of Poland. Furthermore, even if the offence was committed outside Polish territory, surrender of a Polish citizen depends on the second condition of "qualified" double criminality. This means that surrender must be refused also if the offence is committed outside the territory of Poland but it would not constitute an offence under the Polish law had it been committed in the territory of Poland.

Judges did not indicate any problems concerning this issue. Morover, no problems related to this were noticed while analysing case-law for the purpose of this project.

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, such a restriction is not provided by the Polish Code of Criminal Procedure.

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.

Judges who filled in the questionnaire answered that they did not use this instrument.

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.

Judges who filled in the questionnaire answered that they did not use this instrument.

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 difficulties were reported by judges.

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 difficulties were reported by judges.

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.

No difficulties were reported by judges.

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.

Yes, one judge indicated that section I sometimes does not contain the information whether the person who issued the EAW holds the post of a judge.

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?

The problem concerning exchange of supplementary information was addressed in the answer to question 9d above.

In Poland, the Regional Court may issue the EAW *ex officio* (if the case is pending before this court) or upon the motion of a District Court (if the case is pending before this court) or – during the investigative stage of the proceedings – upon the motion of a public prosecutor. Thus, the correspondence concerning supplementary information shall be exchanged directly between the Regional Courts acting as issuing and executing judicial authorities and judicial authorities of other UE Member States.[33] Only in case of the EAW issued at the pre-trial stage of the proceedings additional information upon the request of the executing judicial authority may be submitted by a public prosecutor (Article 607d §§ 2 and 3 of the CCP). However, exchange of information shall be conducted without involvement of the Minister of Justice.[34]

Sometimes Regional Courts acting as issuing judicial authorities ask the public prosecutor or another court requesting the issuance of the EAW for additional information in order to elaborate the answer to request for supplementary information submitted by the executing judicial authority.

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?[35]

- Questions concerning the constitutional/structural position of the judiciary and judges.
- Questions concerning: appointments of new presidents of courts in Poland; disciplinary proceedings conducted against judges; questions as to whether the sentence executed upon surrender could be subject to control by the special measure introduced into Polish law in 2018 and adjudicated by the new Chamber of the Supreme Court (Polish: skarga nadzwyczajna).

[33] See, A. Górski, A. Sakowicz, in: *Kodeks postepowania karnego. Komentarz*, ed. A. Sakowicz, Warszawa 2020, p. 1616. The Authors stress that upon the request for additional information the regional court shall promptly collect requested information and documents and trasmit them to the executing authority.
[34] See, B. Nita-Światłowska, in: *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka, Warszawa 2020, p. 1754.
[35] 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.

- Question concerning the judges which are appointed to examine the case against the requested person – whether such judges were appointed for the post of judge by the new National Counsel for the Judiciary.
- Questions concerning conditions of detention in penitentiary institutions.
- Questions concerning the factual circumstances of an offence, for example: what kind of fraud was committed, or question concerning the exact words used by a defendant in order to insult a police officer (question stemming from the Netherlands executing authority); or questions "whether a defendant accused of an offence under Art. 275 § 1 and Article 276 of the CC acted in a fraudulent manner while he took away identity card, driving license and document confirming registration of a vehicle from the pocked of a victim" – this is an example of a question asked by the UK executing authorities.
- Questions concerning circumstances appearing during the examination of the case (for example: whether the accused pleaded guilty); whether he had a defense counsel;
- Questions concerning circumstances appearing during the execution of a penalty, for example whether the convict was aware of having the status of a fugitive; questions concerning execution of suspended sentence; reasons for ordering the enforcement of a suspended sentence of imprisonment; questions concerning the amount of the remaining penalty which should be executed.

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

As transpires from the answers to the questionnaire, usually no proprio motu information is provided.

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

Judges mentioned the following questions:

- concerning crediting the deprivation of liberty factually executed towards the penalty of imprisonment.
- whether the judgment was issued *in absentia*.
- concerning the place where an offence was committed (in order to establish, whether the offence was not committed in Poland – this is important if one takes into account Article 607p § 2 of the CCP – see answer to question 6a above).
- concerning description of an offence (in order to classify it under Polish law).

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

Yes. In accordance with Article 607z § 1 of the CCP courts are obliged to fix such time limit. Usually, it amounts to 2-4 weeks. Other judges indicated also shorter time limits, i.e., 3 days or longer, like one month.

Some judges mentioned that they indicate the time limit dependent on the date of court's session. i.e., 3 days prior to the court's session concerning execution of the EAW.

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.

Yes, some judges indicated that questions from UK were irrelevant.
Other judges mentioned questions concerning remuneration of court's presidents and judges; questions concerning disciplinary proceedings against judges; questions concerning grounds for execution of suspended sentence or grounds for revocation of conditional release.

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

No information on this issue was provided by judges.

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.

The analyses of the casefiles do not provide information on this issue.

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

The recent statistics concern the total amount of EAWs issued and executed by Polish judicial authorities. The recent statistical data on delays in execution of EAWs concern 2017 and 2018. The Polish authorities notified that the time-limit of 90 days for execution of EAWs in 2017 was exceeded in 5 cases. These cases were not notified to Eurojust.
In 2018 there were no such cases.
See, documents available at:
https://ec.europa.eu/info/publications/replies-questionnaire-quantitative-information-practical-operation-european-arrest-warrant_en

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?

If executing judicial authorities are not able to observe the time limit, they should inform the issuing judicial authorities about this fact and the reasons thereof. The same information should be submitted to the Ministry of Justice.

Pursuant to § 375 para. 1 (3) of the rules on the functioning of the common courts (Ordinance of the Minister of Justice of 18 June 2019, Journal of Laws of 2019, item 1141) the courts shall notify the national member of Eurojust about recurring difficulties in execution of the EAW. The notification shall be made "without delay".

As transpires from the Report on Eurojust's Casework in the Field of the European Arrest Warrant (June 2021), since 2017 until 2020 the Polish judicial authorities have not notified delays in executing the EAWs.
https://www.eurojust.europa.eu/sites/default/files/Documents/pdf/2021_06_eaw_casework_report.pdf

Moreover, in accordance with § 356 of the Ordinance on rules of functioning of common courts, the regional courts are obliged to send to the Ministry of Justice:

3) a copy of a decision on execution of the EAW with the information on the time expiring between the arrest of the requested person and final examination of the EAW.
4) a copy of the EAW translated into Polish.
5) information on the time of execution of the EAW (until surrender).
6) copies of documents sent to the issuing judicial authorities containing information about reasons of non-compliance with the time-limit for examination of the EAW and surrender.

As transpired from the files of cases examined for the purpose of this project, the above information was systematically provided to the Ministry of Justice.

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?

There are two different provisions concerning this issue in the CCP:

1) With reference to the Polish authorities acting as the executing judicial authorities the regulation is as follows:
   Pursuant to Article 607t § 1 of the CCP, "If the EAW is issued for the purpose of prosecuting a Polish citizen or a person who was granted the right to asylum in Poland, this person may be surrendered upon the condition that he will be returned to the territory of Poland after the proceedings in the issuing State were finally concluded, **if such person expresses his/her consent [to return]."**

   The bold part of the quoted provision was added by 2015 amendment of the CCP.

   The above mentioned provision applies only to nationals of Poland and persons granted the right to asylum. It does not apply to residents of Poland.

   In the decision of the Katowice Court of Appeal of 22 October 2019 (II Akz 915/19) this provision was interpreted as follows:
   Pursuant to the Article 607t of the CCP, the return clause is limited by the consent of the requested person. This does not mean, however, that obtaining the consent of the requested person to return after surrender shall influence the decision of the court on the EAW. It should be noted that this clause has its meaning only when the surrendered person is sentenced in the issuing state to a custodial sentence or other measure involving deprivation of liberty and such a person agrees to return him/her to the executing state. If, on the other hand, in the issuing state the surrendered person is sentenced to a non-custodial sentence, the reservation of return made by the court becomes irrelevant and, therefore, in such a case, the returned surrender does not take

place. Obtaining a declaration on this matter lies within the competence of the State of issuing the EAW, after the final termination of the proceedings, and only in the case of adjudication of a custodial sentence or other measure involving deprivation of liberty. Thus, it is not for the court of the executing state to obtain such declaration at the stage of execution of the EAW.
The above decision is published at:
https://www.krakow.sa.gov.pl/container/kzs2020/kzs02-20.pdf (p. 53-54)

However, as transpires from the wording of this provision, the condition of return to the territory of Poland shall be included into a decision on surrender.[36]

2) With reference to Polish authorities acting as the issuing judicial authorities, Article 607j of the CCP states as follows:

"§ 1. If the executing judicial authority surrenders the requested person under the condition that the penalty of imprisonment of other measure involving a deprivation of liberty will be served in this country, proceedings concerning enforcement of the penalty are not initiated.
§ 2. In the case referred to in § 1, the court competent to hear the case, immediatelly after the judgment become final and binding, issues a decision on surrender of the defendant to the issuing Member state of the European Union for the purpose of execution of penalty of imprisonment or other measure involving the deprivation of liberty. A copy of the decision, together with a copy of the judgment to be executed, is transmitted to a competent authority of the executing State."

Thus, in case of an EAW issued by the Polish judicial authorities, the Code of Criminal Procedure does not allow *expressis verbis* for taking into account the consent of the requested person while deciding on his/her return to the MS executing the EAW.
This is criticized in the literature. It is argued that if the executing judicial authorities surrendered the requested person upon the condition of his/her return but dependent on his/her will, the Polish court shall hear a defendant on this issue and if a defendant expresses the wish to execute the sentence in Poland, Article 607j § 2 of the CCP should not be applied (see, S. Steinborn, *O znaczeniu zgody osoby ściganej będącej obywatelem państwa wezwanego na przekazanie w trybie europejskiego nakazu aresztowania* (in:) *Auslieferung von eigenen Staatsangehörigen – Probleme in der Praxis der deutsch-polnischen Zusammenarbeit in Strafsachen. Wydawanie własnych obywateli – Problemy w praktyce polsko-niemieckiej współpracy w sprawach karnych*, ed. M. Małolepszy, G. Hochmayr, P. Nalewajko, Berlin 2013, p. 148-150).

A decision on return is delivered at the session (Polish: posiedzenie) of the court. The requested person has a right to participate in this session but is not notified of the date of such hearing. There are no obstacles to obtain the opinion of the requested person with reference to the possible return. It is argued that such opinion may be taken into consideration by the court deciding on return.

[36] See, B. Nita-Światłowska, in: *Kodeks postępowania karnego. Komentarz*, ed. J. Skorupka, Warszawa 2020, p. 1848; see also a decision of the Supreme Court of 28 February 2013, V KK 460/12, Lex no. 1297697.

As mentioned above, in Article 607j of the CCP and in the whole Chapter 65a of the CCP concerning issuing the EAW, no reference is made to provisions of another Chapters of the CCP transposing the FD 2008/909/JHA. Such reference is made only in Chapter 65b of the CCP concerning execution of the EAW by the Polish judicial authorities. Thus, it is clear that return of the requested person to Poland in case of conditional surrender is governed *mutatis mutandis* by provisions of the CCP transposing FD 2008/909/JHA. No such reference to the relevant provisions transposing the FD 2008/909/JHA was made in regulations concerning Polish courts acting as issuing judicial authorities.

However, in the recent literature it is argued that the lack of such reference does not imply inability to apply the regime of FD 2008/909/JHA. To the contrary, it is underlined that the regime of FD 2008/909/JHA takes precedence over the regulations of the EAW, in accordance with Article 25 of the FD 2008/909/JHA (see, T. Ostropolski, in: *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz do Działu XIII KPK*, Warszawa 2016, p. 793; B. Augustyniak, in: Kodeks postępowania karnego. Tom II. Komentarz aktualizowany, ed. D. Świecki, Lex/el. 2021, para. 4).

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

There is no regulation concerning this issue in the CCP. However, as mentioned by one judge interviewed for the purpose of this project, the guarantee of return shall be given by the court issuing the EAW for the purpose of prosecution. At least this judge mentioned such practice. The second judge also confirmed the competence of the issuing authority to give the guarantee of return. However, she mentioned also one case in which such a guarantee was given by the court competent to examine the case.

As stated above, a decision on the surrender of a person after issuing the final judgment in Poland (i.e., return) is taken by the court competent to hear the case (i.e., to conduct the criminal proceedings against the requested person) in the first instance.

Thus, two different courts are competent to decide on these interconnected issues: the guarantee of return shall be given by the regional court (the issuing judicial authority) but the decision on return after adjudication is issued by the court competent to hear the case, i.e., usually a competent district court.

As was rightly argued by one interviewed judge, the competence and procedure for giving a guarantee of return should be regulated precisely in the CCP.

45.
a) Do the issuing judicial authorities of your Member State use a uniform text for the guarantee of return? If so, what text?

No. There is no regulation providing such a uniform text of the guarantee.

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. There is no specific regulation on this issue. The only provision in the CCP concerning return of the requested person in case of conditional surrender to Poland is Article 607j of the CCP quoted in the answer to question 43.

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;

See answer to question 43.

- (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;

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

No. Article 607j of the CCP clearly states that the only condition for return (surrender back to the executing MS) is the wish of the executing authority (the wording of this provision is as follows: "If the executing judicial authority surrenders the requested person under the condition...").

Hence, unlike in Article 5 (3) FD EAW, Article 607j of the CCP, which trasposes Article 5 (3) FD EAW, does not limit its application to nationals or residents of the executing Member State.

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?

As was explained above, return shall be made immediately after issuing the final judgment in the case. The court competent to hear the case in the first instance is also competent to decide on this issue.

However, it is argued in the literature that return may not be decided immediately in certain circumstances. This concerns, *inter alia*, the situation when other criminal proceedings are conducted against the requested person in Poland. It is stated that in such cases the return shall be adjourned until termination of these proceedings. Adjournment of the decision on return may also be reasoned by the need to execute the penalty of restriction of liberty imposed together with the penalty of deprivation of liberty, until the execution of the non-custodial penalty (see, T. Ostropolski, *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz do Działu XIII KPK*, Warsaw 2016, p. 792).

In cases analyzed for the purpose of this project we did not find those relating to the application of the guarantee of return under Article 607j of the CCP.

With reference to procedure applied for return – see the answer to question 43.

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.

All judges who filled in the questionnaire answered that they do not face any problems regarding the guarantee of return.

A judge interviewed for the purpose of this project mentioned that, due to the lack of a special form for the guarantee and lack of clear rules on this issue in the CCP, the guarantee issued by the court acting as the issuing judicial authority was primarily not accepted by the executing judicial authority. However, after exchange for additional questions it was accepted as a valid guarantee.

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.

Yes. One judge informed that after execution of the EAW for the purpose of prosecution with the condition that the requested person shall be returned to Poland, the issuing MS used the Convention on the Transfer of Sentenced Persons in order to return the requested person.

As was mentioned above, if the EAW is issued for the purpose of prosecuting a Polish citizen or a person who was granted the right to asylum in Poland, this person may be surrendered upon the condition that he will be returned to the territory of Poland after the proceedings in the issuing State were finally concluded, **if such person expresses his/her consent [to return].**

In accordance with Article 607t § 2 of the CCP, if the requested person was sentenced in the issuing MS to a penalty of imprisonment or a measure involving the deprivation of liberty, Article 607s § 3-5 shall apply accordingly, whereas Article 607s § 5 of the CCP states that "the provisions of Chapter 66g apply accordingly, except for Article 611tg, 611ti § 2 and 3, Article 611tk, Article 611tm, Article 611to § 2 and Article 611tp". The provisions of Chapter 66g of the CCP are transposing the FD 2008/909/JHA into Polish law.

Thus, in accordance with all the above-mentioned provisions, return of the requested person to Poland shall be governed by the FD 2008/909/JHA regime. For this reason, it is argued in the literature, that the lack of consent of the requested person for return to Poland is not binding on the issuing MS, having due account to the wording of Article 6 para. 2 (a) of the FD 2008/909/JHA. It should be stressed that the opt-out clause indicated in Article 6 para. 5 of the FD 2008/909/JHA (the obligation to obtain the consent of the sentenced person) expired on 5 December 2016 (see, T. Ostropolski, in: *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz do Działu XIII KPK*, Warsaw 2016, p. 827).

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);

- on the basis of which sources;

- did the executing judicial authorities use the database of the Fundamental Rights Agency[37] in stablishing that risk;

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

Judges did not report such cases.
No refusals to execute the EAWs based on the risk of ill-treatment were found in decisions submitted by the regional courts in Poland (decisions issued in 2020).
Also, the analyses of cases conducted in two Regional Courts did not provide examples of such cases (i.e. refusals based on the risk of being subjected to inhuman or degrading detention conditions in the issuing Member State).

However, the analyses of the available case-law prove that sometimes objections to surrender based on risk of violation of human rights were raised by defence counsels or requested persons with reference to the EAW issued by Bulgarian issuing authorities (see, decision of the Katowice Appeal Court of 16 October 2020, II AKz 1090/20). In this case the objection was rejected by the Court saying that the information available before the court, including statement of the requested person, is enough to establish that there is no real risk of violation of human rights in case of surrender. *Aranyosi and Căldăraru* test was explicitly mentioned and applied by the court.

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

See answer to question 48.

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

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)?

See answer to question 48.

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.

No. None of the judges filling in the questionnaire indicated such problems.

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.

No. None of the judges filling in the questionnaire indicated such problems.

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?

As already mentioned, in two out of all cases analysed for the purpose of this report, the Polish judicial executing authority refused to execute the EAW from the Netherlands relying on the risk for protection of human rights: the lack of imartiality of the issuing authority (the issuing authority when deciding on the execution of EAW's issued by Polish judicial authorities is not objective, asks several irrelevant questions concernig salaries of judges; additionally such questions are not translated into Polish, ect). No other cases with reference to Polish judicial authorities acting as executing judicial authorities were noticed. For this reason the remaining questions in this section of the questionnaire are irrelevant.

We noticed other examples of refusals to execute EAWs relynig on the risk of violation of human rights. However, these cases do not concern deficiencies in the judicial system of the issuing state. For example in one case execution of the enforcement-EAW was refused on the basis of Article 607p § 1 (5) of the CCP due to mistake as to the personal data of the requested person. The requested person was not the offender; his ID card was stolen and another person committed offences using his ID. Furthermore, he was convicted and sentenced under this false name.

In another case the surrender under the prosecution-EAW was refused with reference to Swedish national accused of parental child abduction. The court stated that surrender would be contrary to the requested peron's and his son's right to private and family life (case IV Kop 56/20, a decision of the Regional Court in G.).

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?

No cases concerning this issue were reported.

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.

Judges (interviewed and those who filled in the internal questionnaire) did not report such difficulties. Usually, they replied to questions concerning rule of law and system of disciplinary responsibility of judges in Poland. The analyses of the casefiles confirmed that usually the same or similar questions concerning rule of law in Poland were sent in almost every case concerning the EAWs issued for prosecution purposes.

As transpires from the replies to the questionnaire, usually additional questions were submitted by the executing authorities of the Netherlands, Germany, UK, Denmark and Latvia.

As transpires from the files of cases analysed for the purpose of this project, Polish courts acting as issuing judicial authorities sometimes use standardized answers to questions concerning deficiencies in the judicial system. Since these questions are similar or almost identical in many cases, also answers are standardized, at least within the framework of one regional court.

I do not have specific knowledge whether these standardized answers are prepared solely by judges responsible for issuing/execution of EAWs or with the participation of presidents of these courts or other procedural organs.

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.

No such difficulties were reported by judges.

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?

Polish courts, including the Supreme Court, referred to the Court of Justice several preliminary questions concerning the interpretation of Article 19 of the Treaty on European Union and Article 47 of the Charter of Fundamental Rights in relation to independence of the judiciary, the new model of appointment of judges in Poland and the new system of disciplinary responsibility of judges. However, none of these questions was referred to in the framework of the EAW procedure. For this reason, I do not present these questions here.[38]

The only preliminary reference procedure concerning application of the FD EAW and initiated by the Polish court was the case C-294/16 PPU.[39]

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.

[38] See, *inter alia*, ECJ, judgment of 19 November 2019, *A.K. and others*, C-585/18, C-624/18, C-625/18, ECLI:EU:C:2019:982; ECJ, judgment of 2 March 2021, C-824/18, *A.B. and others*, C-824/18, ECLI:EU:C:2021:153; ECJ, judgment of 6 October 2021, *W.Ż.*, C-487/19, ECLI:EU:C:2021:798; ECJ, judgment of 16 November 2021, joined cases C-748/19 to C-754/19, *WB, XA, YZ, DT, ZY, AX, BV, CU*, ECLI:EU:C:2021:931. The question of appointment of judges by the new National Council of Judiciary was also addressed by the ECtHR. In two cases to Court found violation of Article 6 of the ECHR. See, ECtHR, judgment of 22 July 2021, *Reczkowicz v. Poland*, case no. 43447/19, HUDOC; ECtHR, judgment of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland*, cases no. 49868/19 and 57511/19, HUDOC.

[39] ECJ, judgment of 28 July 2016, *JZ*, C-294/16 PPU, ECLI:EU:C:2016:610.

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.

Only a few judges informed that they issued such AWs. However, they did not report any difficulties.

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.

Judges did not report execution of such warrants.

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

One judge informed about experience in recent cooperation with UK. No problems were reported. The Polish court acting as the issuing authority issued the Arrest Warrant relying directly on Article 599 of the Trade and cooperation agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (Official Journal of the European Union of 30 April 2021, L 149, p. 765-784; thereafter referred to as "Trade Agreement"). The court used the AW form annexed to this agreement (Annex 43, pages 2069-2077 of the above mentioned Official Journal).

In addition it should be underlined that in August 2021 the draft Act on execution of the above mentioned agreement with reference to the cooperation in criminal matters was elaborated (draft Act of 4 August 2021). The draft Act provides that the cooperation in criminal matters shall be regulated by the provision of the Trade Agreement and the provisions applied to cooperation between the Member States of the EU, applied accordingly to matters not regulated by Trade Agreement. It also states *expressis verbis* that surrender of the Polish citizen to the UK may be granted provided that the act covered by an arrest warrant was committed outside the territory of the Republic of Poland, and constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the submitting of the warrant.
Thus, rules goverening surrender of Polish citizen to the MS of the EU and to the UK are the same.
The draft Act is currently subject to legislation procedure.

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

No.
In August 2021 the draft Act amending the Code of Criminal Procedure by regulations enabling cooperation of Polish procedural organs with EPPO was published at the website of the National Legislation Centre:

https://legislacja.rcl.gov.pl/projekt/12350454
The draft Act received the number UD244 and was prepared by the Ministry of Justice. However, subsequently the draft Act was withdrawn from the legislation procedure. No reasons for withdrawal were presented at the website of the National Legislation Centre.

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? If so:

The Polish Constitution allows for extradition of Polish citizens upon certain conditions (see answer to question 6a above).

- 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;

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

In order to answer this question, we asked the Ministry of Justice for information (on the basis of the Act on access to public information).
As transpires from the information obtained from the Ministry of Justice, the following procedure is applied following the *Petruhhin* judgement. In accordance with the order of the Deputy General Public Prosecutor of 23 August 2017, the Regional Public Prosecution Offices are competent to implement this judgment. Thus, is case of extradition request concerning a citizen of another Member State, the public prosecutor shall promptly inform the appropriate judicial authorities of this Member State about extradition request and offences referred to therein. The public prosecutor may submit this information to the central authority dealing with cooperation in criminal matters, indicated by this Member State or through the intermediary of Eurojust or European Judicial Network. Such notification shall be submitted in all cases concerning extradition, be they requests for prosecution purposes or requests for enforcement purposes.

The available case-law confirms that the requirements of *Petruhhin* judgment are fulfilled in extradition procedures conducted in Poland. It is worth mentioning the decision of the Supreme Court of 5 April 2017, III KO 112/16. In this case the extradition request was issued by the Republic of Belarus and the requested person was a citizen of Lithuania. As transpired from the casefile, immediately after submission of the request the Lithuanian authorities were informed about this fact. They were also served with the copy of the arrest warrant issued against the Lithuanian citizen. The correspondence concerning this issue was sent directly to the Consulate of the Republic of Lithuania or to the Ministry of Justice of Lithuania through the intermediary of the Consulate.
For this reason, the Supreme Court found inadmissible the allegation that *Petruhhin* case was not respected by the courts issuing an opinion on extradition in this case.

The Supreme Court stated as follows:
“ Only a relevant request of a Member State of the EU for the surrender of its own citizen, in order to conduct criminal proceedings against him in relation to acts committed outside its territory and covered by the extradition request of a third state, if it is sent to the EU Member State executing the extradition request of this third state, will constitute an obstacle to conducting extradition proceedings, provided that this Member State has been notified of the pending extradition proceedings. Therefore, the lack of such a request for surrender, provided that the Member State whose national is prosecuted knows about the extradition proceedings pending in another EU Member State, does not constitute the obstacle to conducting extradition

proceedings." [explanation: in this case the defence counsel of the requested person argued that the lack of such request for surrender submitted by Lithuanian authorities resulted in "the lack of required permit for prosecution" or "other circumstances excluding prosecution within the meaning of Article 439 § 1 point 9 of the CCP in connection with Article 17 § 1 point 10 and 11 of the CCP"].

In this decision the Supreme Court fully followed the *Petruhhin* judgment by giving priority to surrender to the EU Member Stated over the extradition of the national of such Member State to the third country. However, it should be stressed that Article 607y of the CCP leaves the decision on this issue in the hands of the Minister of Justice. This provision reads as follows:

"§ 1. If the EAW and an extradition request to a third State are submitted with respect to the same requested person, the court, after having examined the EAW, decides on the admissibility of its execution, suspends the proceedings and notifies the Minister of Justice of the decision.
§ 2. If the Minister of Justice decides that the person against whom the EAW was issued should be extradited to a third State, the proceedings concerning the EAW is discontinued. If the extradition is refused, the court resumes the suspended proceedings and issue a decision on surrender."

It is underlined in the literature that the Minister of Justice, while taking a decision mentioned in Article 607y § 2 of the CCP, shall respect the judgment of the Court of Justice delivered in the *Petruhhin* case (see, H. Kuczyńska, Problematyka wydania obywatela państwa członkowskiego Unii Europejskiej do państwa trzeciego. Glosa do postanowienia SN z dnia 5 kwietnia 2017 r., III KO 112/16, Europejski Przegląd Sądowy 2018, no. 2, p. 38-49).

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;

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

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

No information on this issue was gathered during the research.

***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:

The Polish Constitution allows for extradition of Polish citizens upon certain conditions (see answer to question 6a above). No constitutional obstacles are provided which would prohibit extradition of nationals of EEA States.

- 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;

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

No information on this issue was gathered during the research.

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)),[40] 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

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

Missing EAW/decision on surrender
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;

Yes. The executing authorities refer to the offences for which surrender is allowed in the operative part of the decision on surrender. In this part of the decision, they indicate also that surrender was refused with reference to the remaining part of offences indicated in the EAW. The offences are indicated by referring to their factual description and legal qualification.

- to the speciality rule?

The practice varies with this regard. An information on the declaration of the requested person concerning application of the speciality principle is included into the minutes of the hearing concerning execution of the EAW.
Some judges mentioned that they reflect the content of this declaration in the decision on surrender (not in its operative part but in written reasons thereof).
Other judges mentioned that they include such information in the letter informing the issuing authorities about the execution of an EAW.
The analyses of cases conducted for the purpose of this report prove that decisions on surrender sometimes do not contain information on specialty principle. However, such information is included into the letter announcing the execution of an EAW. It is also always included into the letter sent to the competent organs of the police responsible for execution of the decision on surrender. Thus, this information is submitted to organs of another MS responsible for taking over the requested person.

Additionally, information on the declaration of the requested person concerning speciality principle is always included into the letter sent to the Ministry of Justice, informing about the execution of an EAW.

b) whether the requested person renounced his entitlement

See answer to the previous question.

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

The majority of judges who filled in the questionnaire stated that they provide both the issuing authority and the requested person with a translated copy of the decision to execute the EAW.

One judge mentioned that he/she follows the practice of a given state on the basis of reciprocity. So, if the executing authorities of a given State provide the Polish issuing authorities with a translated copy of a decision to execute the EAW, the same practice is followed by a judge/court acting as the executing authority with reference to the EAWs issued by this state.

Another judge mentioned that the requested person is always provided with the translated copy of the decision to execute an EAW. Such a copy, but only in Polish, is also sent to the issuing judicial authority.

It should be underlined that in accordance with Article 607l § 3 of the CCP, a decision on surrender shall be subject to appeal. Such appeal shall be filed within three days of the announcement of the decision and, if the requested person is deprived of liberty and has not been brought to the court hearing, of its being served. Furthermore, as transpires from Article 72 § 3 of the CCP, every decision which is subject to appeal shall be served on a suspect (so also on the requested person) together with its translation. The same applies to all decision which conclude the proceedings and are final and binding.

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 speciality rule is expressed in Article 607e of the CCP which reads as follows:

§ 1. A person surrendered as a result of the execution of a warrant shall not be prosecuted for an offence other than those for which the warrant is issued, nor shall he serve a penalty of imprisonment or other measures involving deprivation of liberty imposed on him in connection with such offences.
§ 2. The court that issued the final judicial decision in the case may order the execution of penalty for only those offences with reference to which the surrender took place. The public prosecutor and the requested person may participate in the court hearing. Article 451 applies accordingly [this provision states that a sentenced person may request to be brought to the court from the penitentiary facility. Exceptionally the court may refuse such request but then the defence counsel must take part in the hearing].
§ 3. The provision of § 1 does not apply if:

1) the executing State declares that prosecution or execution of a penalty of imprisonment or other measures involving deprivation of liberty for all offences preceding the surrender admissible, unless a judicial authority of the executing State decides otherwise in the decision on surrender.
2) a surrendered person does not leave the territory of the Republic of Poland within 45 days of the day when the proceedings were concluded in a final and binding manner despite of the possibility to do so or, after leaving the territory of the Republic of Poland, returns thereto.
3) no penalty of imprisonment or measure involving the deprivation of liberty is imposed on the requested person.
4) criminal proceedings are not connected with the imposition of a measure involving deprivation of liberty on the requested person.
5) the offence committed by the requested person carries a penalty or a measure not involving deprivation of liberty.

6) the requested person agrees to the surrender and waives the right indicated in § 1.
7) after surrender the requested person waives the right indicated in § 1 with regard to offences preceding the surrender before the court competent to hear the case.
8) judicial organ of the executing State which decided on surrender has agreed to the prosecution or to the execution of a penalty of imprisonment or other measure involving deprivation of liberty in connection with offences referred to in § 1, acting on a motion of the court competent to issue the warrant.

Pursuant to Article 607e § 3a of the CCP, the waiver of the protection stemming from the speciality principle provided in Article 607e § 3 (6) and (7) cannot be withdrawn.

In practice, in case of a defendant surrendered to Poland he/she shall be asked by the court before which the case is pending, whether he/she waives the protection of speciality principle. In case of refusal, the procedure provided for in Article 607e § 3 (8) of the CCP is initiated.

If the court neglects the above-mentioned duties and the final judgment is issued imposing an enforceable penalty of imprisonment with reference to an offence to which the speciality principle relates, such situation is classified as the so called "absolute ground" for quashing a judgment under 439 § 1 (9) of the CCP in conjunction with Article 17 § 1 (11) of the CCP.

Moreover, it is stressed by the Supreme Court that plea bargaining (consent to sentencing) is not equal to waiver of speciality principle, since waiver of protection stemming from this principle must be unequivocal, voluntary and expressed with full awareness of the consequences (judgment of the Supreme Court of 19 August 2009, II KK 181/09).

The practical problem concerning application of speciality principle concerns cumulative penalty issued in a separate procedure concerning cumulative judgment (wyrok łączny). The question arising in practice is whether, in case of lack of waiver of the protection stemming from the speciality principle, the procedure indicated in Article 607e § 3 (8) of the CCP shall be initiated prior to issuing a cumulative judgment or only after issuing such a judgment, if it covers also "single" judgment to which the speciality principle relates.

It seems justified to request the executing authority for consent to execution of another penalty than this covered by the EAW prior to issuing the cumulative judgment. The reason behind is that only "enforceable" penalties may form a basis for cumulative judgment while penalties which did not form a basis for surrender are not "enforceable" (see, judgment of the Supreme Court of 20 January 2015, III KK 369/14).

The Supreme Court underlines that "speciality principle" indicated in Article 607e § 1 of the CCP constitutes a procedural obstacle to issuing a cumulative penalty for offences other than those which formed a basis for surrender. Obvious violation of speciality principle occurs if the court is issuing cumulative judgment concerning penalties of imprisonment other than those subject to surrender as well as if the court decides to execute such cumulative judgment (judgment of the Supreme Court of 6 February 2020, II KK 2/20).

The speciality principle causes some problems in connection with the procedure of ordering execution of a penalty of imprisonment conditionally suspended. Some doubts are voiced whether with reference to such penalty the procedure indicated in Article 607e § 3 (8) of the CCP shall be initiated prior or after issuing an order to execute suspended sentence of

imprisonment. One may argue that it should take place after ordering execution of the suspended sentence sine only then the suspended sentence is converted into the enforceable sentence of imprisonment.

One interviewed judge pointed to the need to create the electronic database of all persons surrendered to Poland, which would also contain information on all offences with reference to which surrenders were ordered. Unfortunately, due to lack of precise information sometimes cumulative judgments are issued with reference to offences (penalties) which were not the subject of surrender. Quite often such mistakes are eliminated thanks to cassation procedure (see, *inter alia* the following cases: IV KK 323/21, judgment of the Supreme Court of 25 August 2021; IV KK 780/18, judgment of 4 December 2019).

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.

Yes. Judges mentioned that sometimes it is unclear whether the requested person is protected by the speciality principle or not. Sometimes the declaration of the surrendered person is that he/she is protected by the speciality principle, but another conclusion is stemming from documents obtained from the executing judicial authorities.
All doubts are removed using requests for supplementary information.

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?"

According to Article 607e § 4 of the CCP, "the motion referred to in § 3 point 8 [i.e., the motion for additional surrender] should contain information listed in Article 607c § 1. Article 607c § 2 applies accordingly". Hence, it should contain the same information as the EAW, including indication of "final and binding or enforceable judicial decision in connection with which the warrant was issued".

It is stressed in the case-law that there is no need to submit a motion for additional surrender if the criminal proceedings conducted against the requested person do not result in his/her detention. Furthermore, a consent for additional surrender is not indispensable if the penalty finally imposed in such proceedings does not result in deprivation of liberty. In the resolution of 24 November 2010, I KZP 19/10, the Supreme Court stated that Articles 607e § 3 point 4 and 5 of the CCP regulate independent and separate exceptions to the principle of speciality. Thus, there is no need to apply for additional surrender also during criminal proceedings concerning an offence subject to penalty of deprivation of liberty provided that no detention on remand is applied in such proceedings. The Supreme Court relied on the judgment of the CJEU of 1 December 2008, C-388/08 PPU.

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.

No. The requested person is asked by the court whether he/she waives the speciality principle during the hearing concerning execution of the EAW. The requested person's position on this issue is reflected in the minutes of such hearing.

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?

Majority of judges ticked the answer "no" or "I do not know" with reference to this question. One judge answered "yes" without providing the reasons for such answer.

In my opinion some judges do not feel comfortable having to answer questions about their own independence. But this is only my opinion, based also on conversations with judges.

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

Judges indicated the following information:
Information concerning the place of committing an offence; the scope of the penalty to be enforced after surrender; information concerning issuing a judgment in absentia (with reference to execution-EAWs).

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

Yes. Judges indicate the following questions as "not necessary":
Why the EAW was issued?
Whether the requested person left the country without the permission of the court?
Requests for documents confirming information provided in Section D of the EAW-form;
Requests for information on participation of the requested person in the session of the court concerning requests for enforcement of the suspended sentence or issuing a decision on revoking the conditional release.
Requests for information why the conditional release was revoked.

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?

Judges did not indicate any problems with reference to this issue.
However, the analyses of the cases allow for the conclusion that there is a lack of trust in Polish judicial authorities issuing EAWs. EAWs are not executed despite providing additional information upon the request of the executing judicial authorities. Also, the content of the requests for supplementary information proves such a lack of trust. They relate to the independence of the judges who would be appointed to examine the case after surrender.

It is not my intention here to assess this fact but only to notice it.

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?

Some judges answered that this is not necessary. Other judges supported such idea.

In the Regional Courts in Poland there are judges appointed as "responsible" for international cooperation in criminal matters. In case of decentralised cooperation (like in Poland, where all 46 regional courts issue/execute the EAWs) I do not see the need to designate such additional focal points.

In smaller Regional Courts there is only one judge dealing with EAW cases. So, he/she is a focal point in practice. In bigger Regional Courts all judges or part of judges dealing with criminal matters are involved in execution/issuing the EAWs (judges are chosen to hear the individual cases by using "an automatic case drawing system").

However, in some courts, like in the Regional Court in Warsaw, there is a special division of the Court devoted to cooperation in criminal matters with the judge-head of this division and vast majority of cases are dealt with by this judge.

It should be noted that national members of Eurojust may play such a role of such "focal points".

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?

The answer to this question is based on the judges' replies to the questionnaire:
It was mentioned by some judges that judicial authorities of UK are asking many irrelevant questions.
It was mentioned that judicial authorities of Ireland are asking questions which could be considered as undermining the principle of the mutual trust.
Some judges mentioned that the executing judicial authorities of the Netherlands are asking questions which undermine the mutual trust and mutual recognition of decisions; they are also asking many questions concerning section D of the EAW form, not relevant in the opinion of a judge, like why the suspended sentence was converted into enforceable sentence.
With reference to Denmark it was mentioned that the executing judicial authorities request many information concerning section D of the EAW form concerning the reasons for converting suspended sentence into enforceable sentence.
It was also mentioned that the judicial authorities of Germany do not reply to requests for additional information concerning the penalty which should be executed in Poland in case of refusal to execute the EAW with reference to Polish citizen, based on Article 607s § 1 of the CCP (in such cases the "foreign" penalty shall be executed in Poland). One judge mentioned that the German judicial authorities even state that they do not request execution of such penalty in case of refusal of surrender.
Some judges mentioned that the judicial authorities of Sweden do not reply to requests for additional information concerning the penalty which should be executed in Poland in case of refusal to execute the EAW with reference to Polish citizen, based on Article 607s § 1 of the CCP (in such cases the "foreign" penalty shall be executed in Poland). One judge mentioned that Swedish judicial authorities even state that they do not request execution of such penalty in case of refusal of surrender.
With reference to Italy and Spain – difficulties were mentioned in exchange for information.

My opinion:

As far as my opinion is concerned, I have difficulties answering the question. It is obvious that EAWs issued by Polish judicial authorities for the purpose of prosecution are sometimes not executed by the judicial authorities of other EU states. This occurs even if the Polish judicial authorities answered supplementary questions concerning the rule of law and independence of the judiciary in Poland. The fact is that mutual trust between judicial authorities of the EU has significantly decreased over the past few years.

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

Yes, the following could be proposed in order to facilitate surrender.

- In my opinion only courts should act as executing/issuing authorities. Public prosecutors should not have the competence to decide on this issue.
- I would opt to abolish the speciality principle. In my opinion the speciality principle is more rooted in the concept of state sovereignty than in the idea of protection of human rights. Moreover, it makes the execution of criminal sentences more complicated and causes a lot of additional procedural activity (motions for additional surrender). On the one hand this principle is the guarantee for the requested person.
  However, the majority of judges indicated in the questionnaire that it should be preserved.
- Various problems concern execution-EAWs regarding cumulative penalties. In my opinion, the EAW form should be changed in order to correctly reflect the specific character of this penalty.

<u>Suggestions of judges indicated in the questionnaire:</u>

Section D of the EAW form shall not apply to appeal proceedings unless there is a change of the judgment to the detriment of the accused.
Section D of the EAW from shall not apply to the order converting the suspended sentence into the enforceable sentence.
The understanding of *in absentia* proceedings in Poland and in Article 4a of the FD EAW are different. In the judges' opinion guarantees of Article 4a of the FD EAW shall be lowered.

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;

  In my opinion the catalogue of mandatory and optional grounds for refusal is appropriate. In accordance with the FD EAW the risk of violation of human rights is not mentioned *expressis verbis* as mandatory or optional ground for refusal although it should be. However, this lacuna is filled by the jurisprudence of the CJEU and for this reason I do not opt for amending the FD EAW with regard to this issue.

As mentioned above, I would opt for further limitations of the scope of speciality principle.

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

See answer to the previous question concerning the need to introduce the ground for refusal based on the protection of human rights.

- b) given that surrender proceedings are increasingly becoming more complex and protracted, what, in your opinion, is the effect on mutual trust?

In my opinion decrease in the level of protection of human rights in some EU states is influencing (diminishing) the mutual trust. The surrender proceedings are increasingly becoming more complex because of the lack of mutual trust and not the other way around.

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

Some judges in replies to the questionnaire stated that speciality principle shall be abolished. Other (majority) underlined that since it is a guarantee for the defendant, it should be preserved. In my opinion it should be at least further limited.

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?

In my opinion the Handbook is useful but is not providing answer to practical problems like these identified in this report.

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?

Majority of questioned judges stated that the Handbook is useful. Some of them added that it is useful for unexperienced judges. A few judges informed that they are not using the Handbook and it is not useful.

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?

So far, the use of EIO instead of the EAW was noticed only in a few cases mentioned in the answer to previous questions of the questionnaire.
In 2019 the Code of Criminal Procedure was changed with reference to summoning of persons living in another EU Member State. Now such persons are not requested any more to indicate the addressee for taking summons in Poland.
The new wording of Article 138 of the CCP concerning summoning is as follows:

"A party to the proceedings, as well as a person not having a status of a party but whose rights were violated, if he/she is not residing in Poland or in another Member State of the European Union, is obliged to indicate the addressee for service [i.e., the person or institution which could take a summons] in Poland or in another Member state of the European Union. If he/she fails to do so, a summons sent to the last known address in Poland or in another country of the European Union and, if there in no such address, attached to the case-file, is treated as properly served."

This means that before requesting the regional court to issue the EAW for prosecution purposes, the investigating organs or the court before which the case is pending, shall first try to summon the suspect/defendant by sending a summons to his/her addressee in another MS.

As already mentioned in the introductory part, for the purpose of this report we analysed altogether 594 decisions of the Polish courts refusing to issue or to execute the EAWs. The biggest part of them (551 cases) concerned refusals to issue the EAWs (528 decision refusing to issue the EAWs for the purpose of execution and 23 decisions refusing to issue the EAWs for the purpose of prosecution). 43 decisions concerned refusals to execute the EAWs.

Only in 3 decisions explicit references were made to the possible use of the EIO instead of the EAW. Moreover, all three decisions were issued by the same regional court. Out of these 3 cases 2 concerned the motions to issue the EAW for the purpose of execution of the penalty of imprisonment and 1 case concerned the motion to issue the EAW for the purpose of prosecution. However, in another group of 26 decisions the courts argued that prior to submitting a motion for issuing the EAW, the procedural organs shall make use of the opportunity to summon the requested person at the address in another Member State. No explicit reference to the use of EIO was made in these 26 cases.

The example: in the case II Kop 2/20, the Regional Court in K. stated that it would be contrary to the principle of proportionality to issue the EAW, having regard to the amount of fraud for which the requested person was suspected and the fact that his place of residence abroad is known (he communicates with his daughter via messenger). Thus, first the prosecutorial organs shall try to serve the correspondence to his address abroad and to conduct procedural activities with him using the EIO.

The example of the case where no explicit reference was made to the use of EIO (II Kop 6/20, the Regional Court in S.):
The court refused to issue the EAW for the purpose of execution of the cumulative judgment for the following reasons:
"In the opinion of the Court, in the present case, there were good reasons for refusing to issue the EAW, taking into account the available information about the established place of stay of the convict R. E. and the fact that no steps were taken to establish his exact address by means of legal cooperation between the EU Member States and summoning him to the address thus established. Article 131 § 1 of the CCP does not prejudge the procedure to be followed in such cases since all citizens of the EU are guaranteed the freedom of movement and the right to choose the place of stay and work. Thus, only effective summoning to the address of the convicted person's residence and his failure to appear for execution of the penalty may result in assuming that convicted person actually avoids enforcement procedure and execution of the sentence.

Undoubtedly, R. E. knew his duties as a party to criminal proceedings, but he failed to take correspondence sent to the previously indicated address of residence. Moreover, he did not inform the procedural organs about the change of the place of residence. For this reason, further proceedings regarding the execution of the sentence of one year of imprisonment turned out to be ineffective. Thus, in such circumstances issuing the EAW could be justified on the basis of national regulations.

However, in accordance with the judgment of the Court of Justice of the European Union of May 24, 2016 issued in case C-108/16 Openbaar Ministerie v. Paweł Dworzecki, alternative service of summons specified in Article 132 § 2 of the CCP does not meet the requirements of Article 4a para.1a) (i) of the FD 2002/584/JHA. Hence, this judgment enables the executing authorities of another Member State to refuse the execution of the EAW issued for the purpose of enforcement of a judgment given in the defendant's absence, unless the defendant has been personally informed about the date of the hearing or otherwise actually obtained information about it. This means that the authorities of another MS may refuse execution of the European Arrest Warrant issued in Poland, if the notification of the hearing was served otherwise than in person, including through a substitute summoning, as in this case. The same rules apply in the proceedings aimed at execution of the sentence. This situation is undesirable, because it reduces the effectiveness of the domestic justice system and leads to greater uncertainty on the part of the accused as to his legal situation."

In this case the court established that the cumulative judgment was issued against R.E. in his absence. Moreover, he was summoned to the hearing by means of the substitute summoning (so he was presumend to be properly summoned although he did not take the corresondence addressed to him). Having in mind these circumstances the court stated: "When the court knew the place of the convict's stay on the territory of one of the EU Member States, the principle of loyalty and reliability required the court to make an attempt to establish the exact address of the convict in the territory of the Federal Republic of Germany by means of legal assistance between the Member States of the EU, and to serve the summons to this address."

With reference to the relationship between the EIO on the one hand and the EAW on the other:

In my opinion the EIO procedure could be helpful in reducing the number of the EAWs issued for execution purposes. However, with reference to the prosecution-EAWs the impact of EIO procedure will be less significant. At the investigative stage of the criminal procedure personal appearance of a suspected person before the prosecutorial organs is of crucial importance for effectiveness of "bringing charges" against him/her. Pursuant to Article 313 of the CCP, the decision to bring charges shall be drawn up and announced to the suspect, together with information about his/her procedural rights and duties. The suspect shall be interrogated without delay, unless the announcement of the decision and the interrogation are not possible because he is in hiding or absent from the country.

Thus, being "absent from the country" implies initiation of the procedure aimed at establishing the whereabouts of a suspect. If they are unknown (which happens frequently in case of a suspect staying abroad), he is consider as a fugitive and a national arrest warrant may be issued against him, which is a basis for issuing the EAW.

The whole procedural act of bringing charges against a suspect cannot be made using EIO. Even for this reason alone the EAW procedure cannot be replaced by the EIO or ESO.

Addisional question to 76.a) [submitted in October] Does the national law of your Member State allow for summoning in another Member State? Is there any obligation to use this instrument before issuing a prosecution -EAW? Is summoning in another MS a suitable alternative to issuing a EAW in your view and should it precede issuing a prosecution-EAW? Could you give an estimation of how often the ESO is used by your MS or is received by your MS and issued and issued by another MS?

There is no legal obligation to summon a person abroad prior to submitting a motion for issuing an EAW. However, as transpires from the above-mentioned cases (see the answer to original question 76a), one should not consider a person to be a fugitive if the opportunities to summon him/her to the address known to the prosecutorial authorities in another MS were not exhausted. The summoning can be considered a suitable alternative for issuing an EAW, but not is every case. In particular, in cases concerning organised crime summoning prior to issuing an EAW may not be a good solution.

Unfortunately I do not have information (concrete data) concerning the use of the ESO in practice.

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 answer to question 9 above.

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?

I do not see the need for urgent changes.

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?

I do not see such relevance. Currently the most important obstacle to effective functioning of the principle of mutual recognition is the lack of mutual trust.

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

In some cases, the surrender of a requested person from Poland was adjourned due to Covid-19 pandemic. The adjournment was made upon the motions of the issuing judicial authorities.

In order to combat COVID-19, the possibility to hear a defendant via video-link was introduced in the framework of detention proceedings. Thus, the mandatory judicial hearing which should be granted to every person prior to deciding on his/her detention on remand, may now be exercised by videoconference. This applies also to the judicial hearing of the requested person with reference to the motion for his/her detention pending surrender.

Unfortunately, the new law allows for limiting the contact of the defendant with a defence counsel in case of hearing by videoconference. The court may order that the defence counsel shall appear in the courtroom but not in the detention facility (Article 250 § 3d of the CCP). In such a case the only form of contact between the defendant and his defence counsel is a phone conversation. Moreover, even this form of contact may be limited if this would endanger examination of the motion for detention within the time-limit provided for the arrest (the motion for detention shall be examined by the court during 24 hours after the so-called "police arrest" which cannot exceed 48 hours).

The CCP contains explicit regulation on conducting detention sessions via video-link. Also, all other sessions of the court[41] may be conducted via video-link. Such opportunity was introduced by the Act of 19 June 2020 introducing various measures concerning Covid-19 pandemic. Pursuant to Article 96a of the CCP, provisions of Article 374 § 3 and 8 and Article 517ea of the CCP shall apply accordingly. The mentioned provisions allow for conducting the hearing via video-link with reference to defendants deprived of liberty.

Thus, the CCP offers the opportunity to hear a requested person via video-link. A decision on this issue is taken by the judge, the requested person may only apply for conducting the procedure via video-link. The defence counsel of the requested person takes part in the session being present in the penitentiary facility, unless he/she decides to appear in the courtroom.

One interviewed judge responsible for executing/issuing the EAWs in one regional court stated that he is not using the opportunity of conducting the session via video-link. Thus, all hearings of the requested persons are held in ordinary way (in the courtroom). Only during the lockdown caused by pandemic the court was not working for 2-3 weeks. This was the only time when sessions concerning the EAWs were adjourned.

I do not have information about the practical use of videoconferencing in the EAW's procedure in other regional courts.

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[41] The CCP provides for two forums for adjudication: "a hearing" (Polish: rozprawa) which is public and devoted to examination of criminal responsibility in a contradictory manner and "a session" (Polish posiedzenie). Court's sessions are devoted mainly to incidental issues, like detention on remand, examination of incidental requests, for instance concerning issuing or execution of EAWs.