

University of Groningen

The European arrest warrant and in absentia judgments

Brodersen, K. H. ; Glerum, Vincent; Klip, A. H.

Published in:
New Journal of European Criminal Law

DOI:
[10.1177/20322844221082488](https://doi.org/10.1177/20322844221082488)

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2022

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Brodersen, K. H., Glerum, V., & Klip, A. H. (2022). The European arrest warrant and in absentia judgments: The cause of much trouble. *New Journal of European Criminal Law*, 13(1), 7-27.
<https://doi.org/10.1177/20322844221082488>

Copyright

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license. More information can be found on the University of Groningen website: <https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment>.

Take-down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

The European arrest warrant and *in absentia* judgments: The cause of much trouble

Kei Hannah Brodersen 

Maastricht University, Maastricht, Limburg, Netherlands

Vincent Glerum 

District Court of Amsterdam and University of Groningen, Amsterdam, Noord-Holland, Netherlands

André Klip

Maastricht University, Maastricht, Limburg, Netherlands

New Journal of European Criminal Law

2022, Vol. 13(1) 7–27

© The Author(s) 2022



Article reuse guidelines:

sagepub.com/journals-permissions

DOI: 10.1177/20322844221082488

journals.sagepub.com/home/nje



Abstract

The ground for optional refusal of Article 4a FD 2002/584/JHA was intended to strengthen the rights of defendants and make the execution of European Arrest Warrants after *in absentia* convictions easier. In practice, however, problems at the level of the EU legislator, at the level of national legislators and at the level of judicial authorities seem to stand in the way of achieving those goals. A common thread of the problems with applying Article 4a is a lack of awareness of the case-law of the European Court of Justice. Based on case studies from six EU Member States, this article makes an in-depth analysis of these problems and suggests concrete measures on how to overcome them.

Keywords

In absentia proceedings, European arrest warrant, mutual recognition, mutual trust, AFSJ

European arrest warrants and *in absentia* judgments

Since 28 March 2009, Framework Decision 2002/584/JHA on the European arrest warrant¹ (FD 2002/584/JHA) contains a ground for refusal relating to the execution of decisions rendered *in absentia*. On that day, Framework Decision 2009/299/JHA on *in absentia* decisions² (FD 2009/299/JHA) entered

1. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002], OJ L 190, p 1.
2. Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009], OJ L 81, p 24.

Corresponding author:

Kei Hannah Brodersen, Université de Neuchâtel, Neuchâtel, Switzerland.

Email: hannah.brodersen@unine.ch

into force which deleted Article 5(1) FD 2002/584/JHA. This provision allowed making the execution of a European arrest warrant (EAW) dependent on a guarantee by the issuing judicial authority concerning the opportunity of applying for a retrial if that EAW was issued for the purposes of enforcing an *in absentia* conviction. In its stead, Article 4a was introduced. This provision contains a ground for optional refusal by the executing judicial authority if the requested person ‘did not appear in person at the trial resulting in the decision’ and none of the exceptions listed in the provision applies.

It was deemed necessary to replace the regime of former Article 5(1), because it left the determination of the adequacy of the guarantee provided by the issuing judicial authority up to the executing judicial authority, for whom it was often ‘difficult to know exactly when execution may be refused’.³ The use of the ambiguous term ‘*in absentia*’ – a non-defined technical term whose meaning varies from Member State to Member State⁴ – and differences among the Member States in the protection of fundamental rights⁵ (see [Incorrect Transposition of the Exceptions](#)) contributed to that difficulty.

However, Article 4a brought its own challenges, as a statistical analysis of the cases dealt with by the District Court of Amsterdam, the Dutch executing judicial authority, illustrates. In 2017, for example, this court rendered a decision, namely, 179 execution-EAWs. Article 4a(1) was applicable to 121 execution-EAWs (67.5% of the execution-EAWs). In 92 of those 121 cases (76%), supplementary information was requested pursuant to Article 15(2) FD 2002/584/JHA.⁶ In 81.5% of those 92 cases the time limit of 60 days⁷ was exceeded and in roughly 15% the time limit of 90 days⁸ was exceeded. In 41 of the total of 121 cases in which Article 4a was applicable, the District Court of Amsterdam refused or partially refused to execute the EAW on the basis of that provision (roughly 34%). Regarding the other 50 execution-EAWs, where Article 4a(1) was not applicable, the District Court of Amsterdam (partially) refused to execute only 7 EAWs (roughly 12%).

This high incidence of requests for supplementary information, of non-compliance with time limits, and of (partial) refusals was caused by problems such as:

- not filling in section (d) of the EAW at all or not completely, clearly and correctly. Section (d) of the EAW-form is the ‘instrument’ intended to convey the information needed to determine whether Article 4a applies, and, if so, whether surrender may be refused on the basis of that provision;

3. Recital (3) of the preamble to FD 2009/299/JHA.

4. For the meaning of that term in Belgium, Hungary, Ireland, the Netherlands, Poland and Romania see Kei Hannah Brodersen, Vincent Glerum & André Klip, *The European Arrest Warrant and In Absentia Judgments* (Eleven International Publishing 2020), p 73–81.

5. ECJ, judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107, para 62. See further Alex Tinsley, ‘Note on the Reference in Case C-399/11 Melloni’ (2012) 3(1) *New J Eur Crim L* 19.

6. An executing judicial authority is obliged to ask for supplementary information if it does not have sufficient information in order to validly decide on the execution of an EAW, but if, after having acquitted itself of that obligation, it still does not have the necessary information it may refuse to execute that EAW: ECJ, judgment of 10 August 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, paras 103–105.

7. In cases where the requested person does not consent to his surrender, the final decision on the execution of the EAW should be taken within a period of 60 days after his arrest (Article 17(3) FD 2002/584/JHA).

8. In specific cases in which the EAW cannot be executed within the period of 60 days (see Article 17(3) FD 2002/584/JHA), that time limit may be extended with a further period of 30 days (Article 17(4) FD 2002/584/JHA).

- using section (d) of the old EAW-form, instead of using section (d) of the EAW-form as amended by FD 2009/299/JHA which, unlike the old version, is specifically tailored to the requirements of Article 4a; and
- faulty Dutch or English translations,⁹ frequently leading to deviations from the official standard texts contained in the EAW-form.

Such problems give rise to frequent requests for supplementary information pursuant to Article 15(2) of FD 2002/584/JHA, and sometimes even repeated requests, where the supplementary information provided does not clarify the issue. Requests for supplementary information cause delays in the EAW-proceedings and can lead to non-compliance with the time limits for taking a decision on the execution of an EAW. The problems with section (d) can also result in unjustified decisions to refuse to execute the EAW (unjustified in the sense that had the information provided in section (d) been correct, clear, and complete, the EAW would have been executed), and in unjustified decisions to execute an EAW (unjustified in the sense that had the information provided in section (d) been correct, clear, and complete, the EAW would not have been executed). Unjustified decisions to refuse surrender are problematic, because they create a risk of impunity that could and should have been avoided. Indeed, one of the objectives of FD 2002/584/JHA is to prevent impunity of persons who have committed an offence.¹⁰ Unjustified decisions to allow surrender are problematic, because they are at odds with the duty to respect fundamental rights,¹¹ protected under the Charter of Fundamental Rights of the European Union (Charter).¹²

Clearly, problems such as those indicated above can prevent FD 2009/299/JHA from achieving its objectives of enhancing the procedural rights of persons subject to criminal proceedings, facilitating judicial cooperation in criminal matters, and improving mutual recognition of judicial decisions between Member States (Article 1 FD 2009/299/JHA). Moreover, such problems can have a negative effect on the high level of trust that should exist between the (judicial authorities of the) Member States on which the EAW system is based.¹³

Against this background, the *InAbsentiaEAW* project was launched in 2018 to identify problems relating to EAWs issued for the purpose of executing a sentence pronounced after a trial at which the defendant did not appear in person, and to develop common standards to overcome these problems.¹⁴ This contribution presents the updated key findings of that study. That study as well as this article are largely based on an analysis of the case-law of the European Court of Justice (ECJ), which

9. Pursuant to Article 8(2) FD 2002/584/JHA, the Netherlands accepts translations of the EAW in Dutch and English; see Notification under Articles 6.3, 8.2 and 25.2 European Arrest Warrant by Netherlands, <https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/327> (accessed 12/11/2021).

10. See, for example, ECJ, judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a Third State, Member of the EEA)*, C-488/19, ECLI:EU:C:2021:206, para 72.

11. ECJ, 10 August 2017, *Zdziaszek*, para 107 (n 6), referring to the “rights of defence”.

12. Charter rights are applicable because when a Member State applies provisions of national law adopted to transpose FD 2002/584/JHA, it implements EU law as meant in Article 51(1) Charter; compare ECJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-653/15 PPU, ECLI:EU:C:2016:198, para. 84, concerning Article 4 Charter. See on other fundamental rights: Eva Aizpurua & Mary Rogan, ‘Understanding new actors in European Arrest Warrant cases concerning detention conditions: The role, powers and functions of prison inspection and monitoring bodies’ (2020) 11(2) *New J Eur Crim L* 204.

13. See, for example, ECJ, judgment of 22 December 2017, *Ardic*, C-571/17 PPU, ECLI:EU:C:2017:1026, para. 69.

14. The research resulted, inter alia, in a comparative legal study based on country reports by experts (academics and practitioners) from Belgium, Hungary, Ireland, the Netherlands, Poland, and Romania on their respective Member States: Brodersen, Glerum & Klip (n 4).

is juxtaposed with national law and practice, revealing the root causes of most of the problems described. The *InAbsentiEAW* findings are relevant not only for transposing and applying Article 4a FD 2002/584/JHA, but also for other grounds for refusal contained in that framework decision. In this respect, it is of note that in 2020 and 2021 the Commission initiated infringement proceedings against a large number of Member States for transposing FD 2002/584/JHA incompletely or incorrectly¹⁵ – evidence of the fact that even almost 20 years after its adoption, the EAW still does not run smoothly. The causes for this must be identified and exposed. Moreover, given the general character of the findings, they can also be relevant for transposing and implementing grounds for refusal in other EU instruments concerning mutual recognition of judicial decisions in criminal matters. After describing the system of Article 4a (the [System of Article 4a FD 2002/584/JHA](#)), this contribution will first deal with the issue of autonomous concepts of Union law. One of the findings of the *InAbsentiEAW* project is that issuing and executing judicial authorities seem to have a tendency to interpret and apply such concepts as if they were concepts of national law (the [National Law Interpretation of Autonomous Concepts of EU Law](#)). Next, the issue of incorrect transposition of the exceptions of Article 4a will be discussed. Incorrect transposition of those exceptions alters the level of protection envisaged by that provision (the [Incorrect Transposition of the Exceptions](#)). Transposition of Article 4a as a ground for mandatory refusal is the subsequent issue. Many Member States oblige their executing judicial authorities to refuse to execute an EAW if none of the exceptions of Article 4a applies, thus compounding problems caused by the previous two issues (the [Transposition as a Ground for Mandatory Refusal](#)). Finally, the structure and wording of section (d) of the EAW-form will be scrutinised. This section no longer accurately reflects the requirements of Article 4a, as interpreted by the ECJ, and therefore, potentially misleads both issuing and executing judicial authorities (([Now](#)) [Misleading Character of Section \(d\) of the EAW](#)).

The system of Article 4a FD 2002/584/JHA

Pursuant to Article 4a, the executing judicial authority ‘may’ refuse to execute an EAW issued for the purpose of executing a custodial sentence or a detention order if the requested person ‘did not

15. AU (INFR(2020)2307); BE (INFR(2021)2002); CS (INFR(2020)2312); CY (INFR(2020)2363); DE (INFR(2020)2361); ET (INFR(2020)2279); ES (INFR(2021)2070); HE (INFR(2021)2003); HU (INFR(2021)2071); IE (INFR(2020)2072); IT (INFR(2020)2278); LT (INFR(2020)2306); NL (INFR(2021)2004); PL (INFR(2020)2308); SV (INFR(2020)2362). The register of infringement decisions is accessible at https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en (accessed 22/08/2021).

appear in person at the trial resulting in the decision', unless one of the four exceptions covered by Article 4a(1)(a-d) applies.

The exceptions listed in Article 4a cover situations in which the requested person must be deemed to have waived his right to be present at the trial (Article 4(1)(a-b)),¹⁶ and situations in which the requested person has the right to a retrial, or an appeal (Article 4a(1)(c-d)).^{17, 18} In other words, the exceptions cover situations in which surrender 'must be regarded as not infringing the rights of the defence'.¹⁹ Those exceptions are exhaustive.²⁰ Consequently, if one or more of these exceptions apply, the executing judicial authorities may not make the execution of an EAW dependent on additional guarantees concerning the rights of the defence²¹ and may not refuse the execution of the EAW on the ground that the requested person did not appear in person at the trial resulting in the decision.²²

Section (d) of the model EAW-form is intended to correspond to the requirements of Article 4a. When issuing an EAW for the purposes of executing a custodial sentence or a detention order, the

16. 'The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:
- (a) in due time:
 - (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial;
 - and
 - (ii) was informed that a decision may be handed down if he or she does not appear for the trial;
 - or
 - (b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial; (...)'
17. 'The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:
- (...)
 - (c) after being served with the decision and being expressly informed of the right to a retrial, or an appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:
 - (i) expressly stated that he or she does not contest the decision;
 - or
 - (ii) did not request a retrial or appeal within the applicable time frame;
 - or
 - (d) was not personally served with the decision but:
 - (i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;
 - and
 - (ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant'.
18. ECJ, 26 February 2013, *Melloni*, para 52 (n 5).
19. *Ibid*, para 44.
20. *Ibid*.
21. *Ibid*.
22. See, for example, ECJ judgment of 10 August 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para 55.

issuing judicial authority is required to state whether the requested person appeared in person at the trial resulting in the decision or not (points 1–2). If the requested person did not appear at that trial, the issuing judicial authority should tick the box corresponding to one or more of the exceptions that are applicable to the case at hand (points 3.1–3.4).

Article 4a avoids the difficulties surrounding the use of the ambiguous technical term ‘*in absentia*’ (see the [European Arrest Warrants and In Absentia Judgments](#)) by using a factual description of the situations in which the ground for refusal applies: situations in which the person concerned did not appear in person, that is, did not physically appear at his trial. According to the internal logic of Article 4a, non-appearance in person at ‘the trial resulting in the decision’ raises the possibility that the requested person’s rights of defence were not fully respected, whereas personal appearance at that trial establishes a non-rebuttable presumption that those rights were indeed fully respected. After all, in the event of personal appearance, Article 4a FD 2002/584/JHA does not apply.

According to the ECJ, Article 4a FD 2002/584/JHA is compatible with the right to an effective judicial remedy and to a fair trial (Article 47 Charter), and the rights of the defence (Article 48(2) Charter).²³ The right of the accused to appear in person at his trial is not absolute: an *in absentia* trial does not violate the right to a fair trial if the accused voluntarily and unequivocally waived his right to appear in person or if he has the right to a retrial.²⁴ Exactly those two categories of situations are covered by the exceptions of Article 4a.²⁵

In order to ensure the ‘high level of protection’ that Article 4a is intended to provide,²⁶ the ECJ interprets Article 4a in accordance with Article 6 ECHR and the case-law of the ECtHR.²⁷ In some respects, Article 4a provides for an even *higher* level of protection than Article 6 ECHR, as interpreted by the ECtHR. For instance, while under Article 4a(1)(a), an absent accused must either have been summoned *in person* or must have by other means *actually* received *official* information about the date and the place of the scheduled trial in order for him to be regarded as having voluntarily and unambiguously waived his right to be present, under Article 6 ECHR, a waiver does not necessarily require that an accused was summoned in person or by other means actually received official information.²⁸

Under the regime of Article 5(1) FD 2002/584/JHA, differences among the Member States as regards fundamental rights protection caused difficulties (see the [European Arrest Warrants and In Absentia Judgments](#)). Essentially, Article 4a FD 2002/584/JHA is a compromise between Member States that provide a high level and Member States that provide a lower level of fundamental rights protection. On the one hand, all Member States reached a consensus on the level of protection of the

23. ECJ, 26 February 2013, *Melloni*, para 53 (n 5).

24. Cf. ECtHR, judgment of 1 March 2006, *Sejdovic v. Italy* [GC], ECLI:CE:ECHR:2006:0301JUD005658100, § 84.

25. ECJ, 26 February 2013, *Melloni*, para 49–53 (n 5).

26. See, for example, ECJ, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, para 37.

27. ECJ, 22 December 2017, *Ardic*, para 74 (n 13).

28. Cf. ECtHR, 1 March 2006, *Sejdovic v. Italy*, § 101 (n 24), § 101, where the ECtHR held that ‘certain established facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution’. In such cases, the person concerned will be considered to have waived his right to be present at the trial and to defend himself; cf. ECtHR, judgment of 12 June 2018, *M.T.B. v. Turkey*, ECLI:CE:ECHR:2018:0612JUD004708106, § 49–50. In the same vein advocate-general M. Bobek, opinion of 11 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:333, para 74. See for further examples of a higher level of protection under Article 4a: Brodersen, Glerum & Klip, p 102 (footnote 86) and p 110 (footnote 122) (n 4).

procedural rights of persons who were convicted *in absentia*.²⁹ That consensus relates to the exceptions (see above) and that level is a *high* level of protection, in order to allow the executing judicial authority to execute the EAW, while *fully* respecting the rights of the defence.³⁰ This part of the compromise is intended to satisfy the needs of Member States with a high level of fundamental rights protection. On the other hand, even if none of the exceptions of Article 4a(1)(a-d) FD 2002/584/JHA applies pursuant to the wording of that provision the executing judicial authority is *not obliged* to refuse the execution of the EAW. In deciding whether or not to refuse to execute the EAW, it may take into account ‘other circumstances that enable it to ensure that the surrender of the person concerned does not entail a breach of his rights of defence’.³¹ The *optional* nature of the ground for refusal permits the executing judicial authorities of Member States with a high level of fundamental rights protection to refuse the execution of the EAW, once it has established that none of the exceptions applies, whereas that same optional nature allows the executing judicial authorities of other Member States to be satisfied with a lower level of fundamental rights protection and to refrain from refusing to execute the EAW.

Whilst Article 4a does not seek to harmonise national criminal procedural rules on *in absentia* trials, it may have such an effect, for instance, when Member States adapt their legislation in order to comply with the case-law of the ECJ on key concepts of that provision. Direct harmonisation of the right to be present is the exclusive province of Directive 2016/343 on the presumption of innocence and on the right to be present at the trial in criminal proceedings.³² That directive lays down common minimum rules concerning, inter alia, certain aspects of the right to be present at the trial and provides that Member States are to ensure that suspects and accused persons have the right to be present at their trial (Article 8(1)), a right which is not absolute. Regarding the relationship between FD 2002/584/JHA and Directive 2016/343/EU, the ECJ, in essence, held that Article 4a is a *lex specialis* and that any non-conformity with the provisions of that directive by the issuing Member State cannot constitute a reason for refusing to execute an EAW.³³

National law interpretation of autonomous concepts of EU law

Autonomous concepts of EU law

According to a well-established tenet of EU law, the terms of a provision of EU law which does not make reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union,³⁴ taking into account the wording and the context of the provision, and the purpose of the legislation at

29. ECJ, 26 February 2013, *Melloni*, para 62 (n 5).

30. See, for example, ECJ, judgment of 24 May 2016, *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:346, para 37.

31. See, for example, *ibid*, para 50.

32. Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016], OJ L 65, p 1. Ireland and Denmark are not bound by this directive.

33. ECJ, judgment of 17 December 2020, *Generalstaatsanwaltschaft Hamburg*, C-416/20 PPU, ECLI:EU:C:2020:1042, paras 45–47.

34. See on autonomous concepts of Union law, *inter alios*, Leandro Mancano, ‘Judicial Harmonisation Through Autonomous Concepts of European Union Law. The Example of the European Arrest Warrant Framework Decision’ (2018) 43 *European Law Review* 69; Valsamis Mitsilegas, ‘Autonomous concepts, diversity management and mutual trust in Europe’s area of criminal justice’ (2020) 57 *Common Market Law Review* 45.

hand.³⁵ This tenet is based on the need for uniform application of EU law and on the principle of equality.³⁶ When a provision of EU law contains autonomous concepts which must be interpreted uniformly, the meaning of those concepts cannot be left to the discretion of Member States on the basis of their national law.³⁷ Instead, the meaning of such concepts must be determined irrespective of national qualifications³⁸ and independently of national substantive and procedural rules in criminal matters ‘which by nature diverge in the various Member States’.³⁹

Judging from recital (3) of the preamble to FD 2009/299/JHA, it was felt that the previous regime concerning *in absentia* decisions left too much latitude to executing judicial authorities, resulting in uncertainty as to when the execution of an EAW would be refused (see the [European Arrest Warrants and In Absentia Judgments](#)). According to recital (4) of the preamble, to remedy this situation, FD 2009/299/JHA harmonises the grounds of refusal concerning *in absentia* decisions in a number of framework decisions by providing ‘clear’ and ‘common’ grounds for non-recognition of decisions rendered following a trial at which the requested person did not appear in person. Those grounds for non-recognition could hardly be called ‘clear’ and ‘common’ if their applicability and scope were to depend on the various national laws of 27 Member States.

It should, therefore, not come as a surprise that key concepts of Article 4a, such as ‘the trial resulting in the decision’ (Article 4a(1)), ‘summoned in person’ (Article 4a(1(a))), and ‘by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial’ (Article 4a(1(a))), constitute autonomous concepts of EU law,⁴⁰ even though Article 4a does contain a reference to the law of the Member States. That reference, however, does not concern the key concepts mentioned earlier and, therefore, does not serve the purpose of indicating that the meaning and scope of those concepts are to be determined by the national laws of the Member States.⁴¹ Instead, it merely seeks to serve as a reminder that FD 2009/299/JHA does not harmonise national procedural rules concerning *in absentia* proceedings as such, as is also evident from recital (14) of the preamble (‘(...) [The provisions of FD 2009/299/JHA] are not designed to harmonise national legislation. (...)’).

As yet, the ECJ has not had an opportunity to rule on the character of concepts that constitute the exceptions contained in Article 4a(1)(b-d), but the reasons for holding that the concepts of Article 4a(1)(a) are autonomous concepts of EU law, must equally apply: if they were not autonomous concepts of EU law, Article 4a could not provide a ‘clear’ and ‘common’ ground for refusal, and ‘guarantee a high level of protection’. We therefore conclude that the key concepts of exceptions (b-d) should be autonomous concepts of EU law as well.

Because of the autonomous nature of the key concepts of Article 4a, filling in section (d) of the EAW in essence requires a two-part operation. First, the issuing judicial authority must establish what happened in the national proceedings that led to the *in absentia* decision on a factual level.

35. See André Klip, *European Criminal Law. An Integrative Approach* (4th ed, Intersentia Cambridge 2021), p 151–152.

36. See, for example, ECJ, judgment of 17 October 2018, *UD*, C-393/18, ECLI:EU:C:2018:835, para 46.

37. See, for example, ECJ, judgment of 17 July 2008, *Kozłowski*, C-66/08, ECI:EU:C:2008:437, para 41; ECJ, judgment of 16 November 2010, *Mantello*, C-261/09, ECLI:EU:C:2010:683, para 38.

38. ECJ, 10 August 2017, *Tupikas*, para 67 (n 22).

39. ECJ, 22 December 2017, *Ardic*, C-571/17 PPU, para 63 (n 13).

40. *Ibid* (‘the trial resulting in the decision’); ECJ, 24 May 2016, *Dworzecki*, C-108/16 PPU, para 32 (n 26) (‘summoned in person’; ‘by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial’).

41. ECJ, 24 May 2016, *Dworzecki*, C-108/16 PPU, para 29 (n 26).

Subsequently, it must determine whether its findings as to the facts mean that the person concerned did not appear in person at the trial resulting in the decision and, if so, whether those findings carry the conclusion that one or more of the exceptions apply, bearing in mind the autonomous nature of the expressions used in section (d) and taking into account the relevant case-law of the ECJ. In doing so, it must distance itself from national law notions, in other words, it must take off its national law glasses and put on its EU law glasses. If the person concerned did not appear in person at the trial resulting in the decision and if the facts demonstrate the existence of one or more of the exceptions, the issuing judicial authority may tick the applicable box(es) in section (d) of the EAW. On the other hand, if the facts do not correspond to one or more of the exceptions, it must not tick any of the boxes belonging to points 3.1–3.4 of section (d) of the EAW. But in that case, the issuing judicial authority may still mention any circumstances which in its view support the conclusion that surrendering the requested person would not entail a breach of the rights of defence. The two-part operation applies, *mutatis mutandis*, to assessing section (d) by the executing judicial authority.

One of the preconditions for this two-part operation is that the meaning of autonomous concepts of EU law is settled. However, not every key concept of Article 4a has been elucidated by the ECJ. The concept of a ‘trial resulting in the decision’ *in the context of a trial with multiple hearings within one and the same degree of jurisdiction* is but one example. The *InAbsentiaEAW* project showed that Member States included in that project have three mutually exclusive interpretations of that concept: (1) only the presence of the person concerned at *all* of the hearings excludes the applicability of Article 4a, (2) his presence at *only one* of the hearings suffices to exclude the applicability of Article 4a, no matter what happened at that hearing, and (3) only his presence at the hearing(s) at which *the merits of the case* were dealt with excludes the applicability of Article 4a.⁴² Applying these differing interpretations can lead to misunderstandings between issuing and executing judicial authorities, and can result in incorrect decisions as to whether Article 4a is applicable to the case at hand.

If the meaning of an autonomous concept of EU law is not settled, issuing or executing judicial authorities – that qualify as a ‘court or tribunal’ – could – and in some cases should – ask the ECJ for guidance pursuant to Article 267 of the Treaty on the Functioning of the European Union. The *InAbsentiaEAW* project, however, came up with another – arguably more efficient – solution. That solution is based on the reasonable assumption that in issuing an EAW, the issuing judicial authority is of the opinion that the requested person’s rights of defence were not breached despite his absence at the trial resulting in the decision. That being the case, the issuing authority should be able to explain that opinion and it should do so in a factual manner and without referring to national legal terminology. Even if the executing judicial authority were to find that none of the exceptions applies, this method could enable it to arrive at the same conclusion as the issuing judicial authority. Provided that its Member State left it with a margin of discretion, the executing judicial could then refrain from refusing to execute the EAW (see the [Transposition as a Ground for Mandatory Refusal](#)). The following sections will make clear why a factual description of what happened in the procedure leading up to the EAW is paramount to ensure a correct application of Article 4a under the current legal framework.

Of course, this two-part operation presupposes that both issuing and executing judicial authorities are actually aware of the autonomous nature of the key concepts of Article 4a. Unfortunately, the *InAbsentiaEAW* project showed that this is not always the case, as demonstrated in the next section.

42. Brodersen, Glerum & Klip, p 96–99 (n 4).

National law interpretation

When filling in section (d) of the EAW-form, judicial authorities sometimes seem to view the autonomous concepts contained in that section – which correspond to the autonomous concepts of Article 4a – through national law glasses and give them a national law meaning. Because that national law meaning is not necessarily the same as the autonomous Union law meaning and because the national laws of the various Member States by their nature are divergent, applying a national law meaning can lead to misunderstandings between judicial authorities and, thus, hamper achieving the objectives of Article 4a.

The *Tupikas* and *Dworzecki* judgments illustrate this point.⁴³ In the former judgment, the ECJ defined the autonomous concept of a ‘trial resulting in the decision’ as the ‘final sentencing decision’ or the ‘final conviction’.⁴⁴ In doing so, it distinguished a *final* judicial decision referred to in Article 4a FD 2002/584/JHA and in section (d) of the EAW-form from an *enforceable* judicial decision referred to in Article 8(1)(c) FD 2002/584/JHA and in section (b) of the EAW-form.⁴⁵ It is possible that, in some cases, a final decision and an enforceable decision are ‘indissociable’, but this is an issue that is ‘still governed’ by national law.⁴⁶ In other words, depending on the national law of the issuing Member State, a final judicial decision does not necessarily constitute an enforceable judicial decision (yet), for example, when the national law of that Member State affords the convicted person a *terme de grâce* during which he may request a pardon after his conviction became final, or when the execution of a final custodial sentence is suspended, in which case that sentence is not enforceable as long as that suspension is not revoked.

In practice, however, issuing judicial authorities often regard a first instance judgment of conviction which was subsequently upheld on appeal as a final judicial decision in the sense of Article 4a and section (d), just because according to national law that is the judgment which will be enforced after surrender, such as in the case of the EAW issued against Mr Tupikas. Section (b) of his EAW mentioned a first instance judgment which was upheld on appeal and section (d) mentioned that Mr Tupikas appeared in person at the trial resulting in that judgment. However, on the basis of the guidance provided by the ECJ in its *Tupikas* and *Zdziaszek* judgments, the District Court of Amsterdam determined that the judgment on appeal was also relevant for Article 4a and section (d). In the *Zdziaszek* judgment, the ECJ held that where the final finding of guilt and the final determination of the sentence are ‘dissociated’, *both* of those final decisions are subject to the verifications required by Article 4a.⁴⁷ This was the case with the proceedings against Mr Tupikas: the appeal proceedings concerned the determination of his sentence only. In the end, the District Court of Amsterdam refused to execute the EAW, since Mr Tupikas had not appeared at the appeal trial, and none of the exceptions applied.⁴⁸

Mr Dworzecki was summoned to his trial at the address given by him to the authorities. The summons was handed over to an adult member of his household who undertook to pass the summons to the addressee. According to the law of the issuing Member State, this was a perfectly

43. See on the *Dworzecki*, *Tupikas*, *Zdziaszek* and *Ardic* judgments: Lorena Bachmaier Winter, ‘Fundamental Rights and Effectiveness in the European AFSJ. The Continuous and Never Easy Challenge of Striking the Right Balance’ (2018) 1 eucrim https://eucrim.eu/media/issue/pdf/eucrim_issue_2018-01.pdf#page=58 (accessed 10/11/2021).

44. ECJ, 10 August 2017, *Tupikas*, paras 74–75 (n 22).

45. *Ibid*, para 71.

46. *Ibid*, para 76.

47. ECJ, 10 August 2017, *Zdziaszek*, para 94 (n 6).

48. District Court of Amsterdam, judgment of 30 August 2017, ECLI:NL:RBAMS:2017:6273.

valid way of serving a summons on an accused. In the EAW issued against Mr Dworzecki, the issuing judicial authority indicated that he had ‘actually received official information about the date and the place of the trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial’ (Article 4a(1)(a)(i) FD 2002/584/JHA). However, it was not established that such official information had actually reached Mr Dworzecki. In a previous case, the District Court of Amsterdam was informed by the issuing judicial authority that, under Polish law, service of a summons at an accused’s address on an adult member of the household who undertakes to pass the summons on to the accused, under Polish law, was equivalent to a personal service of the summons.⁴⁹ However, the ECJ held that the concept ‘by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial’ is an autonomous concept of EU law that must be interpreted uniformly throughout the EU.⁵⁰ The ECJ held that this autonomous concept can cover a situation such as the one in Mr Dworzecki’s case but only if it is unequivocally established that the third party actually passed the summons on to the person concerned, and that the issuing judicial authority must indicate in the EAW the evidence on the basis of which it found that the person concerned had indeed received that information.⁵¹ Consequently, the situation under Polish law was not relevant for determining whether the exception of Article 4a(1)(a)(i) applied.

The ECJ rendered its *Dworzecki* judgment in 2016, but even after that judgment, issuing judicial authorities often kept indicating⁵² – even until today, 5 years later⁵³ – that the person concerned ‘by other means actually received official information on the date and the place of the scheduled trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial’ in circumstances in which the summons was served on an adult member of his household without proffering – and, when asked to provide supplementary information, without being able to proffer – any evidence that the summons actually reached the person concerned. The same holds true for the other example given above. Four years after the *Tupikas* judgment, issuing judicial authorities still frequently indicate a first instance judgment as a decision referred to in Article 4a and section (d) where a final judgment on appeal should have been indicated.⁵⁴ This is evidence of a lack of knowledge of the case-law of the ECJ – and, therefore, evidence of a lack of awareness of the autonomous character of key concepts of Article 4a – on the part of some issuing judicial authorities.

49. District Court of Amsterdam, judgment of 24 February 2016, ECLI:NL:RBAMS:2016:868.

50. ECJ, 24 May 2016, *Dworzecki*, para 32 (n 26).

51. *Ibid.*, paras 48–49.

52. Problems such as these were one of the reasons for initiating the *InAbsentiaEAW* project.

53. See, for example, District Court of Amsterdam, interlocutory judgment of 21 April 2021, ECLI:NL:RBAMS:2021:1969: section (d) of the EAW indicated that the requested person by other means had actually received information on the date and the place of the trial, but supplementary information provided by the issuing judicial authority showed that in actual fact the summons was served on a third party. Neither the EAW nor the supplementary information referred to evidence that the summons was actually passed on to the requested person.

54. See, for example, District Court of Amsterdam, interlocutory judgment of 10 August 2021, ECLI:NL:RBAMS:2021:4336: sections (b) and (d) referred to a final and enforceable first instance judgment which was upheld on appeal, but it turned out that the appeal judgment was the ‘decision’ referred to in Article 4a and that the requested person had not appeared in person at the trial resulting in that decision.

National legal presumptions

Closely related to the issue of lack of awareness of the autonomous character of key concepts of Article 4a is the issue of national legal presumptions concerning summoning an accused to a trial. It should be remembered that Article 4a does not harmonise national criminal procedural law and, therefore, does not have a direct effect on (the application of) that law.⁵⁵ This provision does not oblige Member States to organise their national rules on summoning accused persons in such a way that service of a summons always meets the requirements of Article 4a(1)(a) and, consequently, it leaves room for modes of serving a summons that do not meet those requirements.⁵⁶

In five of the six Member States included in the *InAbsentiaEAW* project, national rules on summoning an accused to stand trial provide for a wide variety of modes of non-personal service of summonses – such as public announcement of the summons, sending the summons through the mail to the accused’s registered address, leaving a notice at the door with instructions where to collect the summons, or handing the summons over to a household member of the accused’s, to his chosen legal counsellor, to his employer, or to an official⁵⁷ – and operate with legal presumptions.⁵⁸ Under Polish law, for example, a failure to collect a summons after the authorities twice left a notice at the address of the accused with instructions where and when to collect it is regarded as a waiver of the right to be present at the trial.⁵⁹ Under Dutch law, an absent accused is regarded as having waived his right to be present at the first instance trial, if the summons was served validly – for example, by sending the summons through the mail to his registered or actual address or by handing over the summons to a third party at that address – unless there are clear indications to the contrary.⁶⁰ National legal presumptions such as these do not require *positive* evidence that the information contained in the summons actually reached the addressee, or, in other words, that the addressee was aware of that information. Such national legal presumptions, therefore, do not meet the autonomous requirements of Article 4a. After all, the person concerned can only be regarded as having waived his right to be present at the trial, if it is *unequivocally established* that he *actually* received official information on the date and the place of the scheduled trial (see [the National Law Interpretation](#)).⁶¹

Legal presumptions are particularly dangerous when coupled with a lack of awareness of the autonomous character of key concepts such as ‘by other means actually received official information’. If an issuing judicial authority is not aware of the autonomous character of that concept and if its national law operates with a legal presumption that a particular way of non-personal service produces a waiver of the right to be present at the trial, it is likely that in the EAW it would indicate that the requested person ‘by other means actually received official information of the scheduled

55. In the same vein: Supreme Court of the Netherlands, judgment of 30 May 2017, ECLI:NL:HR:2017:976, para. 3.2. The Supreme Court rejected the argument that the *Dworzecki* judgment is co-determinative for the validity of service of a summons in a Dutch criminal case. It held that FD 2002/584/JHA relates to the EAW and to surrender proceedings between the Member States, but does not relate to a trial in a criminal case (‘de berechting van een strafzaak’) and, therefore, does not apply to service of summonses in criminal cases (‘de betekening van dagvaardingen in strafzaken’).

56. However, if application of national rules regarding service of summonses leads to results that do not meet the requirements of Article 4a, an issuing Member State runs the risk that the execution of its EAWs is refused regularly by judicial authorities of other Member States. This might be an incentive for amending those rules.

57. Brodersen, Glerum & Klip, p 134 (n 4).

58. Ireland is the exception, as trials *in absentia* as such are not possible under Irish law, except for very minor offences: *Ibid*, p 76.

59. *Ibid*, p 135.

60. Supreme Court of the Netherlands, judgment of 12 March 2002, ECLI:NL:HR:2002:BD5163, paras 3.33–3.34.

61. ECJ, 24 May 2016, *Dworzecki*, para 48 (n 26).

date and place of the trial'. In this way, national legal presumptions relating to non-personal service of a summons intensify the negative effect of a lack of awareness of the autonomous character of key concepts of that provision on the correct application of Article 4a.

Incorrect transposition of the exceptions

The exhaustive exceptions mentioned in Article 4a reflect a consensus reached by all Member States about the scope to be given *under EU law* to procedural rights of persons who are convicted *in absentia* and who are the subject of an EAW.⁶² The *Melloni* judgment makes it clear that, where an EU instrument calls for national implementing measures, Member States remain free to apply national standards of protection of fundamental rights, provided that the level of protection of the Charter, as interpreted by the ECJ, and the primacy, unity and effectiveness of Union law are not compromised.⁶³ In Mr Melloni's case, Spain was not allowed to apply a *higher* level of protection of fundamental rights based on its constitution – namely, requiring an additional guarantee that Mr Melloni would have the right to have his *in absentia* conviction reviewed in Italy – because the exception of Article 4a(1)(b) was applicable. Allowing for such additional requirements would not only compromise the primacy of Union law (Article 4a contains an exhaustive list of exceptions), but also its unity and effectiveness (additional requirements cast doubt on the uniformity of the standard of protection and, thus, undermine the principle of mutual trust and recognition).⁶⁴

Applying national standards which afford a *lower* level of protection is equally problematic. After all, where the ECJ refers to the 'consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted *in absentia* who are the subject of a European arrest warrant',⁶⁵ it does not seem to leave any room for tightening that scope either. Moreover, affording a lower level of protection would compromise the level of protection afforded by Union law, and would also – for the same reasons as providing for more protection – compromise the unity and effectiveness of Union law.⁶⁶ We therefore conclude that the exceptions of Article 4a constitute a *full* harmonisation of the circumstances in which the execution of an EAW issued in order to enforce an *in absentia* decision must be regarded as not infringing the rights of the defence. As a result, when transposing the exceptions of Article 4a Member States may not alter the level of protection afforded by those exceptions, as expressed in the autonomous concepts of EU law that make up those exceptions.

62. ECJ, 26 February 2013, *Melloni*, para 62 (n 5). See on the *Melloni* judgment, *inter alios*, Leonard F. M. Besselink, 'The parameters of constitutional conflict after Melloni' (2014) 39 *European Law Review* 531; Nik de Boer, 'Addressing rights divergence under the Charter: Melloni' (2013) 50 *Common Market Law Review* 1083; Giulia Cavallone, 'European arrest warrant and fundamental rights in decisions rendered in absentia: the extent of Union law in the case C-399/11 Melloni v. Ministerio Fiscal' (2014) 4 *European Criminal Law Review* 19; Aida Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' (2014) 10 *European Constitutional Law Review* 308.

63. *Ibid.*, para 60.

64. *Ibid.*, paras 61–63.

65. *Ibid.*, para. 62.

66. In the same vein advocate-general E. Sharpston, opinion of 6 December 2018, *Związek Gmin Zagłębia Miedziowego w Polkowicach*, C-566/17, ECLI:EU:C:2018:995, footnote 112 ('In [*Melloni*], however, the Court concluded that, precisely because the relevant rules had been harmonised completely at EU level, the national court was *no longer permitted* to apply the higher standard of fundamental rights protection provided by its national constitutional law'); advocate-general M. Bobek, opinion of 25 July 2018, *Dzivev and Others*, C-310/16, ECLI:EU:C:2018:623, paras 73–75 ('The rules contained in [Article 4a] indeed exhaustively cover an aspect of the EAW procedure, thus precluding autonomous national rules on the same subject matter').

Poland, one of the Member States included in the *InAbsentiaEAW* project, transposed some of the exceptions of Article 4a in such a way, that the level of protection is altered. This Member State transposed the first exception of Article 4a – concerning summoning the requested person – in such a way that it is not required that the requested person was summoned *in person* or by other means *actually* received official information about the date and the place of the trial. That same Member State transposed the second exception – concerning defence by a mandated legal counsellor – in such a way that it is not required that the requested person *was aware of the scheduled trial*. The requirements that the summons is handed over in person, that the requested person actually received information about the date and the place of the trial, and that he was aware of the scheduled trial are *essential* components of the respective exceptions, as they express the high level of protection that Article 4a seeks to afford. After all, actual awareness either of the date and place of the trial or of the scheduled trial is a precondition for a valid waiver of the right to appear in person at the trial.⁶⁷ By doing away with those requirements, Poland lowered the level of protection of fundamental rights as envisaged by Article 4a.⁶⁸

Such an incorrect transposition is likely to cause problems both when issuing and executing EAWs. If its national law does not require a summons in person, the issuing judicial authority will probably regard non-personal service of a summons as sufficient and will assume that the first exception applies, whereas the executing judicial authority probably will hold that his exception is not applicable. If the national law of the executing judicial authority does not require a summons in person, it probably will regard non-personal service of a summons as complying with the requirements of the first exception.

Evidently, Poland is not the only Member State that transposed exceptions incorrectly. A recent report from the Commission on the implementation of FD 2002/584/JHA mentions that the exceptions could not be identified in *several* Member States and that in *some* Member States, autonomous concepts such as ‘being summoned in person’, ‘actually received official information’ or ‘being aware of the scheduled trial’ have not been explicitly transposed.⁶⁹ It is, therefore, likely that such issues are included in the infringement proceedings initiated by the Commission against, inter alia, Poland (see the [European Arrest Warrants and In Absentia Judgments](#)).

Transposition as a ground for mandatory refusal

Article 4a contains a ground for optional refusal. Nevertheless, half of the Member States transposed this provision as a ground for mandatory refusal.⁷⁰ The same ratio is reflected in the Member States included in the *InAbsentiaEAW* project: of six Member States, Hungary, Ireland and the Netherlands opted for transposition as a ground for mandatory refusal.⁷¹

67. See, for example, ECtHR, 1 March 2006, *Sejdovic v. Italy*, § 101 (n 24).

68. In all fairness, it should be pointed out that, regarding the *execution* of EAWs, Polish law contains a ground for mandatory refusal concerning fundamental rights violations. One could argue that the provision adopted to transpose Article 4a, when taken together with that fundamental rights provision, provides for a level of protection that does not fall below the level of protection envisaged by Article 4a: Brodersen, Glerum & Klip, p 63 (n 4).

69. *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, 2 July 2020, COM(2020) 270 final, p 18.

70. *Ibid*, p 18.

71. Brodersen, Glerum & Klip, p 51 (n 4).

An important consequence of transposition as a ground for mandatory refusal is that the executing judicial authority is *prohibited* from taking into account circumstances on the basis of which it could conclude that the requested person's rights of defence were not breached, even though none of the exceptions of Article 4a applies. Such circumstances can present themselves, for example, where the person concerned displayed 'any manifest lack of diligence (...)', notably where it transpires that he sought to avoid service of the information addressed to him',⁷² 'sought to avoid any contact with the lawyers appointed by the [courts of the issuing Member State]',⁷³ or 'brought an appeal against the decisions at first instance, which confirms the existence of valid instructions under [the law of the issuing Member State] being given to a lawyer (...)'.⁷⁴ As a result of a transposition of Article 4a as a ground for mandatory refusal, an executing judicial authority must automatically refuse to execute an EAW if the requested person did not appear in person at the trial resulting in the decision and none of those exceptions applies.

As discussed in [the System of Article 4a FD 2002/584/JHA](#), Article 4a goes further than required by the ECtHR's case-law on *in absentia* proceedings. Therefore, even though none of the exceptions applies, it is still possible that surrendering the requested person would not breach his rights of defence under the ECHR. However, we do not yet know what impact Directive 2016/343 will have on these situations.

Again, the cases of Mr Dworzecki and Mr Tupikas – of the eponymous ECJ judgments – serve as an illustration. Mr Dworzecki had confessed that he had committed the offences of which he was suspected, had reached an agreement with the public prosecutor as to the penalty to be imposed on him, and had given an address for receiving official information. He did not appear in person at the trial resulting in the decision. The summons was handed over to an adult member of the household at the address indicated by Mr Dworzecki. Because it could not be unequivocally established that he actually received the information on the date and place of the scheduled trial, the exception of Article 4a(1)(a) did not apply.⁷⁵ Neither did any of the other exceptions. Mr Tupikas appeared in person at the first instance trial resulting in his conviction, appealed against the sentence imposed, but did not appear in person at the appeal trial. The summons for the appeal trial had been sent to the address given by Mr Tupikas to the Lithuanian authorities and he had been defended in his absence by a court-appointed legal counsellor. However, it was not clear whether he had actually received the summons (Article 4a(1)(a)) or had given a mandate to that legal counsel (Article 4a(1)(b)), and none of the other exceptions applied. In the circumstances of both cases, the person concerned was evidently aware of the proceedings and of the charges against him and could reasonably expect to be summoned at his address.⁷⁶ Such circumstances could support the conclusion that the person concerned manifestly displayed a lack of diligence in ensuring that he received official information addressed to him, and, thus, could justify a decision to surrender him despite his absence at his

72. ECJ, 24 May 2016, *Dworzecki*, para 51 (n 26).

73. ECJ, 17 December 2020, *Generalstaatsanwaltschaft Hamburg*, para 52 (n 33).

74. *Ibid*, para 53. On appeal, the person concerned had been represented by court-appointed lawyers (para 15). See also the opinion of advocate-general M. Bobek in the *Tupikas* case: opinion of 27 July 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:609, para. 79 ('(...) However, the person concerned was aware of the decision given at first instance and brought an appeal (and was therefore aware of those proceedings). If, moreover, such a person was duly represented, it is difficult to see how his rights of defence were not respected').

75. See ECJ, 24 May 2016, *Dworzecki*, para 48 (n 26).

76. Regarding an agreement with the public prosecutor see ECtHR, judgment of 26 January 2017, *Lena Atanasova v. Bulgaria*, ECLI:CE:ECHR:2017:0126JUD005200907, § 48 and § 53. Regarding lodging an appeal see ECtHR, decision of 23 February 1999, *De Groot v. The Netherlands*, ECLI:CE:ECHR:1999:0223DEC003496697 and ECtHR, judgment of 24 May 2007, *Da Luz Domingues Ferreira v. Belgium*, ECLI:CE:ECHR:2007:0524JUD005004999, § 50.

trial. However, in both cases the District Court of Amsterdam was *forced* to refuse the execution of the EAW, because the Netherlands had transposed Article 4a as a ground for mandatory refusal.⁷⁷

Although the issue of transposition as a ground for mandatory refusal was addressed in the preliminary reference in the *Tupikas* and *Zdziaszek* cases, the questions referred to the ECJ did not directly relate to that issue. Nevertheless, advocate-general Bobek concluded in both cases that the Netherlands had incorrectly transposed Article 4a as a ground for mandatory refusal. According to him, such a transposition reverses the logic of Article 4a by turning the *possibility* of a refusal into a *requirement* of a refusal. Moreover, transposition as a ground for mandatory refusal turns the situations covered by the four exceptions into the *only* situations in which the executing judicial authority may execute the EAW when the person concerned did not appear in person at the trial. Drawing an analogy with the ECJ's case-law on Article 4(6) FD 2002/584/JHA – when transposing that optional ground for refusal Member States must leave a 'margin of discretion' to their executing judicial authorities⁷⁸ – the advocate-general opined that, similarly, the executing judicial authority must enjoy such a 'margin of discretion' when Member States transpose Article 4a.⁷⁹

However, the ECJ did not go quite as far as its advocate-general. The ECJ contented itself by stating that FD 2002/584/JHA 'does not prevent the executing judicial authority from ensuring that the rights of the person concerned are respected, by taking due consideration of all the circumstances characterising the case before it'.⁸⁰ This wording does not exclude transposition as a ground for mandatory refusal. Given that Article 4a represents a compromise between Member States with varying national levels of fundamental rights protection (see [the System of Article 4a FD 2002/584/JHA](#)), requiring Member States with a higher national level of protection to give their executing judicial authorities the possibility to surrender the requested person even though none of the exceptions applies might upset that compromise.

Whether Member States are free to transpose Article 4a as a ground for mandatory refusal or not, it is clear that transposition as a ground for mandatory refusal can have unfortunate consequences. It can result in a high incidence of refusals, possibly including cases in which, having regard to the standard of protection guaranteed by EU law, surrender would not entail a breach of the requested person's rights of defence. In 2019, for example, out of a total of 185 refusals by the District Court of Amsterdam 54 refusals were based on the Dutch transposition of Article 4a.⁸¹ Therefore, one of the *InAbsentiaEAW* project's recommendations to Member States was to turn a transposition as a ground for mandatory refusal into a ground for optional refusal.⁸²

In 2021, the Netherlands was forced to effect a fresh transposition of FD 2002/584/JHA because judgments of the ECJ had shown that, in a number of respects, national law adopted to transpose that

77. District Court of Amsterdam, judgment of 16 June 2016, ECLI:NL:RBAMS:2016:3643 (Mr Dworzecki); District Court of Amsterdam, judgment 30 August 2017, ECLI:NL:RBAMS:2017:6273 (Mr Zdziaszek). See specifically Adriano Martufi & Daila Gigengack, 'Exploring mutual trust through the lens of an executing judicial authority: The practice of the Court of Amsterdam in EAW proceedings' (2020) 11(3) *New J Eur Crim L* 282.

78. ECJ, judgment of 29 June 2017, *Poplawski*, C-573/17, ECLI:EU:C:2017:503, para 21. Recently, the ECJ made it clear that this applies to *all* grounds for optional refusal contained in Article 4 FD 2002/584/JHA: ECJ, judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, ECLI:EU:C:2021:339, para 41.

79. Opinion of 26 July 2017, *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:609, paras 71–79; opinion of 26 July 2017, *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:612, paras 106–110.

80. ECJ, 10 August 2017, *Tupikas*, para 97 (n 22); ECJ, 10 August 2017, *Zdziaszek*, para 110 (n 6).

81. *Statistics on the practical operation of the European arrest warrant – 2019*, 6 August 2021, SWD(2021) 227 final, p 33 and 34.

82. Brodersen, Glerum & Klip, p 205 (n 4).

framework decision was not in conformity with EU law.⁸³ In light of the ECJ's case-law on the optional nature of the ground for refusal of Article 4a, the Netherlands decided to re-transpose Article 4a as a ground for optional refusal. The amended law⁸⁴ entered into force on 1 April 2021 and its effects were felt immediately. In the first month under the new legal regime, the District Court of Amsterdam was confronted with eight cases in which the requested person did not appear in person and in which none of the exceptions applied.⁸⁵ However, in nearly half of those cases it was able to establish that surrendering the requested person would not mean a breach of his rights of defence and ordered his surrender accordingly.⁸⁶ In the remaining cases execution of the EAW was (partially) refused.

The (now) misleading character of section (d) of the EAW

Section (d) is pivotal for the correct operation of the system of Article 4a. As with the other sections of the EAW-form, the indications in that section are intended to provide 'the minimum official information required'⁸⁷ to enable executing judicial authorities to validly decide on the execution of an EAW.⁸⁸ The *InabsentiEAW* project showed that the structure and wording of section (d) can actually constitute an obstacle to achieving that goal, because they have the potential to mislead both issuing and executing judicial authorities as to the information required by Article 4a.

In one respect section (d) is somewhat 'misleading' in and of itself. Once the issuing judicial authority indicates that the requested person did not appear in person at the trial resulting in the decision (point 2 of section (d)), it should determine whether one of the situations described in points 3.1–3.4 – corresponding to the four exceptions – applies and, if so, tick the appropriate box (see [the National Law Interpretation](#)). The *InabsentiEAW* project showed that the wording of section (d) ('If you have ticked the box under point 2, please confirm the existence of one of the following (...)') can actually create the misguided impression that the issuing judicial authority must always tick one of the boxes of point 3, even if that particular point and its corresponding exception are not (fully) applicable to the situation at hand.⁸⁹

In other respects, section (d) no longer accurately reflects the requirements of Article 4a, as interpreted by the ECJ. The opening sentence of section (d) merely refers to the 'decision'. Because

83. See ECJ, judgment of 26 September 2015, *A.*, C-463/15 PPU, ECLI:EU:C:2015:634; ECJ, judgment of 6 October 2009, *Wolzenburg*, C-123/08, ECLI:EU:C:2009:616; ECJ, 29 June 2017, *Poplawski* (n 78); ECJ, judgment of 12 February 2019, *TC*, C-492/18 PPU, ECLI:EU:C:2019:108; ECJ, judgment of 24 June 2019, *Poplawski*, C-573/17, ECLI:EU:C:2019:530; ECJ, judgment of 11 March 2020, *SF (European arrest warrant — Guarantee of return to the executing State)*, C-314/18, ECLI:EU:C:2020:191.

84. *Staatsblad* 2021, 125.

85. District Court of Amsterdam, judgment of 15 April 2021, ECLI:NL:RBAMS:2021:1803; District Court of Amsterdam, judgment of 15 April 2021, ECLI:NL:RBAMS:2021:1813; District Court of Amsterdam, judgment of 15 April 2021, ECLI:NL:RBAMS:2021:1818; District Court of Amsterdam, judgment of 15 April 2021, ECLI:NL:RBAMS:2021:2762; District Court of Amsterdam, judgment of 21 April 2021, ECLI:NL:RBAMS:2021:1969; District Court of Amsterdam, judgment of 22 April 2021, ECLI:NL:RBAMS:2021:2353 (not published); District Court of Amsterdam, judgment of 22 April 2021, ECLI:NL:RBAMS:2021:2321; District Court of Amsterdam, judgment of 29 April 2021, ECLI:NL:RBAMS:2021:2325.

86. District Court of Amsterdam, judgment of 15 April 2021, ECLI:NL:RBAMS:2021:1803; District Court of Amsterdam, judgment of 15 April 2021, ECLI:NL:RBAMS:2021:1813; District Court of Amsterdam, judgment of 22 April 2021, ECLI:NL:RBAMS:2021:2321.

87. ECJ, judgment of 23 January 2018, *Piotrowski*, C-367/17, ECLI:EU:C:2018:27, para 58–59.

88. ECJ, 10 August 2017, *Zdziaszek*, para 103 (n 6).

89. Brodersen, Glerum & Klip, p 159 (n 4).

section (b) of the EAW-form requires mentioning the existence of a national ‘enforceable judicial decision’, section (d) is almost inviting issuing judicial authorities to refer to the enforceable decision of section (b) instead of the final conviction. As we saw earlier, an enforceable judicial decision does not automatically coincide with a final judicial decision (see [the National Law Interpretation](#)).

In the *Tupikas* judgment, the ECJ held that Article 4a is applicable to a decision *on appeal*, but only if the appeal court made a ‘final ruling on the guilt of the person concerned and imposed a penalty on him, following an assessment, in fact and in law, of the incriminating and exculpatory evidence, including, where appropriate, the taking account of the individual situation of the person concerned’.⁹⁰ These conditions are not reflected in section (d), which could, therefore, mislead issuing and executing authorities into thinking that section (d) does not apply to appeal proceedings at all, or that it applies to all appeal proceedings.

Moreover, the use of the singular (‘the decision’) seems to suggest that section (d) can only be applicable to *one* decision. This is not in line with the ECJ’s case-law on subsequent proceedings resulting in subsequent decisions. If a decision which finally determined the guilt of the person concerned and imposed a penalty and if the level or nature of that penalty is amended by a subsequent decision that is taken by a competent authority that enjoyed a certain discretion in this regard and that finally determined the sentence, Article 4a applies to *both decisions* which means that the issuing judicial authority must provide and the executing judicial authority must assess information concerning both sets of proceedings.⁹¹

Incidentally, if judicial authorities are indeed misled by the defects detailed above this is evidence – yet again – of a lack of knowledge of the ECJ’s case-law on Article 4a.

The *InabsentiEAW* project resulted in concrete proposals to amend section (d) in order to bring it into line with the ECJ’s case-law on Article 4a and to provide judicial authorities with more guidance when filling in and assessing that section.⁹² But it is doubtful whether there is political support for amending the EAW-form, as that would require amending FD 2002/584/JHA itself. The focus of the Commission and the Council is on ensuring correct and complete *transposition* of FD 2002/584/JHA⁹³ – as is also evidenced by recent infringement proceedings against a number of Member States (see the [European Arrest Warrants and In Absentia Judgments](#)) – and on improving the *practical application* of FD 2002/584/JHA.⁹⁴

Final considerations

The issues discussed in the [National Law Interpretation of Autonomous Concepts of EU Law](#), [Incorrect Transposition of the Exceptions](#), and [Transposition as a Ground for Mandatory Refusal and \(Now\) Misleading Character of Section \(d\) of the EAW](#) illustrate what can go wrong with making, transposing and applying EU law on mutual recognition in criminal matters. At the level of the EU, loose drafting of section (d) of the EAW-form and a failure to amend that section in order to

90. ECJ, 10 August 2017, *Tupikas*, para 81 (n 22).

91. ECJ, 10 August 2017, *Zdziaszek*, para 93 (n 6).

92. Brodersen, Glerum & Klip, p 225–229 (n 4).

93. European Commission, *Report on the implementation of the FD on the European arrest warrant*, 2 July 2020, COM(2020) 270 final, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52020DC0270> (accessed 15/11/2021), p 22–23.

94. *Council conclusions ‘The European arrest warrant and extradition procedures - current challenges and the way forward’*, 4 December 2020, Council document 13684/20, p 4.

keep up with the ECJ's case-law can result in incorrect application by judicial authorities. At the level of the Member States, incorrect transposition of the exceptions of Article 4a alters the level of protection envisaged by Article 4a. Also, at the level of Member States, an unfortunate mode of transposition – namely, as a ground for mandatory refusal – results in a high incidence of refusals to execute an EAW. At the level of the judicial authorities, national interpretations of autonomous concepts of EU law result in incorrect application of the system of Article 4a.

These issues mutually exacerbate themselves. Incorrect transposition of exceptions can amplify the negative effect of the national law interpretation of autonomous concepts of EU law. If, for example, the transposition of the first exception does not mention the element that the summons was served 'in person' or that the person concerned 'actually' received official information on the date and the place of the trial, this can reinforce the erroneous notion that a non-personal service of a summons in accordance with national law *ipso jure* meets the requirements of Article 4a. In its turn, the misleading structure and wording of section (d) can amplify problems caused by the previous two issues. If, on account of these issues, the executing judicial authority of a Member State that transposed Article 4a as a ground for mandatory refusal cannot establish that one of the exceptions applies, it is automatically forced to refuse to execute the EAW.

A common thread of the problems at all three levels is that they indicate a lack of knowledge of ECJ case law. Apparently, Member States that incorrectly transposed the exceptions of Article 4a were not aware that these exceptions affect a *full* harmonisation of situations in which executing an EAW issued to enforce an *in absentia* decision must be regarded as not infringing the rights of defence. And apparently, judicial authorities are not always aware of the autonomous character of concepts of EU law and/or of the interpretation given by the ECJ to those concepts. Even among the experts involved in the *InAbsentiaEAW* project there was no unanimity on whether all of the key concepts of Article 4a carry an autonomous meaning under EU law and whether the exceptions of that provision constitute a full harmonisation.

In light of this, the *InAbsentiaEAW* project formulated a number of recommendations specifically designed to remedy that lack of knowledge and also to help judicial authorities in presenting and assessing relevant information in a way that avoids problems as far as possible.⁹⁵

All Member States and issuing and executing judicial authorities were recommended:

- to recognise that the issues addressed in Article 4a FD 2002/584/JHA relate to autonomous concepts of EU law and that attaching a national legal meaning to them may give rise to misunderstandings.

All Member States were further recommended:

- to centralise the competence to issue EAWs and the competence to execute EAWs in order to prevent that judicial authorities only issue or execute EAWs occasionally. Attributing the competence to issue and to execute EAWs to a large number of judicial authorities within one Member State can have an adverse effect on the quality of the EAWs and on the cost-

95. See for recommendations relating to *other* obstacles to achieving the objectives of FD 2009/299/JHA: Brodersen, Glerum & Klip, p 199–212 (n 4).

effectiveness of EAW proceedings.⁹⁶ Some of those judicial authorities may only have limited experience with EAWs and, therefore, only limited incentive to follow the relevant case-law and to keep their knowledge up to date. Furthermore, if a judicial authority only issues an EAW or only decides on the execution of an EAW once in a very long time, each time it has to reacquaint itself with the relevant rules and the relevant case-law.

- *to set up training programmes for issuing and executing judicial authorities with a view to regularly updating them on the case-law of the ECJ and the ECtHR.*

With the increasing number of judgments rendered by the ECJ on the EAW and other relevant forms of mutual recognition and with the ever-expanding case-law of the ECtHR, it is of the utmost importance that Member States provide permanent training for their issuing and executing judicial authorities.

Issuing judicial authorities were recommended:

- *to always fill in section (d) of the EAW-form (as far as it is applicable).*

The issuing judicial authority should always fill in section (d) of the EAW, even if it is of the opinion that Article 4a is not applicable. Leaving section (d) open can trigger a request for supplementary information and, therefore, can cause – unnecessary – delays.

- *when providing information, to provide it in a clear, correct, comprehensive and factual manner and to avoid legal qualifications on the basis of their own national law.*

Providing information – either in the EAW or on the basis of Article 15(2)–(3) FD 2002/584/JHA – in a clear, correct, comprehensive and *factual* way may avoid misunderstandings between issuing and executing judicial authorities. Using legal terms derived from the law of the issuing Member State should be avoided, as this can also cause misunderstandings. Indeed, these terms can have a different meaning according to the legal system of the executing Member State.

- *to explain why Article 4a is not applicable to a particular decision, if that is the opinion of the issuing judicial authority.*

Explaining why, in the opinion of the issuing judicial authority, Article 4a is not applicable to a particular decision enables the executing judicial authority to check whether it agrees with the conclusion drawn by its counterpart and, if not, to request supplementary information. If the issuing judicial authority does not explain why Article 4a is not applicable, it is most likely that a request for supplementary information will be made.

Executing judicial authorities were recommended:

- *to apply the autonomous concepts of Article 4a on the basis of factual descriptions and not according to national legal qualifications.*

96. Except for Ireland, in all Member States included in the project the competence for issuing EAWs is decentralised. In Hungary, Ireland, and the Netherlands the competence to execute EAWs is centralised: Brodersen, Glerum & Klip, p 22 and 31 (n 4).

- to consider, before deciding on the execution of an EAW, whether the issue at hand is a matter that needs to be clarified by the ECJ.

Given that Article 4a contains autonomous concepts of EU law – many of which have not been elucidated yet by the ECJ– that the execution of an EAW can have fundamental rights implications, and that a refusal to execute an EAW should be the exception rather than the rule and creates a risk of impunity, the executing judicial authority should consider whether it is necessary to verify its interpretation of (the national transposition of) Article 4a with the ECJ.

In absentia proceedings must be regarded as an exception to the general rule that criminal proceedings are held in the presence of the accused, although neither the ECHR nor EU law prohibit proceedings in his or her absence as a matter of principle. Therefore, to a certain extent, one might regard the troubles relating to *in absentia* proceedings as self-made problems – after all, Member States could also decide not to hold such proceedings on a large scale or not before two instances on the facts. However, given the reality of *in absentia* proceedings in many Member States, the correct application of Article 4a FD 2009/299/JHA needs to be strengthened. The *InAbsentiaEAW* project and our recommendations aim at contributing to this.

Acknowledgements

The authors thank Mr Justice John Edwards, Judge of the Court of Appeal of Ireland and Adjunct Professor of Law at the University of Limerick (Ireland), Dr. Szabolcs Hornyák, Judge of the Supreme Court of Hungary, Prof. Dr. Małgorzata Wąsek-Wiaderek, Judge of the Supreme Court of Poland and Professor of Criminal Procedure at the John Paul II Catholic University of Lublin (Poland), Dr. Mariana Radu, Eurojust and the Ministry of Justice of Romania (Central Authority for EAWs), and Mr Jan Van Gaever, Advocate General at the Court of Appeal of Brussels (Belgium) for the fruitful collaboration in the context of the *InAbsentiaEAW* research project on the findings of which this contribution is based. They also thank two anonymous reviewers for their comments.

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: This work was part of a larger research project (“*InAbsentiaEAW*”) that was funded by the European Union’s Justice Programme (2014–2020) [grant number 766419].

ORCID iDs

Kei Hannah Brodersen  <https://orcid.org/0000-0002-6850-071X>

Vincent Glerum  <https://orcid.org/0000-0001-7668-1939>