

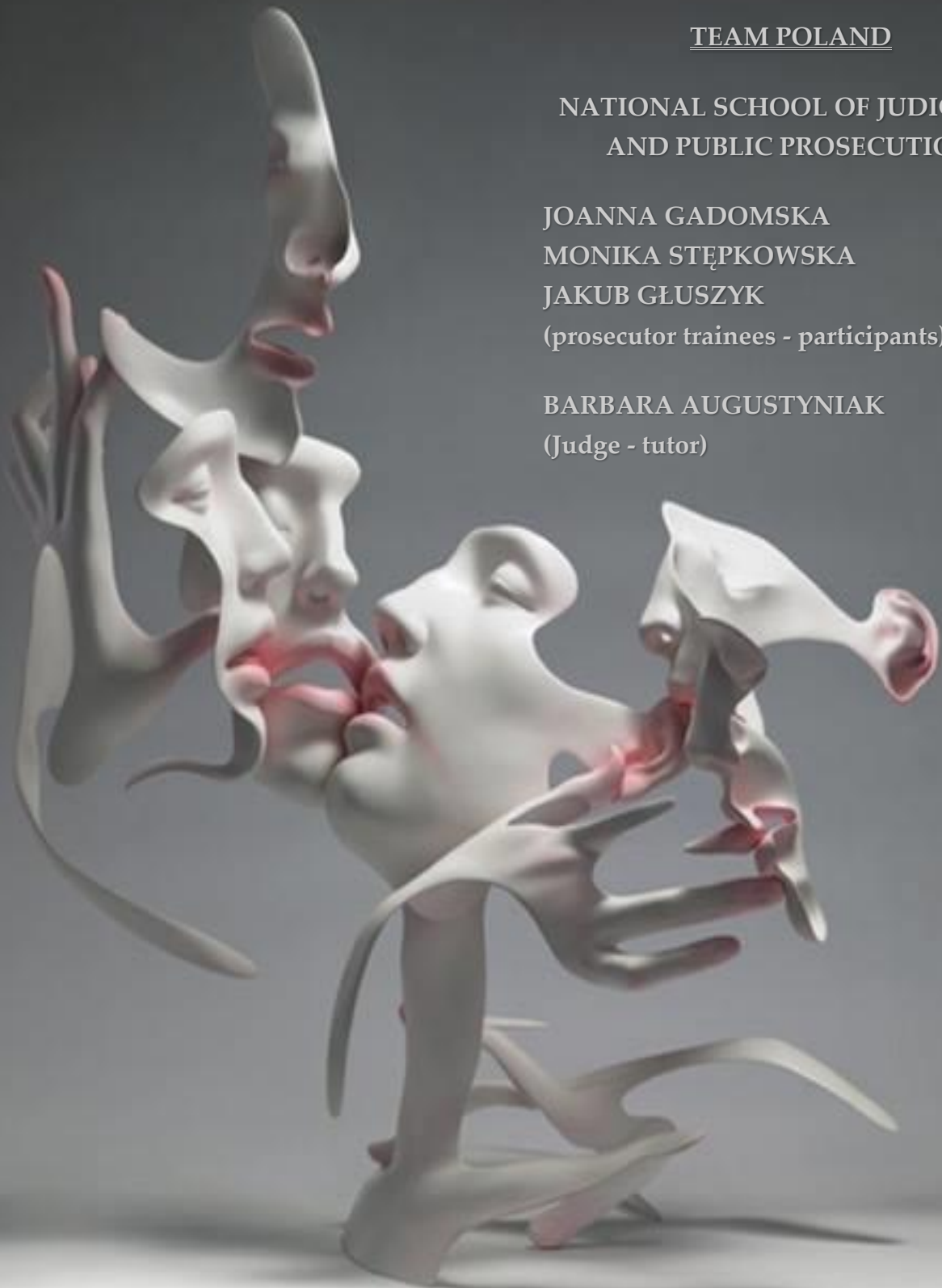
The concept of “a trial in absentia resulting in a decision” within the European Arrest Warrant framework.

TEAM POLAND

NATIONAL SCHOOL OF JUDICIARY
AND PUBLIC PROSECUTION

JOANNA GADOMSKA
MONIKA STĘPKOWSKA
JAKUB GŁUSZYK
(prosecutor trainees - participants)

BARBARA AUGUSTYNIAK
(Judge - tutor)



**THEMIS COMPETITION
SEMI FINAL -A- 2018
BARCELONA**

The concept of “*a trial in absentia resulting in a decision*” within the European Arrest Warrant framework.

TABLE OF CONTENTS

OVERVIEW

1. INTRODUCTION	p. 2-7
1.1. Brief historical insight	p. 2 - 3
1.2. Notion of a trial “ <i>in absentia</i> ”	p. 3-4
1.3. Polish perspective	p. 4-5
1.4. European Arrest Warrant Framework Decision	p. 5-7
2. “<i>TRIAL RESULTING IN A DECISION</i>” – A CASE STUDY	p. 7-15
2.1. Case C-399/11 <i>Melloni</i>	p. 7-8
2.2. Case C-270/17 PPU <i>Tupikas</i>	p. 9 - 10
2.3. Case C-271/17 PPU <i>Zdziaszek</i>	p. 11-13
2.4. Case C-571/17 PPU <i>Samet Ardic</i>	p. 13-15
3. CONCLUSIONS	p.16-19
3.1. Findings	p.16-17
3.2. Recommendations	p.17-19

BIBLIOGRAPHY

AN OVERVIEW

This paper addresses selected issues related to the European Arrest Warrant framework that appear when executing a judgment that has been delivered in another Member State as a result of trial in the absence of the defendant. The main focus is placed on answering the question which procedural scenarios could be counted as “an absence of the defendant”, and which legal proceedings fall into the category of “*trial resulting in a decision*”. This goal is achieved through the examination of the origins of “*in absentia*” procedures, the European Arrest Warrant framework decision itself, and viewpoints expressed by the Court of Justice of the European Union (hereinafter “the CJEU”) in selected landmark cases.

Chapters 1.1-1.4 provide the reader with a brief introduction on the notion of trial “*in absentia*” from historical and comparative perspectives found in the Western legal traditions. The fourth section is dedicated to current legal grounds for recognition of judgments *in absentia* between Member States regarding the execution of a European Arrest Warrant (hereinafter “the EAW”). Chapters 2.1-2.4 include a thorough analysis of the term “*trial resulting in a decision*” as interpreted by the CJEU decisions in the cases of *Melloni*, *Tupikas*, *Zdziaszek* and *Ardic*. The third and the last chapter offers conclusions on the presented issues with regard the basic principles of the legal system of the EU, with the final section containing general recommendations *de lege ferenda*.

1. INTRODUCTION

As it usually is when fundamentals of law are discussed, the issue of a criminal trial *in absentia* turns out to be a conflict of two opposing values – a reminder of the goddess Justitia who holds a sword and scales in her hands. On one hand, deciding a fate of a person without his or her presence seems to cast a shadow on the principle of fair trial and the concept of justice itself. On the other hand, the requirement of personal presence of the accused poses a variety of practical problems, mainly concerning executability and inevitability of the punishment. Nevertheless, the absence of the main actor in a court drama always entails a challenge to the due process of law, and a need for proper remedies to address such a challenge. There is no consensus on what constitutes the “*in absentia*” nature of trial, or during which stage or type of proceedings should this notion apply. As such, it is not surprising that permissibility of criminal proceedings against an absentee has been a source of great controversy from the very beginnings of modern legal traditions. Even within Western law traditions there are different perspectives for permissibility of trials *in absentia*. For example, in the United Kingdom, the presence of a defendant is required because of the severity of the crime. On the contrary, the French Code of Criminal Procedure allows the trial to proceed in the absence of defendant only in severe cases – due to a serious need to satisfy the sense of justice. The international criminal tribunals are considered to have a *sui generis* nature that arises from the extreme gravity of the cases examined by them. They seem to follow French way of reasoning yet even among them there is no uniform approach. Their attitudes towards the issue discussed herein have fluctuated over the years - from a permissive approach during Nuremberg trials, through inadmissibility in post-war period, and again to partial reconsideration of the issue at hand in the recent past. As one might expect, the legal system of the European Union is not exempt from these challenges.

1.1. Brief historical insight

From the historical point of view, trials *in absentia* are neither modern nor unique events. Since the early stages, national legal systems have had their backgrounds often intertwined with the main course of the history of Europe. A list of convicted world-famous absentees includes, *inter alia*, Charles I of England, Giuseppe Garibaldi, and Oleg Gordievsky.

The early Anglo-Saxon law required the presence of a defendant, but that prerequisite has had less in common with procedural guarantees than it had with the nature of then-acceptable items of evidence. Only a defendant who was physically present could have been tested against hot iron or boiling water. A trial by combat – an innovation introduced in England by Norman invaders - had not solved this inconvenience. Nevertheless, in case of unjustifiable absence, judgments *in absentia* were not entered by the courts, because the similar purpose was accomplished by the status of an outlaw. The accused had to be first “exacted”, that is ordered by the court to appear, before five successive

county court sessions. Failure to appear at the last occasion equated to the status of an outlaw. The accused, while not having been formally found guilty, has had to face even worse consequences, such as forfeiture of all assets and summary execution by anyone at any time. Fear of outlawry thus served as a measure against contumacy. Later developments of common law introduced the trial by jury, but the principle has been upheld, and the presence of the defendant has been still required. Consequently, common law jurisdictions are generally negatively predisposed to trials *in absentia* in criminal matters¹. As an example, the Supreme Court of the United States² has found that defendant who is entirely absent from the commencement of the trial cannot be tried *in absentia*. Exceptions to this rule are limited to disappearance in the midst of a trial and to disruptive conduct that results in the removal from the courtroom.

In the civil law tradition, which developed from the Roman law, trials *in absentia* are usually considered a normal part of the criminal justice system. Early French law had known the concept of outlawry as well. Initially, it resembled its Anglo-saxon counterpart, but under the influences of judicial practice, inquisitorial mode of proceedings, Catholic Church jurisprudence and absolute monarchy, the concept of outlawry has developed and gained significance. Through the historical stages of a substitute for confession, pronouncement of guilt, and contumacy procedure³, outlawry evolved into a real process – a modern trial *in absentia*. The major French contribution has been to acknowledge the right of the accused to a retrial upon appearance. Several member states, including the Netherlands, Italy, Belgium, Spain, Czech Republic and Poland, shared French experiences on the issue at hand, and currently allow for trials *in absentia*. Others, like Germany, do not allow therefor under normal circumstances.

1.2. Notion of a trial “*in absentia*”

As it has been demonstrated above, the complicated development of proceedings *in absentia* has not promoted conceptual convergence. According to the renowned Black’s Law Dictionary⁴, *in absentia* simply means: “*In the absence of (someone); in (someone)’s absence <tried in absentia>*”. Its basic, literal meaning might be obvious, but beyond that point the simplicity of the matter ceases. One can derive at least three different complex scenarios which can be described as a trial *in absentia*.

1 Although from 2002 ruling in *Regina v. Jones*, this attitude began to change. As it was stated by the Court of Appeal judge Lord Bingham: “*To that question the Court of Appeal gave an affirmative answer, while emphasising that the discretion to proceed with a trial in the absence, from the beginning, of the defendant is one to be exercised with extreme care and only in the rare case where, after full consideration of all relevant matters, including in particular the fairness of a trial, the judge concludes that the trial should proceed.*”

2 *vide Hopt v. Utah* 110 US 574, (1884), *Diaz v. United States*, 223 U.S. 442 (1912), *Crosby v. United States* (1993).

3 *vide* French Ordinance from 1670.

4 *viz.* Black’s Law Dictionary, Ninth Edition, p. 827, under “*in absentia*”.

Firstly, a situation may occur when the defendant has never appeared at any stage of the trial, sometimes referred to as “*total absentia*”. This scenario intrinsically provokes a question as to whether the accused has been aware about the trial, and if not, whether he or she has had been properly served with a bill of indictment or with a subpoena. Obviously, the legal outlook depends on the answers to those questions. There is a variant to this scenario that includes a penalty order, customarily issued during a closed court session as an alternative to a trial⁵. It could be as well considered a “*judgment in absentia*”, although the absolute cassatory nature of its appellate measures reduces the validity of the problem at issue. The last situation that falls into this category is when the defendant explicitly states prior to the commencement of trial that he or she wishes to be present but because of justified reasons cannot attend the session of the court thus seized.

Secondly, there is a possibility that the defendant is present at least at the early stages of a trial i.e. during the arraignment, indictment, or even where he or she submits explanations (or enters a plea). Then, after these stages, the defendant voluntarily chooses not to attend trial further. Such occurrence is sometimes described as “*partial absentia*”. This scenario is the least controversial one, as it can be usually seen as a proper waiver of one’s the right to attend trial.

Thirdly, the absence of the defendant may be directly enforced by the adjudicating judge. Grounds for such action involve disruption of the trial, misbehaviour or contempt of court; usually all of them present a serious level of malevolence. Those acts cannot be seen as a waiver of the right to attendance, since the defendant does not make a choice on the merits. Instead, the decision is rendered by the judge at the trial. This kind of outcome can be thus describe as “*compulsory absentia*”.

It must be also acknowledged that all of these above-mentioned configurations could be further modified with the presence of defender. It is generally accepted that the defence attorney cannot entirely replace the defendant in his procedural rights and obligations, but nevertheless his presence and activities crucial when the proceedings come under the evaluation of compliance with procedural guarantees.

1.3. Polish perspective

Polish legal culture is also familiar with *in absentia* proceedings. Historically, it was mainly used against (real or presumed) elusive traitors such as the leaders of Targowica Confederation and

⁵ It is often referred in Polish judicial practice as a “proposal for conviction” to consider.

the dissident colonel Richard Kukliński. Nowadays, its use is generally limited to minor misdemeanour cases.

Prior to major amendment passed in 2013, the presence of the accused at the first-instance hearing was mandatory under the Polish criminal procedure, as a general rule⁶. After receiving the explanations of the accused, the court enjoyed discretion as to conducting a trial in his or her absence without any further limitations. Nevertheless, the general participation rule has had two exceptions. Presence of the accused could have been unessential where he or she willingly induced him- or herself into a state in which he or she were unfit to participate in the proceedings, or where he or she explicitly stated that he or she would not participate in the proceedings. Simultaneously, then-extant regulations allowed for a default judgment in summary proceedings (*i.e. simplified proceedings*). The sentence was served upon the accused and within a time-limit of seven days, he or she could file an objection to a judgment by default, providing a statement of reasons for his or her failure to appear at the court. Acceptance of the objection resulted in a retrial. Otherwise, the accused had a right to appeal under the general provisions.

The amendment that entered into force on July 1, 2015⁷ changed the rules of participation of the defendant in the hearing in criminal proceedings. The legislator abrogated the compulsory presence of the defendant at this stage of the proceedings. Instead, the principle of liberty was introduced and the right to take a free decision on this subject was left to the accused. The accused is obliged to participate in the trial in two situations. First, the presence of the accused is mandatory in cases of gravest indictable offences (“*zbrodnie*”⁸) - during the activities carried out at the commencement of a hearing, including the concise presentation of charges by the prosecutor. Secondly, such an obligation could be imposed on the accused by presiding judge or the court. The default judgment procedure has been entirely abolished.

It is also worth mentioning for the purposes of this paper that the presence of a defendant has not been mandatory either in appeal proceedings or in proceedings after the judgment has become final and binding (*i.e.* of the purposes of an aggregate sentence, or execution of judgments). In addition, Polish law retains the proceedings for a penalty order, conducted without a public trial. It is also possible to temporarily remove the accused from the courtroom if he or she conducts him- or herself in a manner disturbing the order of the hearing, or incompatible with the dignity of the court.

6 Articles 374 § 1, 376 § 1, 377 479 §1, 480, 482 of Polish Code of Criminal Proceeding, enacted on 1997.08.04 (Dz.U.1997.89.555), the version valid until 30.06.2015

7 Amendment of Polish Code of Criminal Proceedings enacted on 27.09.2013 (Dz.U.2013.1247)

8 An indictable offence is a prohibited act punished by imprisonment for at least three years, or a more severe penalty

1.4 The European Arrest Warrant Framework Decision

The first notable impulses for common minimum standards for the trials *in absentia* held in Europe came from the institutions of the Council of Europe. The Committee of Ministers in the Resolution (75) 11, of 21 May 1975⁹ has laid down a set of nine recommendations, placing emphasis mainly on the importance of summon procedure. Afterwards, a landmark case *Colozza v. Italy* (1985)¹⁰ was brought before the European Court of Human Rights. The ECtHR, acting on the article 6 of the European Convention on Human Rights and Fundamental Freedoms (the ECHR), has stated that - "*When domestic law permits a trial to be held notwithstanding the absence of a person "charged with a criminal offence" who is in Mr. Colozza's position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge.*"

The above-mentioned standards were subsequently transplanted into the law of the European Union. However, when the first EAW Framework Decision was passed on 13 June 2002¹¹, only partial guarantees were provided. Said decision contained only one paragraph under its Article 5, which stated that if the EAW has been issued in case of (total) *in absentia* proceedings then the execution of a warrant might depend on recognizing the defendant's right for retrial.

The next important step was the Council Framework Decision 2009/299/JHA of 26 February 2009¹² that amended several framework decisions, including the EAW Framework Decision of 13 June 2002. The amending Decision explicitly refers to Article 6 of the European Convention on Human Rights. It has not been designed to harmonise national laws on trials *in absentia*, but rather to establish specific terms (i.e., per Article 1(3) of the amending Decision, to establish *common rules*) for the non-recognition of an EAW, and other cooperative tools. As stated in the preamble: "*Under this Framework Decision [i.e. the Framework Decision 2009/299/JHA amending the EAW Framework Decision], the person's awareness of the trial should be ensured by each Member State in accordance with its national law, it being understood that this must comply with the requirements of that Convention*". The newly added Article 4a entirely replaced previous provisions and

9 Council of Europe, Committee of Ministers Resolution (75) 11 on the criteria governing proceedings held In the absence of the accused (adopted by the Committee of Ministers on 21 May 1975 at the 245th meeting of the Ministers' Deputies) – access 23 March 2018

10 Judgment of the ECHR of 12 February 1985 in case *Colozza v. Italy*, Application No 9024/80

11 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States

12 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

established a general and optional right for refusing to execute an EAW where the accused has not appeared in person at his or her trial at any stage. This right is, however, subject to a derogation when specific conditions are met. Those conditions revolve around scenarios described previously in chapter 1.2 as “total absentia”. Their main goal is to ensure a proper summon or information that was “actually received” about the proceedings and the right to appeal against the decision. Additionally, a deliberate instruction of a legal counsellor is considered to be sufficient to serve these purposes.

The 2009 amendment might have seemed as an ultimate and sufficient resolution to the mutual recognition of *in absentia* judgments within the EAW framework, yet the practice turned out to be more demanding. Recent case-law of the CJEU demonstrated that legislative efforts focused on the “*in absentia*” notion omitted the other constitutive component of the proceedings - which is the trial itself. Despite its frequent use in the legal text, the normative term “*a trial resulting in a decision*” has not been defined by the Union legislature. As a consequence, a controversy has arisen as to what kind of proceedings within the broad spectrum of criminal process should be recognised as constituting such a “trial”.

2. “TRIAL RESULTING IN A DECISION” – A CASE STUDY

It is indispensable to emphasize that the concept of “*trial resulting in the decision*” as referred to in Article 4a of the EAW Framework Decision, must be given an autonomous interpretation within the EU legal system. Recent judgments of the CJEU in *Tupikas* and *Ardic*, discussed below, provide a more concise interpretation of the term at issue. Although, no analysis on an EAW would be complete without the decision that one may consider a landmark case for the EAW framework in general – i.e. the decision in *Melloni*.

The *Melloni* decision has once generated, and perhaps still generates, a torrent of controversy, due to the fact that, thereunder, the CJEU obligated the Member States to disregard their constitutional safeguards of fair trial to the detriment of the defendant – in defiance of the actual wording of the EAW Decision.

2.1 Case C-399/11 *Melloni*¹³ - the Executing Judicial Authorities are precluded from making the execution of an EAW issued for the purposes of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State, domestic constitutional standards notwithstanding

¹³ Judgment of the Court of 26 February 2013, in case C-399/11 - Melloni, EU:C:2013:107,

Melloni is said to be a landmark case in regard to the relation between EU law on the EAW and national standards of fundamental rights applicable in criminal procedures. The main issue of the case was the question whether Member States were allowed to retain higher constitutional standards in defiance of an EAW issued *in absentia*, where there was a *constitutional* domestic norm specifying that a Member State should accord a defendant a chance at fair trial.

Mr Stefano Melloni was convicted in Italy in a trial *in absentia* for bankruptcy fraud and sentenced to 10 years of imprisonment. Italian authorities issued an EAW due to the fact that the convict absconded to Spain. However, Mr Melloni alleged that the right to a fair trial, as stated in the Spanish Constitution, has had been infringed. He stated that the EAW pertinent to him should not be executed, because the Italian procedural law made it impossible for him to appeal against sentences imposed *in absentia*, and that such execution of an EAW and his surrender would impair his right to a fair trial.

Article 4a(1)(b) of the EAW Decision precludes a refusal to execute the EAW issued due to a decision made *in absentia* where the person concerned, “being aware of the scheduled trial, has 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”. Indeed, Mr Melloni has had appointed two defence counsellors and was actually defended *in absentia* by them.

The CJEU ruled that Article 53 of the Charter of Fundamental Rights of the European Union (“the Charter”) is to be interpreted as not allowing a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence, as guaranteed by its constitution¹⁴. This effectively negated the existence and applicability of Article 53(4) of the Charter, which requires a harmonious interpretation of fundamental rights found under EU law with those applicable under national constitutions, as it was the case in *Melloni*.

This case was – and still is – also derided as decided *per incuriam* and/or in defiance of the actual wording of the EAW decision, as it expressly states in section (12) of its preamble that it “*does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media*”. Framework decisions, such as they were, were also incapable of producing direct effect by virtue of then-Article 34(2)(b)

14 Judgment of the Court of 26 February 2013, in case C-399/11 - Melloni, EU:C:2013:107, n. 64

TEU – up to and including a direct effect to the detriment of a defendant at a criminal trial in defiance of its actual wording, something the CJEU was reluctant to pronounce on in regard to directives.

2.2 Case C-270/17 PPU *Tupikas*¹⁵ - meaning of a “trial resulting in a decision” where there are several tiers of jurisdiction.

Melloni initiated the modern line of case-law on the issue of a trial that produces a decision *in absentia*. As such, it was in no way the end of what the CJEU wanted to say on this issue. The next step for this line of case-law was made in the form of judgments in *Zdziaszek* (discussed elsewhere in this paper) and *Tupikas*, both delivered recently on 10 August 2017.

The facts of the case in *Tupikas* were as follows. Mr Tadas Tupikas, a Lithuanian national, was the subject of an EAW issued by the Lithuanian judicial authority to Rechtbank Amsterdam — Netherlands, for the purpose of executing a sentence of one year and four months of imprisonment. At the first instance, Mr Tupikas appeared at trial in person. Subsequently he appealed against the judgment and his appeal was dismissed. The EAW has not included information on whether he appeared in person at the proceedings at second instance.

The Court thus further clarified that the concept of “trial resulting in the decision”¹⁶ when at least one of decisions has been handed down *in absentia* of the person concerned. The Court stated that term at issue is to be interpreted as referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of an EAW.

Furthermore, the Court opined that in the event that where the proceedings take place at several instances which have given rise to successive decisions, and at least one of them was given *in absentia*, it is appropriate to understand by “trial resulting in the decision”, within the meaning of Article 4a(1) of Framework Decision 2002/584, the instance which led to the last of those decisions. This was subject to a proviso that the court at issue has made a final ruling on the guilt of the person concerned and imposed a penalty on him, such as a custodial sentence, following an assessment, in fact and in law, of the incriminating and exculpatory evidence, including, where appropriate, the taking account of the individual situation of the person concerned. It might be said that not *all* decisions at the second instance involve *imposing* a penalty, e.g. where an appellate court dismisses

¹⁵ Judgment of the Court of 10 August 2017 in case C-270/17 PPU - *Tupikas*,

¹⁶ within the meaning of Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009

an appeal lodged against a conviction imposed at first instance. Conversely, a court adjudicating at second instance and consequently *imposing a sentence* on the defendant would fall within this definition fashioned by the Court. In addition, mere formal orders (e.g. an order refusing to entertain an appeal due to it having been lodged out of time) would not fall within the scope of a “*decision*” envisaged by the Court, as the appellate court would have to entertain an examination of fact and law, and not to merely address a procedural issue.

2.3 Case C-271/17 PPU *Zdziaszek*¹⁷ - The referring court asks if above expression must be understood as referring to the appeal proceedings and/or to proceedings for the amendment of custodial sentences handed down previously, such as those which led to the judgment handing down a cumulative sentence at issue in the main proceedings.

The case at issue, ref. no. C-271/17 PPU, involved a situation where an European Arrest Warrant was issued by the Regional Court in Gdańsk, Poland. That court asked the District Court in Amsterdam, Netherlands, for the execution of the EAW. The EAW was issued to arrest and surrender of Mr Zdziaszek, a Polish national, who was residing in the Netherlands. The purpose was to surrender Mr Zdziaszek for carrying out two custodial sentences in Poland.

On 25th of March 2014, the District Court in Wejherowo, Poland, entered a judgment which referred to five offences under Polish criminal law, numbered from 1 to 5, which were committed by Mr Zdziaszek.

The Regional Court in Wejherowo, in its decision of 25 March 2014:

- firstly, combined the custodial sentence, which was a conviction for offence 1, pronounced by final judgment of 21st of April 2005 of the District Court in Wejherowo and the custodial sentence imposed on Mr Zdziaszek for offence 2 by final judgment of 16th of June 2006 of the District Court in Gdynia, Poland, into one cumulative custodial sentence of one year and six months imprisonment, and
- secondly, changed the four-year cumulative custodial sentence imposed on Mr Zdziaszek for offences 3 to 5 by a final judgment from 10th of April 2012 of the District Court in Wejherowo, to a cumulative custodial sentence of three years and six months imprisonment, because it was required by the favourable law.

¹⁷ Judgment of the Court of 10 August 2017, in case C-271/17 PPU - *Zdziaszek*, ECLI:EU:C:2017:629

In respect of the custodial sentence relating to offences 1 and 2, the referring court, in judgment from 11th of April 2017:

- refused the surrender of Mr Zdziaszek in so far as the custodial sentence relates to offence 1, on the ground that that offence, as described in the European Arrest Warrant at issue, was not punishable under Netherlands law, and
- stayed its decision on the execution of the European Arrest Warrant, in so far as that custodial sentence related to offence 2, in order to allow it to request further information from the issuing judicial authority.

Consequently, the request for a preliminary ruling in *Zdziaszek* referred only the custodial sentence relating to offences 3 to 5.

The issue of a trial *in absentia* emerged because Mr Zdziaszek was summoned before the court for the purposes of the first hearing on 28th of January 2014, with the service having been made to the address which had been given by him. There was no response to the summons and Mr Zdziaszek did not appear at that hearing. The District Court in Wejherowo in Poland then appointed a lawyer as the defense counsellor of Mr Zdziaszek who participated in the proceedings in his stead. Mr Zdziaszek was summoned to the second hearing on 25th of March 2014 in the same way and he did not appear again. The counsellor appointed by the court took part in the hearing at the end of which the court pronounced a cumulative sentence. As a result, Mr Zdziaszek did not appear in person during the proceedings, not only at first instance, but also at the appeal hearing. He was properly notified of the hearing in the matter of his appeal. A defence counsel assigned to him appeared for him.

In the opinion of the Advocate General, the referring court wanted to be apprised as to whether the proceedings which led to the cumulative judgment, which no longer concerned the issue of guilt, constitute a “trial resulting in the decision” within the meaning of the first sentence of Article 4a(1) of the EAW Framework Decision. The national court’s second question aimed at specifying the purposes of the execution of an EAW and consequences resulting therefrom in the event of deficiency as to the information provided by the issuing judicial authority. The court further asked under that head about a possibility of refusing to execute an EAW where it turned out that respect for the procedural rights of the person concerned should have been assessed in connection with a different judgment than the one referred to in the EAW itself, and where the supplementary information provided under Article 15(2) of the EAW Framework Decision made it impossible to verify whether the procedural rights of the person concerned had been safeguarded. The aim of the third question was to ascertain whether the concept of “trial resulting in the decision”, within the meaning of the

introductory sentence of Article 4a(1) of the EAW Framework Decision, included appeal proceedings that resulted in an examination of the merits of the case and confirmed the sentence imposed at first instance, which the EAW had been intended to execute. That question required an assessment as to whether the effective protection of the rights of defence of the person concerned during the appeal proceedings could remedy any shortcomings which may have arisen at first instance¹⁸.

Deciding the above, the Court emphasized that the concept of “*trial resulting in the decision*”, within the meaning of Article 4a(1) of the EAW Decision, as amended, must be interpreted as referring not only to the proceedings which brought about the decision on appeal, where that decision, after a renewed examination of the case in merits-related respect, finally determined the guilt of the person concerned, but also to subsequent proceedings, such as those that led to the judgement handing down the cumulative sentence at issue here, at the end of which the decision that finally amended the level of the initial sentence was handed down, to an extent as the authority which passed the latter decision enjoyed a certain discretion in that regard.

Secondly, the Court pointed out that “Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as meaning that, where the person concerned has not appeared in person in the relevant proceeding or, as the case may be, in the relevant proceedings for the application of Article 4a(1) of that Framework Decision, as amended, and where neither the information contained in the standard form for a European arrest warrant annexed to that Framework Decision nor the information obtained pursuant to Article 15(2) of that Framework Decision, as amended, provide sufficient evidence to establish the existence of one of the situations referred to in Article 4a(1)(a) to (d) of Framework Decision 2002/584, as amended, the executing judicial authority may refuse to execute the European arrest warrant”.

The Court further explained that Framework Decision, as amended, does not preclude taking into consideration all the circumstances characterising the case in order to ensure that the rights to the defence of the person concerned were respected during the relevant proceeding or proceedings.

The CJEU recalled that the European Court of Human Rights has already taken note of the fact that the guarantees laid down in Article 6 of the ECHR would apply not only to the finding of guilt, but also to the determination of the sentence. Therefore, genuine enjoyment of the right to a fair trial would necessitate that the right of the person concerned to be present at the hearing because of the significant consequences which it can have on the level of the sentence to be imposed should be safeguarded.

¹⁸ Opinion of Advocate General Bobek of 26 July 2017 in case C-271/17 PPU – Zdziaszek, ECLI:EU:C:2017:612

According to the Court of Justice, the above applies to specific proceedings for the determination of an overall sentence when those proceedings are not an exercise in a simple, formal and “arithmetic” calculation, but are instead linked to the determination of the quantum of the sentence, in particular by taking into consideration the situation or individual properties of the person concerned, as well as mitigating or aggravating circumstances.

Furthermore, the Court indicated that having a jurisdiction to increase the sentence previously imposed is insignificant. As such, proceedings giving rise to a judgement handing down a cumulative (i.e. aggregate) sentence, such as those at issue in the main proceedings, which led to a new determination of the level of custodial sentences previously imposed, should have been considered relevant for the application of Article 4a(1) of Framework Decision 2002/584, when the competent authority has been entitled to have a margin of discretion and lead to a decision which finally determined the sentence.

Where such proceedings determine the level of the sentence which the convicted person will ultimately serve, this person must be able to effectively exercise his rights of defence in order to influence the decision to be taken in his or her favour.

The Court further stressed that the fact that the new sentence can hypothetically be more favourable to the person concerned is irrelevant. The approach applies due to the fact that the level of the sentence is not established at once but depends on the evaluation of the facts of the case by the competent authority, and, according to the Court, it is precisely the duration of the sentence to be served (and, hence, not “favourability” per se) that is finally handed down which is of decisive importance for the person concerned.

2.4 Case C-571/17 PPU *Samet Ardic*¹⁹ : the concept of a “trial resulting in the decision” must be interpreted as not including subsequent proceedings in which suspension of a sentence is revoked.

The newest relevant case after *Zdziaszek* and *Tupikas* on the concept commented upon is *Samet Ardic*, a judgment of the Court of 22 December 2017. The case at issue allowed the Court to consider the relevance of suspension of a sentence for the purposes of the EAW Decision.

The Court established the following facts of the case. An EAW was sought for a German national residing in the Netherlands – Mr Samet Ardic, for the purpose of executing two custodial sentences in Germany, each of which was imposed for a period of one year and eight months, by way

¹⁹ Judgment of the Court of 22 December 2017, in case C-571/17 PPU - Ardic, ECLI:EU:C:2017:1026,

of final judgments following trials at which the interested party appeared in person. The court revoked those suspensions and ordered the execution of the remainder of those sentences, because the interested party has had infringed the prescribed conditions. Mr Ardic appeared in person at the trials that resulted in the judgments which finally imposed on him two custodial sentences. The suspension revocation decisions at issue in the main proceedings, which were made subsequently, were handed down *in absentia*.

On above grounds, the national court referred a question to the Court of Justice for a preliminary ruling. The court wished to know whether subsequent proceedings in the matter of suspension of a sentence, in which the court, in the absence of the requested person, orders that suspension to be revoked on the ground of non-compliance with conditions and evasion of the supervision and guidance of a probation officer, constitute a “*trial resulting in the decision*” as referred to in Article 4a of the EAW Decision - where the requested person has been found guilty in final proceedings conducted in his presence and has had imposed on him a custodial sentence, the execution of which has been suspended subject to certain conditions²⁰.

In reply to that question, the Court recalled its previous jurisprudence and pointed out that in its judgment case *Zdziaszek*²¹ there was a distinction made between measures which modify the quantum of the penalty imposed, and the measures relating to the methods for execution of such a penalty. In that judgment, the Court also indicated that, according to the case-law of the European Court of Human Rights, Article 6 of the ECHR does not apply to measures concerning the methods for executing a custodial sentence, „in particular those relating to provisional release”.

Attention must be given to the fact that *Ardic* case concerned the revocation decisions in the main proceedings which have not modified the severity of sentences imposed on Mr Ardic, who was then under an obligation to serve the full duration of those sentences.

As such, the Court of Justice stated that “*the concept of „decision*”, referred to [in the EAW Decision] does not cover a decision relating to the execution or application of a custodial sentence previously imposed, except where the purpose or effect of that decision is to modify either the nature or quantum of that sentence and the authority which adopted it enjoyed some discretion in that regard. This is in line with its previous jurisprudence, as it further expands upon the “modification” issue as the dividing line between court decisions that are relevant or irrelevant for Article 4a of the EAW Decision.

20 Judgment of the Court of 22 December 2017, in case C-571/17 PPU - Ardic, ECLI:EU:C:2017:1026,

21 Judgment of the Court of 10 August 2017, C-271/17 PPU - Zdziaszek, EU:C:2017:629

The Court further added that a „mere”, revocation of suspension, even amounting to a revocation of suspension in its entirety, is not relevant for the concept of a trial resulting in a decision *in absentia*. To borrow the language used by the Court, the only effect of suspension revocation decisions, such as those reviewed in *Samet Ardic*, is that the person concerned must, “at most”, serve the remainder of the sentence initially imposed. Where the suspension is revoked in its entirety, the sentence once again produces all its effects and the determination of the quantum of the sentence still remaining to be served is derived from a purely arithmetic operation, with the number of days already served in custody being simply deducted from the total sentence imposed by the final criminal conviction. This nature of a “purely arithmetic operation” has also prompted the Court to add that “while it cannot be denied that a suspension revocation measure is likely to affect the situation of the person concerned, the fact remains that that person cannot be unaware of the consequences that may result from an infringement of the conditions to which the benefit of such a suspension is subject”. The Court concluded in the operative part that “the concept of „*trial resulting in the decision*”, as referred to in Article 4a(1) of Framework Decision 2002/584, must be interpreted as not including subsequent proceedings in which that suspension is revoked on the grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed. There was also a certain preference for an unperturbed functioning of the EAW system underlying the Court’s reasoning, as the Court referred *obiter* to effectiveness of the EAW mechanism as a reason not to extend the concept of a trial resulting in a decision further than it was defined in *Zdziaszek* and *Tupikas*.

Addendum: the Polish implementation of the Court’s case-law

While the decisions of the Court of Justice referred to above are somewhat recent, they have been already noticed in the Polish academia and judicial practice. Under the most recent Polish legal work, which states the law as it stood on 1 January 2018, on Article 607r§3 of the Polish Code of Criminal Procedure (i.e. a provision which transposes the EAW Decision into Polish criminal procedural law), it is expressly posited that the concept of a “trial”, referred to under Article 607r§3 of the Code, must not be interpreted restrictively to cover only the trial at first instance, with the decisions in *Zdziaszek* and *Tupikas* explicitly referred to. It is also posited therein, *case Tupikas*, that the concept of a “*trial resulting in a decision*” refers to that instance, at which the defendant was heard on culpability *and* sentencing, e.g. in regard to meting out a sentence of imprisonment, only after hearing the case on merits, both as to fact and the applicable law. It remains to be seen whether this statement of the law finds its way into Polish domestic jurisprudence, as there are no reported Polish cases, as of the time of writing, that refer to *Zdziaszek*, *Tupikas* or *Ardic* in the context of the EAW Framework.

3. CONCLUSIONS

3.1 Findings

As it has been indicated at the beginning of this paper, criminal proceedings against absentees evoke a conflict between two important interests: the duty of the state to ensure rapid and effective justice and the respect for the rights of the accused. Due to varying past experiences and influences, this dilemma is resolved differently by each Member State. Subsequently, when such individual approaches meet with the freedom of movement (and, by extension, with the EAW framework), the conflict itself transcends to a supranational level. In effect, this necessitates an intervention of the CJEU.

Problems that arise at that higher level, which have been selected and analysed above, demonstrate that proceedings *in absentia* present considerable challenges for the Area of Freedom, Security and Justice. Even within a particular domain, such as the discussed EAW framework, elementary notions such as “*trial resulting in a decision*” can be understood differently. The subtle nature of the problem makes this divergence by no means indifferent to the situation of individuals.

All of the above indicates that the examined matter is indeed fundamental, and thus inevitably linked, to the basic principles of the law of European Union.

The principle of mutual recognition is, by far, most strongly affected by procedural differences among the Member States. This principle is inseparable with *ratio legis* of the EAW that distinguishes it from the ordinary extradition procedure. The partial remedy for this problem has been found under stringent provisions of Article 4a of EAW Framework Decision, which after the *Melloni* case became the exclusive grounds for refusal of surrender. This outcome has formed implied minimum and maximum standards of protection and it is considered to have caused the indirect harmonisation of national rules concerning proceedings *in absentia*. Despite the fact that harmonisation was explicitly excluded from the desirable goals of EAW Framework Decision, it was enforced that way into the domestic legal systems (at least partially)²². This solution is not exactly optimal, because it lacks the advantages of two approaches: the flexibility of mutual recognition and legal certainty of direct harmonisation. The above-mentioned problem with interpreting the notion of a “*trial resulting in a decision*” is a good example of that second vice.

²² For example as a result of *Melloni* case Spanish constitutional provisions were changed. The Polish Constitution itself, which originally provided higher protection of Polish citizens, had to be amended in order to comply with the requirements of the EAW Framework.

Furthermore, a closer examination suggests a possible deficit in the protection of fundamental rights in regard to the participation of instructed lawyer as a sufficient substitute for the defendant. The CJEU has established that Articles 47 and 48 of the Charter of Fundamental Rights of the European Union correspond to Article 6 ECHR (invoked explicitly in the preamble of the EAW Framework decision). The above-mentioned Articles neither imply nor state that instruction of a defence counsel can be regarded as a waiver of right to appear in person. It is then up to debate whether the provisions of the EAW Framework Decision are in full compliance with them.

3.2 Recommendations

The following recommendations can be provided in the light of the findings presented above.

The Area of Freedom, Security and Justice has to be understood as an area without internal frontiers, in which prevention of crime and safeguard fundamental rights coexist. A balance has to be preserved between freedom, security and justice.

Recommendation 1 – Standardised minimum level of the protection of fundamental rights

The high level of protection of fundamental rights, which is ensured by such a standard, guarantees mutual benefits not only for the principle of mutual recognition of judicial decisions but also for the protection of fundamental rights in favour of individuals within the EU. Basing the framework on trust due to a shared common value is the result of this standard. It also intensifies judicial cooperation between Member States and helps to achieve the objectives of the Area of Freedom, Security and Justice. This standard has to be an outcome of a consensus of the highest fundamental rights protection from the national laws of the Member States, ECHR and the Charter²³. National courts have to consider the long-term outlook and abide by the standardised minimum level of protection of fundamental rights during the proceedings, even if there is no perspective of issuing an EAW in the future.

Recommendation 2 – Standard form waiver

It is still not clear whether the legal representation by an authorized lawyer can be understood as a waiver. The European Court of Human Rights took note of the fact that, in order to waive his or her rights vis-à-vis an indictment, the accused has to be diligently served therewith, so to enable the accused to be aware of the trial and the charges. Furthermore, his or her waiver has to be clear and voluntary, with his or her counsel having been given a chance to defend him or her. If above

²³ “Maintaining a balance between judicial cooperation and fundamental rights protection ...” by R. Rampersad, 23 October 2015, Master’s thesis LL.M. University of Utrecht, unpublished, access 19 March 2018

requirements are met, may be acceptable that the legal representation by a lawyer can be understood as a waiver. But the question remains what to do if the rights of accused were waived implicitly. We can consider a document, called “an affidavit”, in order to solve above problem. In this declaration defendant can pledge not only the renunciation of his or her right to take part in proceedings and to defend him- or herself, but also indicate awareness of the consequences of his or her waiver. This form, which defendant should authenticate and sign, could be annexed to the EAW Framework Decision²⁴.

Recommendation 3 – Monitoring programme

There is no easy solution concerning an EAW in regard to trials resulting in a decision *in absentia*. Any possible amendments should not be made without careful deliberation and analysis of all advantages and disadvantages thereof. It might, however, be inevitable that such amendments are going to occur. The European Union is changing, and it is not clear which path is going to be taken by the cooperation between Member States after the so-called „Brexit”. Without a doubt, the instruments already available in criminal matters should be adjusted to the needs of the evolving EU. The most reasonable step to improve the EAW in regard to the issue of adjudication *in absentia* could be a monitoring programme, fashioned to obtain a better knowledge about strong (and weak) points of the applicable rules. The evaluation could be conducted every two to four years, in order to verify if the current solutions are working properly, or perhaps to find that they are obsolete, ineffective, or harmful. This is all the more relevant given that the issue commented upon has great impact on the fundamental rights of the citizens of the Union.

Recommendation 4 – Consultation procedure

Communication between judicial authorities under Article 15(2) of the Framework Decision always depends on the specific circumstances of each case. Because of such circumstances, the type of details required usually mirrors the purpose for which that information is designated. If the authority has any doubts concerning the level of protection of person rights of defence in the proceedings which led to the judgment, it should ask additional questions about these proceedings²⁵. Every element has to be considered separately in each particular case. Perhaps most importantly, consultation procedure has to be used in order to counteract a refusal of execution of EAW on account of insignificant errors effected during the surrender proceedings. In addition, this procedure can remain helpful in avoiding miscarriages of justice.

²⁴ *Ibidem*.

²⁵ Opinion of Advocate General Bobek of 26 July 2017 in case C-271/17 PPU – Zdziaszek, ECLI:EU:C:2017:612

Recommendation 5 - The importance of section F of EAW Form

The next issue to consider is the EAW form, or, more specifically, Part F of the aforementioned document. Completing Part F of the EAW is not compulsory, yet it is highly recommended. It is the place for the issuing Member State to provide more information on the case, and such additional information may help to execute an EAW. That information can also be used where there exist special circumstances related to the case, e.g. remarks on any restrictions placed on the accused as to the contact with third parties after his or her arrest, or where there are warnings about the risk of destroying evidence. Moreover, and as to what would possibly be the most crucial issue in event of a trial *in absentia* resulting in a decision, this part should be used to provide necessary supplementary information for the executing judicial authority to decide whether the person is to be surrendered.

BIBLIOGRAPHY

1. "Trial in Absentia," by Starkey, James G., *St. John's Law Review*: Vol. 53, Starkey, James G. (2012), access 20 March, 2018
2. "Maintaining a balance between judicial cooperation and fundamental rights protection within the Area of Freedom, Security and Justice" by R. Rampersad, 23 October 2015, Master's thesis LL.M. University of Utrecht, unpublished, access 19 March 2018
3. "Diverse Approaches To Total And Partial In Absentia Trials By International Criminal Tribunals" by M.H. Zakerhossein* And A-M. de Brouwer, *Criminal Law Forum* (2015 accessible at Springerlink.com 19 March 2018)
4. "In Absentia War Crimes Trials: A Just Means To Enforce International Human Rights?" by J.M. Prescott, 4 April 1994, unpublished, access 20 March 1994
5. Commentary on Article 607r§3 of the Polish Code of Criminal Procedure [in:] *Kodeks postępowania karnego. Tom II. Komentarz aktualizowany* (D. Świecki, ed., et al.), Wolters Kluwer, Warsaw, on-line updated version 2018)
6. "Harmonizing procedural rights indirectly: The Framework Decision on trials in absentia" by Martin Bose, Law.unc.edu, access 23 March 2018
7. Judgment of the Court of 26 February 2013, in case C-399/11 - Melloni, ECLI:EU:C:2013:107, access 26 March 2018
8. Judgment of the Court of 10 August 2017 in case C-270/17 PPU – Tupikas, ECLI:EU:C:2017:628, access 26 March 2018
9. Opinion of Advocate General Bobek of 26 July 2017 in case C-271/17 PPU – Zdiaszek, ECLI:EU:C:2017:612, access 26 March 2018
10. Judgment of the Court of 10 August 2017, in case C-271/17 PPU - Zdiaszek, ECLI:EU:C:2017:629, access 26 March 2018
11. Judgment of the Court of 22 December 2017, in case C-571/17 PPU - Ardic, ECLI:EU:C:2017:1026, access 26 March 2018

Front page graphics – Unmask Group - <http://www.widewalls.ch/artist/unmask-group/>