



# **MutualRecognition2.0**

RESEARCH PROJECT

## **COUNTRY REPORT**

### **POLAND**

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## Introduction

The Report follows the Annotated Agenda drafted for the purpose of the project.

For the purpose of the Report the authors made interviews with 18 practitioners (6 public prosecutors; 6 judges; 2 people from the Ministry of Justice; 2 academics - including one with judicial experience; 2 defence lawyers) from 5 big cities located in different parts of Poland (Lublin or Lublin region, Warsaw, Gdańsk, Poznań, Wrocław). The interviews were conducted in the form of direct conversation both on side (interviews in Gdańsk and Lublin) and online (via MS TEAMS) and were based on written questionnaire prepared in Polish for all three stages of the proceedings: pre-trial stage; the trial stage and the enforcement stage of the proceedings. The Report also reflects the opinions of practitioners presented during the workshop held on 28 November 2024 in Lublin.

The information on the application of the different cooperation instruments provided by the practitioners was reported in general terms, without indicating which opinion came from a particular practitioner.

We would like to thank all interviewed practitioners for providing us with a very interesting overview of practice on the European cooperation in criminal matters.

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The report was written by professor Małgorzata Wąsek-Wiaderek in cooperation with dr Marek Smarzewski (who drafted the preliminary version of Section 1 and 3) and dr Adrian Zbiciak (who collected part of materials used in Section 2.3.).

<b>1.</b>	<b>THE INSTRUMENTS AND NATIONAL LAW</b>	
<b>1.1.</b>	<b>Transposition of EU instruments.....</b>	<b>5</b>
<b>1.2.</b>	<b>Ratification of conventions.....</b>	<b>8</b>
<b>1.3.</b>	<b>Competent (judicial) authorities and central authorities.....</b>	<b>10</b>
1.3.1.	Competent (judicial) authorities.....	10
1.3.2.	Central authorities.....	18
1.3.3.	Coordination.....	22
<b>2.</b>	<b>THE INSTRUMENTS AND INVESTIGATION/PROSECUTION.....</b>	<b>27</b>
<b>2.1.</b>	<b>Applicability of the instruments according to EU law.....</b>	<b>27</b>
2.1.1.	Pre-trial stage.....	27
2.1.1.1.	Substage 1 (no detention on remand possible) .....	27
(a)	Person concerned present in issuing MS.....	27
(b)	Person concerned present in another MS.....	29
2.1.1.2.	Substage 2 (detention on remand possible).....	30
(a)	Person concerned present in issuing MS.....	30
(i)	detention on remand possible but not ordered.....	30
(ii)	person in detention on remand.....	31
(b)	Person concerned present in another MS.....	31
(i)	detention on remand possible but not ordered.....	31
(ii)	detention on remand ordered.....	32
2.1.2.	Trial Stage.....	36
(a)	Person concerned present in issuing MS.....	36
(i)	detention on remand possible but not ordered.....	36
(ii)	person concerned in detention on remand.....	36
(b)	Person concerned is present in another MS.....	36
(i)	detention on remand possible but not ordered.....	36
(ii)	detention on remand ordered.....	38
<b>2.2.</b>	<b>Applicability and application of the instruments at the pre-trial stage according to national law</b>	<b>41</b>
2.2.1.	Substage 1 (no detention on remand possible).....	41
(a)	Person concerned present in issuing MS.....	43
(b)	Person concerned is present in another MS.....	46
2.2.2.	Substage 2 (detention on remand possible).....	59
(a)	Person concerned present in issuing MS.....	59
(i)	detention on remand possible but not ordered.....	59
(ii)	person concerned in detention on remand.....	59
(b)	Person concerned is present in another MS.....	59
(i)	detention on remand possible but not ordered.....	59
(ii)	detention on remand ordered.....	62
<b>2.3.</b>	<b>Applicability and application of the instruments at the trial stage according to national law</b>	<b>68</b>

(a)	Person concerned present in issuing MS.....	68
(i)	detention on remand possible but not ordered.....	68
(ii)	person concerned in detention on remand.....	71
(b)	Person concerned is present in another MS.....	71
(i)	detention on remand possible but not ordered.....	70
(ii)	detention on remand ordered.....	81
<b>3.</b>	<b>THE INSTRUMENTS AND SENTENCE ENFORCEMENT.....</b>	<b>93</b>
<b>3.1.</b>	<b>Applicability of the instruments or conventions according to EU law.....</b>	<b>93</b>
(a)	Person concerned is present in issuing MS.....	93
(b)	Person concerned is present in another MS.....	96
<b>3.2.</b>	<b>Applicability and application of the instruments according to national law.....</b>	<b>97</b>
(a)	Person concerned is present in issuing MS.....	101
(b)	Person is present in another MS.....	112
<b>4.</b>	<b>ANTICIPATING THE APPLICATION OF INSTRUMENTS: SENTENCING.....</b>	<b>116</b>
<b>5.</b>	<b>MISCELLANEOUS: WHEREABOUTS UNKNOWN AND <i>IN ABSENTIA</i>.....</b>	<b>118</b>
	<b>Memorandum.....</b>	<b>121</b>
	<b>Reference list.....</b>	<b>127</b>

## Chapter I THE INSTRUMENTS AND NATIONAL LAW

### 1.1. Transposition of EU instruments

All EU instruments (framework decisions and one directive) listed below are implemented as a part of the Code of Criminal Procedure of 1997<sup>1</sup> (hereafter referred to as “CCP”). The transposing regulations form part of Chapter XIII of the CCP devoted to “international cooperation in criminal matters”.

#### (a) FD 2002/584/JHA

The provisions of FD 2002/584/JHA were implemented into the Code of Criminal Procedure by the Act of 18 March 2004 amending the Criminal Code (hereafter referred to as “CC”), the CCP and the Code of Petty Offences<sup>2</sup>, in force from 1 May 2004. In Chapter 65a (“Motion to the European Union Member State for the surrender of a requested person pursuant to the European Arrest Warrant”), Articles 607a-607j of the CCP concern the issuing of the EAW; Chapter 65b (“Motion of the European Union Member State to surrender a requested person pursuant to an European Arrest Warrant”) contains provisions (Articles 607k-607zc of the CCP) relating to the execution of the EAW by the Polish judicial authorities.

#### (b) FD 2008/909/JHA

Regulations of FD 2008/909/JHA were transposed into the Code of Criminal Procedure by the Act of 16 September 2011 amending the CCP, the Act on the Public Prosecutor’s Office and the Act on the National Criminal Register, with the binding force since 1 January 2012<sup>3</sup>. Chapter 66f contains provisions concerning the motion to the EU Member State for the enforcement of the penalty of imprisonment (Articles 611t-611tf of the CCP). In turn, Chapter 66g includes regulations regarding the motion of the EU Member State for the enforcement of a penalty of imprisonment in Poland.

It should be noted that the transposition of FD 2008/909/JHA did not cover security (protective) measures involving the deprivation of liberty, which are connected with the ruling of a stay in a medical (psychiatric) facility. Moreover, it should also be noted that until 5 December 2016, Poland took advantage of the opt-out clause, which manifested itself in the fact that the acceptance of the judgment by Poland and its transfer to Poland took place only with the consent of the convicted person<sup>4</sup>. In practice, this meant that, for example, Article 611tk § 1 (3)(a) of the

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<sup>1</sup> Journal of Laws 2025, Item 46, with amendments. For the translation into English, not comprising the latest amendments, see: Adamczyk, *The Code of Criminal Procedure* (C.H. Beck, 2014).

<sup>2</sup> Journal of Laws 2004, No. 69, Item 626.

<sup>3</sup> Journal of Laws 2011, No. 240, Item 1430.

<sup>4</sup> Buczma, Kierzyńska (ed.), Stefaniak-Dąbrowska, *Wzajemne uznawanie orzeczeń karnych w Unii Europejskiej. Poradnik dla praktyków* (Wydawnictwo Krajowej Szkoły Sądownictwa i Prokuratury, 2023), p. 128.

CCP (providing for the exclusion of the need to consent to transfer a convict who is a Polish citizen and resides permanently or temporarily in the territory of the Republic of Poland) did not apply to judgments issued before 5 December 2016. The suspension was based on Article 4(2) of the Act of 16 September 2011 and on Article 6(5) of FD 2008/909/JHA.

It should also be mentioned that Poland made the following declaration under Article 28(2) of FD 2008/909/JHA:

“...the Republic of Poland hereby declares that, in cases where the final judgment is issued within 3 years following the date of entry into force, the Republic of Poland will, as an issuing and an executing State, continue to apply the legal instruments on the transfer of sentenced persons applicable prior to entry into force of the Framework Decision”. As transpires from the website of the European Judicial Network, the declaration has not been withdrawn by Poland<sup>5</sup>.

#### (c) FD 2008/947/JHA

The provisions implementing FD 2008/947/JHA are included in the CCP in Chapter 66h („Motion to the European Union Member State for the enforcement of a judgment imposing a conditionally suspended penalty of imprisonment, a penalty of restriction of liberty, an autonomous penal measure, and decisions on conditional release and conditional discontinuation of proceedings”; Articles 611u-611uc of the CCP) and in Chapter 66i (“Motion of the European Union Member State for the enforcement of a judgment imposing probation measure”; Articles 611ud-611uj of the CCP). Regulations of FD 2008/947/JHA were transposed into the Polish legal order by the above-mentioned Act of 16 September 2011 amending the CCP, the Act on the Public Prosecutor’s Office and the Act on the National Criminal Register, with the binding force as from 1 January 2012.

#### (d) FD 2009/829/JHA

The regulations concerning mutual recognition of the supervision measures alternative to pre-trial detention contained in FD 2009/829/JHA have been implemented into the Code of Criminal Procedure in Articles 607zd-607zg (Chapter 65c: „Motion to the European Union Member State for the enforcement of preventive measures”) and in Articles 607zh-607zn of the CCP (Chapter 65d: „Motion of the European Union Member State for enforcement of a judgment issued to ensure the due course of proceedings”). The FD 2009/829/JHA was transposed into the

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<sup>5</sup> Declaration by the Republic of Poland on Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, <https://www.ejn-crimjust.europa.eu/ejn/libshowdocument/EN/775/EN> (last visited: 21 Aug. 2024).

CCP by the act of 31 August 2012 amending the CCP as of 17 October 2012<sup>6</sup>. Poland did not make the notification under Article 21(3) of the FD 2009/829/JHA<sup>7</sup>.

**(e) Directive 2014/41/EU**

Directive 2014/41/EU was implemented into the Polish legal order in Articles 589w-589zd of the CCP (Chapter 62c: “Request to a Member State of the European Union for the execution of an investigative measure pursuant to European Investigation Order”) and in Article 589ze-589zt of the CCP (Chapter 62d: “Request of a Member State of the European Union for the execution of an investigative measure pursuant to European Investigation Order”) by the law of 10 January 2018 amending the CCP as from 8 February 2018<sup>8</sup>.

Poland made the declaration under Article 34 (4) of the EIO Directive that it wishes to continue applying the following agreements on cooperation in criminal matters with the Member States of the EU:

1. Agreement between the Republic of Poland and the Federal Republic of Germany on the follow-up and facilitation of the application of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

2. Agreement between the Republic of Poland and the Republic of Austria on follow-up and facilitation of the application of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

3. Agreement between the Republic of Poland and the Slovak Republic on follow-up and facilitation of the application of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

4. The Agreement between the People’s Republic of Poland and the Republic of Austria on Mutual Assistance in Criminal Matters, signed at Vienna on 27 February 1978.

5. The Convention between the Polish People’s Republic and the Czechoslovak Socialist Republic on legal assistance and legal relations in civil, family, labour and criminal matters signed in Warsaw on 21 December 1987<sup>9</sup>.

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<sup>6</sup> Journal of Laws 2012, Item 1091.

<sup>7</sup> See: Implementation of Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between the Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention – Information provided to the General Secretariat, [https://www.ejn-crimjust.europa.eu/ejnupload/Practical\\_info/Supervision/ImplementationSupervisionNov16.PDF](https://www.ejn-crimjust.europa.eu/ejnupload/Practical_info/Supervision/ImplementationSupervisionNov16.PDF), pp. 16-17 (last visited: 1 Oct. 2024).

<sup>8</sup> Journal of Laws 2018, Item 201.

<sup>9</sup> Notification on the implementation by Poland on the Directive on the European Investigation Order in criminal matters, <https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=2072>, p. 4 (last visited: 30 Sept. 2024).

## 1.2. Ratification of conventions

In Poland all conventions concerning international cooperation in criminal matters, once duly ratified, become a part of the national law. Thus, the provisions of such conventions are not “repeated” or “transposed” to the CCP or elsewhere. Pursuant to Article 615 § 2 of the CCP (this is a provision concluding the whole chapter on international cooperation in criminal matters), the provisions of this Chapter of the CCP do not apply if an international treaty to which the Republic of Poland is a party, provides otherwise. Hence, if certain institution of international cooperation in criminal matters is regulated in the convention ratified by Poland and in the Chapter XIII CCP, the regulations of the convention prevail and shall be applied directly by the procedural organs. The rule stemming from Article 615 § 2 CCP has its constitutional confirmation in Article 91 para. 1 and 2 of the Polish Constitution of 1997<sup>10</sup>, which read as follows:

„1. After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes”<sup>11</sup>.

### (a) EU Convention on Mutual Assistance in Criminal Matters

EU Convention on Mutual Assistance in Criminal Matters of 29 May 2000 with the Protocol to the Convention of 16 October 2001 was ratified by Poland by the Act of 23 July 2004<sup>12</sup>. As follows from the content of the Government declaration of 13 March 2007<sup>13</sup>, the Convention, in accordance with its Article 27(3), entered into force on 23 August 2005, and within the meaning of Article 28(4) – on 26 October 2005. In turn, the Protocol of 16 October 2001, pursuant to Article 13(3) is effective from 5 October 2005, and within the scope specified in Article 14(4) from 26 October 2005.

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<sup>10</sup> Journal of Laws 1997, No. 78, Item 483, with amendments.

<sup>11</sup> Text of the Constitution in English available at: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (access: 28 September 2024). On this issue see: Kułaga, “The Implementation of International Agreements in the Polish Legal System. The Selected Aspects of Practice in Recent Two Decades”, 9(1) Polish Review of International and European Law (2020), 125-151; available at: <https://czasopisma.uksw.edu.pl/index.php/priel/article/view/6544> (last visited: 28 Sept. 2024).

<sup>12</sup> The Act of 23 July 2004 on the ratification of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, done at Brussels on 29 May 2000, and the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000, done at Luxembourg on 16 October 2001 (Journal of Laws 2004, No. 187, Item 1924).

<sup>13</sup> Government statement of 13 March 2007 on the binding force of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, done at Brussels on 29 May 2000, and the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000, done at Luxembourg on 16 October 2001 (Journal of Laws 2007, No. 135, Item 951).



In the scope of the application of the provisions of the Convention, the following reservations regarding some cooperation instruments indicated in the above-mentioned Government declaration of 13 March 2007, are significant:

- On the basis of Article 9(6) of the Convention Poland made the temporary transfer of persons deprived of liberty to another Member State for the purposes of criminal proceedings dependent on the consent of the person concerned.
- On the basis of Article 10(9) of the Convention – a reservation that Poland will not submit any requests to interrogate a suspect or accused person by videoconference and a declaration not to comply with such requests as part of cooperation based on the Convention.

#### (b) European Convention on the Transfer of Proceedings in Criminal Matters

The European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972 has not yet been ratified by Poland<sup>14</sup>. The lack of ratification of the Convention was explained by the fact that the mechanism for the transfer of proceedings was available on the basis of bilateral agreements and national regulations. In this context, the inadvisability of joining the Convention was emphasized, considering the specific solutions provided therein and regarding the issue of jurisdiction, the adoption of which into the Polish legal order could result in excessive expansion, and consequently, an undesirable increase in the repressiveness of criminal law<sup>15</sup>. It is argued in the literature that the limited scope of ratification of the Convention results from the differences in the legislation of individual countries, and often also from limited trust in the functioning of the justice systems of other countries. However, the main obstacle seems to be the desire to fundamentally preserve the right to punish, in its understanding, as one of the features of national sovereignty<sup>16</sup>. As will be provided later in this Report, the transfer of proceedings and taking over of the prosecution may be done on the basis of bilateral agreements<sup>17</sup>.

The European Convention on the Transfer of Proceedings in Criminal Matters has been ratified by 13 Member States. Therefore, there are no uniform standards of cooperation on the transfer of proceedings between Member States. For these reasons, Article 21 of the European Convention on Mutual Assistance in Criminal Matters is most often applied for this purpose. This provision makes it possible to request the prosecution of a suspect in the territory of another

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<sup>14</sup> <<https://arch-bip.ms.gov.pl/pl/ministerstwo/wspolpraca-miedzynarodowa/rada-europy/konwencje-rady-europy-z-obszaru-sprawiedliwosc-i-sprawy-wewnetrzne-podpisaneratyfikowane-przez-polske/>>, (last visited: 2 Apr. 2024).

<sup>15</sup> <<https://www.sejm.gov.pl/sejm7.nsf/InterpelacjaTresc.xsp?key=60C7C49A>>, (last visited: 2 Apr. 2024).

<sup>16</sup> Cf. Polit-Langierowicz, “Wzajemne uznawanie orzeczeń karnych między państwami Unii Europejskiej”, 3 Prokuratura i Prawo (2008), 82-95, at 84-85.

<sup>17</sup> Cf. Kuczyńska, “Glosa do postanowienia Sądu Najwyższego z dnia 20 października 2016 r., sygn. akt III K 230/16”, 9 Prokuratura i Prawo (2017), 187-199, at 189-190.

state party to the Convention, but it is far from precise. Also because of the lack of precise regulation of the transfer procedure in the aforementioned legal act, the Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters was adopted on 27 November 2024, which aims to harmonize the provisions governing this area of cooperation<sup>18</sup>.

### (c) European Convention on Mutual Assistance in Criminal Matters.

The Republic of Poland is a party to the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and to the additional Protocol to this Convention of 17 March 1978<sup>19</sup>. Poland also ratified the second additional Protocol to the Convention of 8 November 2001 with the binding force as from 1 February 2004<sup>20</sup>. In connection with the ratification of the Convention and its additional protocols Poland made the following reservation which is important for the research conducted as part of the project: in accordance with Article 9, paragraph 9, the Republic of Poland declared that it will not avail itself of the possibility of hearing by video conference the accused person or the suspect (Article 9, paragraph 8)<sup>21</sup>.

### 1.3. Competent (judicial) authorities and central authorities

#### 1.3.1. Competent (judicial) authorities

There are 11 Appeal Courts (Polish: Sądy Apelacyjne) in Poland. The appeal courts cover 47 regions, so there are 47 Regional Courts (Polish: Sądy Okręgowe) in Poland. At the lowest level of common courts are located District Courts (Polish: Sądy Rejonowe). In accordance with Article 1 § 3 of the Act on public prosecutor's office<sup>22</sup> Public prosecutors of universal prosecutorial bodies include public prosecutors of the National Public Prosecutor's Office (Prokuratura Krajowa), Provincial Public Prosecutor's Offices (prokuratury regionalne), Regional Public Prosecutor's Offices (prokuratury okręgowe) and District Public Prosecutor's Offices (prokuratury rejonowe).

### (a) FD 2002/584/JHA

Based on Article 1(1) of the FD 2002/584/JHA an EAW constitutes a judicial decision, therefore, within the meaning of Article 6(1) of the FD 2002/584/JHA, the judicial authority of the issuing Member State competent under the law in force in that state should be entitled to issue an EAW. According to Article 607a of the CCP, the EAW is issued by the **competent regional court**.

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<sup>18</sup> O.J. L 2024/3011. On the current problems in applying this instrument of cooperation, see: De Jonge, "Transfer of criminal proceedings: from stumbling block to cornerstone of cooperation in criminal matters in the EU", 21 ERA Forum (2020), 449-464.

<sup>19</sup> Journal of Laws 1999, No. 76, Item 854. The Convention and the Additional Protocol entered into force on June 17, 1996.

<sup>20</sup> Journal of Laws 2004, No. 139, Item 1476.

<sup>21</sup> See reservations published at: <https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=182&codeNature=0> (last visited: 30 Sept. 2024).

<sup>22</sup> Consolidated text: Journal of Laws 2024, Item 390.

At the stage of the preparatory proceedings, the EAW is issued on a motion of the public prosecutor, if it is suspected that a person prosecuted for an offence falling under the jurisdiction of the Polish criminal courts may be staying in the territory of another EU Member State. However, during the court and enforcement proceedings, the EAW is issued *ex officio* or on a motion of a competent district or appeal court.

In this context – with reference to Article 6(3) of the FD 2002/584/JHA – attention should be paid to certain inaccuracies regarding terminology used in the Polish notification concerning the European Arrest Warrant. The notification indicates “the circuit court having territorial jurisdiction”<sup>23</sup>, while it seems that properly “the regional courts” should be indicated. It is commonly accepted, also in the case-law of the European Court of Human Rights concerning Poland, to use the following terminology in relation to types of courts within the structure of common courts in Poland: district court (sąd rejonowy); regional court (sąd okręgowy); appeal/appellate court (sąd apelacyjny).

Summarizing, EAWs in Poland are issued and executed by all 47 Regional Courts.<sup>24</sup>

#### (b) FD 2008/909/JHA

The judicial nature of a decision to transfer a custodial sentence for execution to another Member State is not provided for in FD 2008/909/JHA. In the light of Article 2(1) of the FD 2008/909/JHA, authority or authorities designated as competent under national law, in situations where the Member State is the issuing state, are also competent to issue a transfer decision. From the list prepared in accordance with Article 2(2) of FD 2008/909/JHA, based on information submitted to the General Secretariat of the Council of the European Union by individual Member States, it follows that the catalogue of authorities competent to decide on the transfer of a custodial sentence is diverse and includes not only judicial but also prosecutorial authorities, and sometimes even the Minister of Justice<sup>25</sup>.

In the Polish legal system, a request to another Member State for recognition and enforcement in that state of a judgment issued in Poland imposing an enforceable penalty of imprisonment is made on the basis of a decision of **the regional court in whose region the judgment was issued** (Article 611t § 1 of the CCP).

Pursuant to Article 611tg § 1 of the CCP, the regional court is also competent if another Member State requests the execution in Poland of a final and binding judgment imposing a penalty of imprisonment.

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<sup>23</sup> Notification under art. 6(3) European Arrest Warrant by Poland, <<https://www.ejn-crimjust.europa.eu/ejn/libshowdocument/PL/328/EN>>, (last visited: 4 Apr. 2024), p. 2.

<sup>24</sup> See for detailed analyses: Wąsek-Wiaderek, Zbiciak, “The Practice of Poland on the European Arrest Warrant” in Barbosa, Glerum, Kijlstra, Klip, Peristeridou, Wąsek-Wiaderek, Zbiciak, *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, 23 Maastricht Law Series (2022), p. 237-321.

<sup>25</sup> <<https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/1540>>, (last visited: 5 Mar. 2024).

The competence of the issuing and enforcing authorities is therefore assigned to the regional courts, as in the case of issuing and executing of EAWs.

(c) FD 2008/947/JHA

A decision to request another Member State for execution of measures covered by the FD 2008/947/JHA (i.e. judgments imposing a conditionally suspended penalty of imprisonment, a penalty of restriction of liberty, an autonomous penal measure, a decision on conditional release or a decision on conditional discontinuation of proceedings) is issued by the court which adjudicated the case in the first instance proceedings<sup>26</sup>. In practice this means that district courts or regional courts are competent to issue such decisions. Article 611u § 1 CCP mentions only “a court” as a competent organ, without indicating the level of the competent court. However, it is rightly assumed in the doctrine that the court having the competence to adjudicate the case at first instance is also competent to adjudicate in enforcement proceedings<sup>27</sup>. This approach is correct since – in principle – in accordance with Article 3 § 1 of the Criminal Enforcement Code of 1997 (thereafter referred to as “CEC”<sup>28</sup>), in proceedings concerning the enforcement of a given judgment, the competent court is the court that issued the judgment in the first instance, i.e. the district court or the regional court. Therefore, if the CCP in provisions concerning a given cooperation instrument does not specify the concrete court as the issuing authority and the decision is made at the stage of enforcement proceedings, it means that Article 3 § 1 of the CEC should apply instead of provisions determining the general jurisdiction of the courts set out in the CCP<sup>29</sup>.

Unlike the issuing judicial authority, the executing one is precisely defined: Article 611ud § 1 of the CCP mentions the district court in whose judicial circuit the sentenced person has a lawful residence. However, a decision of the district court acting as the executing judicial authority may be appealed to the competent regional court.

Article 3(1) of the FD 2008/947/JHA imposes an obligation to inform the General Secretariat of the Council of the European Union of the authority or authorities competent to take action in accordance with the Framework Decision. The information submitted on 13 March

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<sup>26</sup> The Polish legislator did not designate non-judicial authorities as competent to make decisions on the transmission of judgments to which the analyzed cooperation instrument refers. According to the provision of Art. 3(2) of the FD 2008/947/JHA this was not permissible since in Poland only courts are entitled to issue decisions or judgments covered by the scope of application of this Framework Decision.

<sup>27</sup> Augustyniak, “Komentarz do art. 611u Kodeksu postępowania karnego” in Świecki (Ed.), *Kodeks postępowania karnego. Tom II. Komentarz aktualizowany* (LEX, 2024), thesis no. 12; Głogowska, “Komentarz do art. 611u Kodeksu postępowania karnego” in Zagrodnik (Ed.), *Kodeks postępowania karnego. Komentarz* (LEX, 2023), thesis no. 5; Nita-Świątłowska, “Komentarz do art. 611u Kodeksu postępowania karnego” in Skorupka (Ed.), *Kodeks postępowania karnego. Komentarz* (Legalis, 2023), thesis no. IV (2); Sygreła, “Komentarz do art. 611u Kodeksu postępowania karnego” in Gerecka-Żołyńska (Ed.), *Kodeks karny wykonawczy. Komentarz* (Wolters Kluwer, 2023), p. 970.

<sup>28</sup> Consolidated text: Journal of Laws 2024, Item 706.

<sup>29</sup> Cf. Steinborn, “Komentarz do art. 611u Kodeksu postępowania karnego” in Paprzycki (Ed.), *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego* (LEX, 2015), thesis no. 13.

2012 and published on 13 April 2012 indicates that when Poland acts as the issuing state, district or regional courts are competent. On the other hand, where the Republic of Poland is the executing State – “regional courts” with local jurisdiction for the lawful and ordinary residence of the offender are competent to execute the request. However, in cases referred to in Article 5(2) of the Framework Decision – “the Regional Court with jurisdiction for the Śródmieście district of the capital city Warsaw is the executing authority”<sup>30</sup>.

(d) FD 2009/829/JHA

Article 6(1) of the FD 2009/829/JHA indicates “judicial authorities” as competent to issue an ESO. However, Article 6 (2) FD 2009/829/JHA allows also for conferring such competence to non-judicial authorities, provided that such authorities have competence for taking decisions of a similar nature under their national law and procedures. The decision referred to in Article 18(1)(c) of the FD 2009/829/JHA (i.e. issuing an arrest warrant or any other enforceable judicial decision having the same effect) may be taken only by the judicial authority.

Under the Polish law Article 607zd § 1 CCP indicates that the authority competent to make the request for the enforcement of a decision imposing a preventive measure defined in Article 272 CCP (guarantee of a trustworthy person), Article 275 CCP (police supervision), Article 275a CCP (order to leave premises occupied together with the victim) and Article 276 CCP (suspension in the execution of duties) is a court or a public prosecutor. As rightly noted in the doctrine, Article 607zd § 1 CCP does not specify the jurisdiction of the court or prosecutor to perform this action. It should therefore be assumed that the court before which the proceedings are currently pending or the prosecutor conducting or supervising the preparatory proceedings is competent to issue an ESO. However, with reference to public prosecutors § 296 of the Regulation of the internal order of common organizational units of the prosecutor’s office of 7 April 2016<sup>31</sup> clearly indicates the following public prosecutors as competent to issue an ESO: the Director of the Department of the Organised Crime and Corruption of the National Public Prosecution Office; the Head of the Internal Affairs of the National Public Prosecution Office; the head of the locally competent branch of such office, the Provincial Public Prosecutor and the Regional Public Prosecutor.

The competence of the individual authority also depends on the stage of criminal proceedings; during preparatory proceedings the above-mentioned prosecutors remain the

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<sup>30</sup> Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with the view to the supervision of probation measures and alternative sanctions – Notification of the implementation of the Council Framework Decision by Poland, <<https://www.ejn-crimjust.europa.eu/ejn/libshowdocument/EN/715/EN>>, (last visited: 6 Mar. 2024), p. 3. It should be clarified that the notion “regional court” used in this notification means in Polish “sąd rejonowy”.

<sup>31</sup> Consolidated text: Journal of Laws 2023, Item 1115, with amendments; thereafter referred to as “the Regulation on internal order”.

competent authorities to apply for the recognition of a preventive measure in another Member State, while in court proceedings it is the court<sup>32</sup>.

Despite the above conclusions as to the competent issuing authorities, the notification made by Poland under Article 6(1) of the FD 2009/829/JHA indicates not “courts” in general, but only “the regional courts” as competent to issue the ESO at the judicial stage of the proceedings. With reference to pre-trial proceedings the notification is correct but not precise – in accordance with Article 607zd § 1 CCP it generally indicates “public prosecutor’s offices” as the competent authorities to issue an ESO<sup>33</sup>, while the above mentioned § 296 of the Regulation on internal order clearly indicates the limited number of public prosecutors entitled to issue an ESO.

The public prosecutor’s competence to issue an ESO remains closely related to its general competence to apply non-custodial preventive measure at the preparatory stage of the proceedings (see Article 250 § 4 CCP in conjunction with Article 250 § 1 CCP). Thus, it was justified to indicate the prosecutor, who is also the authority conducting or supervising the preparatory proceedings, as an organ competent to forward the decisions regarding the measures previously applied by him for enforcement in another Member State.

A decision on issuing an ESO by a prosecutor or a court is not subject to appeal (Art. 607zg CCP). Nevertheless, an interlocutory appeal may be filed against the decision imposing a preventive measure (Article 252 of the CCP), which is subsequently subject to ESO and is transferred for enforcement in another Member State.

It should be noted that in the case of a Member State’s request for the execution of an ESO in Poland, the competence to issue a decision on the matter rests with the prosecutor having jurisdiction over the place where the person to whom the ESO applies legally resides (Art. 607zh § 1 of the CCP)<sup>34</sup>.

#### (e ) Directive 2014/41/EU

Article 2(c) of Directive 2014/41/EU indicates the following authorities as competent to issue an EIO: a judge, a court, an investigating judge or a public prosecutor competent in the case concerned. The Directive also confers the power to issue an EIO on any other investigative authority, determined by the state issuing the EIO, which is competent to order the gathering of evidence in accordance with the national law. In such a case, however, the EIO is subject to the

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<sup>32</sup> Nita-Światłowska, “Komentarz do art. 607zd Kodeksu postępowania karnego” in Skorupka (Ed.), *Kodeks postępowania karnego. Komentarz* (Legalis, 2023), thesis no. VI(2).

<sup>33</sup> Notification of the implementation of Poland of Framework Decision on Supervision Measures (replacement of the notification of 11/07/13), < <https://www.ejn-crimjust.europa.eu/ejn/libshowdocument/EN/1153/EN>>, (last visited: 4 Apr. 2024), p. 2.

<sup>34</sup> Poland submitted the following declaration in accordance with Article 6(1) of the Framework Decision: the authorities competent to act according to the Framework Decision are: (a) where the Republic of Poland is the issuing State: the regional courts or public prosecutor’s offices; (b) where the Republic of Poland is the executing State: the public prosecutor’s offices with local jurisdiction depending on the lawful, ordinary place of residence of the offender. See, the notification mentioned in the previous footnote.

approval of a judicial authority, i.e. a judge, a court, an investigating judge or a public prosecutor in the issuing state.

In Polish law Article 589w § 1 CCP provides **the court before which the case is pending** with the competence to issue an EIO at the judicial stage of the proceedings. At the preparatory stage of the proceedings the issuing authority is **the public prosecutor conducting the proceedings**. Article 589w § 2 CCP states that in the event of preparatory proceedings being conducted by the Police or the authorities referred to in Article 312 CCP (the Border Guard, the Internal Security Agency, the National Tax Administration, the Central Anti-Corruption Bureau, the Military Gendarmerie and the other agencies referred to in special provisions), in the course of inquiry (Polish: *dochodzenie*) or in the “verifying proceedings”, referred to in Article 307 CCP (Polish – *postępowanie sprawdzające*), or if preparatory proceedings are conducted by the authorities referred to in Article 133 § 1 and Article 134 § 1 of the Fiscal Criminal Code of 10 September 1999<sup>35</sup> (i.e. to the extent specified in the FCC – by the head of the customs and tax office, the head of the tax office, the head of the National Tax Administration, the Border Guards, the Police, the Internal Security Agency, the Military Gendarmerie, Central Anti-Corruption Bureau), **a decision regarding EIO may also be issued by the authority conducting the proceedings. The decision then requires approval by the prosecutor**<sup>36</sup>. The authority’s jurisdiction to issue an EIO therefore depends on the stage at which the proceedings are at the time the decision is made.

An exception to the rule can be read against the background of Article 589w § 4 of the CCP, which provides for the competence of the court – at any stage of the proceedings – to make decisions on EIO, replacing those required in Article 237 § 1 of the CCP (court decision consenting to the surveillance and recording of the content of telephone conversations by way of telephone tapping). In this context, the regulation of Article 589w § 5 of the CCP is important, which states that the decision on the EIO replaces the decision on the admission, obtaining or conducting a given piece of evidence. It should be noted that in this respect, doubts have arisen in the case law and doctrine as to which authority is competent to issue an EIO requesting information on bank accounts or transactions or requesting the monitoring of banking or financial operations conducted using given accounts for a specified period of time. The question was whether in such a situation the issuance of an EIO must be preceded by a prior decision on exemption from banking secrecy in the issuing country. As an example, A. Sakowicz took the position that the inability of the prosecutor to obtain information covered by banking secrecy without a prior consent of the locally competent regional court results in the justification for concluding that this authority, and not the prosecutor, will be competent at the stage of preparatory proceedings for

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<sup>35</sup> Consolidated text: Journal of Laws 2024, Item 628, with amendments; hereinafter as: FCC.

<sup>36</sup> The approval should be made by including the notice into Section L of the EIO form. See, Kierzyńska, “Implementacja END” in: Buczma, Kierzyńska, *Europejski nakaz dochodzeniowy. Nowy model współpracy w sprawach karnych w Unii Europejskiej* (C.H. Beck, 2018), p. 216.

issuing the EIO<sup>37</sup>. A different view on this issue – although correct – is expressed by B. Augustyniak and H. Kuczyńska, who believe that the decision on the EIO regarding obtaining information covered by banking secrecy is issued by the public prosecutor, but only after being released from the obligation to maintain banking secrecy by the locally competent regional court<sup>38</sup>. This approach found its confirmation in the jurisprudence of the Supreme Court, which held that the only competence of the court is to determine whether, and if so, to what extent evidence regarding banking information may be taken by the prosecutor. It is the prosecutor, who, upon obtaining the appropriate consent of the national court, decides to submit to the executing authority a request contained in the EIO to provide evidence of circumstances covered by banking secrecy<sup>39</sup>.

As part of the fulfilment of the obligation arising from Article 33(1) (a) of the Directive 2014/41/EU, Poland indicated as the authorities competent to issue an EIO: district, circuit, appeal courts and the Supreme Court; district, circuit and regional Public Prosecutor's Office; the National Public Prosecutor's Office; other investigative authorities entitled to conduct covered investigations, i.e.: authorities of the Police, Border Guard, Internal Security Agency and the National Revenue Administration, the Central Anti-Corruption Bureau, the Military Gendarmerie, the Trade Inspectorate and the State Sanitary Inspectorate, the President of the Office of Electronic Communications, State Hunting Guard, Forest Service, heads of Customs and Revenue Offices as well as heads of Revenue Offices, the Military Counter-Intelligence Service and Military Intelligence Service. The notification additionally indicated the jurisdiction of the regional court (which was incorrectly called a circuit court) in relation to the activity consisting of the temporary transfer of a person held in custody to Poland, as the issuing state, to carry out investigative measures. Moreover, district courts were marked as having jurisdiction in matters relating to interception of telecommunications<sup>40</sup>.

The problem of issuing judicial authorities is closely connected with the right to appeal against a decision to issue an EIO. Pursuant to Article 14(1) of the Directive 2014/41/EU it is required to provide, in relation to the investigative measures specified in the EIO, legal remedies equivalent to those available in a similar case in national law. In turn, Article 14(2) of Directive

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<sup>37</sup> Sakowicz, "Komentarz do art. 589w Kodeksu postępowania karnego", In: Sakowicz (Ed.), *Kodeks postępowania karnego. Komentarz* (Legalis, 2023, Warsaw), thesis no. 9.

<sup>38</sup> Augustyniak, "Komentarz do art. 589w Kodeksu postępowania karnego", In: Świecki (Ed.), *Kodeks postępowania karnego. Komentarz aktualizowany*, vol. II (LEX, 2024), thesis no. 12; Kuczyńska, "Komentarz do art. 589w Kodeksu postępowania karnego" in Skorupka (Ed.), *Kodeks postępowania karnego. Komentarz* (Legalis, 2023, Warsaw), thesis no. XI(3); Smarzewski, "Obtaining Evidence Protected by Banking Secrecy through European Investigation Order in Preparatory Proceedings. Remarks from the Polish Perspective", 54(3) *Review of European and Comparative Law* (2023), pp. 195-219.

<sup>39</sup> Supreme Court, No. I KZP 17/21, Legalis no. 2707936, decision of 2 June 2022.

<sup>40</sup> Notification of the implementation by Poland on the Directive on the European Investigation Order in criminal matters. Competent authorities, < <https://www.ejn-crimjust.europa.eu/ejn/libshowdocument/EN/2072/EN>>, (last visited: 5 Apr. 2024), p. 1-2.



2014/41/EU provides that the substantive grounds for issuing an EIO may only be effectively challenged by means of objection in the issuing state. The wording of the latter provision is reflected in the content of Article 589zc § 1 of the CCP which states that no complaint may be lodged against a decision regarding the EIO, unless the specific provision relating to the activity indicated in the EIO provides otherwise. In other words, if a specific provision relating to a given investigative measure specified in the EIO confers the right of filing a complaint against the decision regarding it, a complaint may also be filed against the decision on the EIO, which constitutes a decision on the performance of the measure<sup>41</sup>.

The competence to issue a decision on the execution of the EIO was, in turn, generally assigned to the prosecutor or the district court, in whose circuit the evidence is located, or shall be examined (Art. 589ze § 1 of the CCP)<sup>42</sup>. However, there are exceptions to the general rule. Based on Article 589ze § 2 of the CCP, if the admission, obtaining or conducting the evidence is reserved for the court or requires a court's decision, this court also decides on the execution of the EIO. In situation, where the EIO concerns a temporary transfer to the issuing state of a person held in custody for the purpose of conducting an investigative measure, the regional court is competent to issue a decision (Article 589ze § 3 of the CCP). Pursuant to Article 589ze § 4 of the CCP, the regional court is also competent to issue a decision on the execution of the EIO, the subject of which is the temporary transfer to the Republic of Poland of a person held in custody for the purpose of conducting an investigative measure.

#### (f) EU Convention on Mutual Assistance in Criminal Matters

Poland identified the authorities competent to act on the basis of this Convention in a declaration submitted pursuant to Article 24(1) of the Convention, upon notification under Article 27(2) of the Convention. The authorities competent to cooperate include, as part of the implementation of the objectives set out in Article 6(5) of the Convention: the Chief Police Commander — in the scope covered by Articles 12 and 14; the Minister of Finance – in the scope covered by Article 12 of the Convention in respect of serious fiscal offences; in the context of Article 13 of the Convention – the Attorney General. Moreover, circuit prosecutors having territorial jurisdiction were recognized as competent authorities for the

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<sup>41</sup> Kuczyńska, "Komentarz do art. 589zc Kodeksu postępowania karnego" in Skorupka (Ed.), *Kodeks postępowania karnego. Komentarz* (Legalis, 2023, Warsaw), thesis no. I(3).

<sup>42</sup> The Notification mentioned in the previous footnote indicates the following authorities deciding on the recognition and execution of the EIO: a) district courts - at the trial stage; b) Regional Public Prosecutor's Office - at the pre-trial stage, and regardless of the stage of the proceeding: a) regional courts - in matters concerning the temporary transfer of a person held in custody to the issuing State or to Poland to carry out investigative measures; b) district courts - in matters relating to interception of telecommunications. As already mentioned, the term "**circuit court/prosecutor office**" is not correct since the widely accepted name for "*sądy/prokuratury okręgowe*" is "**regional courts/prosecutor office**".

purposes of applying Articles 18, 19, 20 (1-3 and 5) of the Convention . The role of contact points was assigned to the Voivodeship Police Commanders having territorial jurisdiction<sup>43</sup>.

Regardless of the content of the declaration, it seems that the courts also have competence in the field of cooperation using the instruments provided in the Convention. Pursuant to Article 27(2) of the Convention, the list of the authorities indicated by a Member State does not exclude the possibility of cooperation between the authorities mentioned in the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and in the Benelux Treaty. Such an assumption seems fully justified since it results from an appropriate assessment made from the perspective of Article 3(1) of the Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

#### (g) European Convention on Mutual Assistance in Criminal Matters

Pursuant to Article 3(1) of European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, requests for mutual assistance in criminal matters should be submitted by “judicial authorities”. Therefore, there are no doubts that the Polish courts have the competence to cooperate using the instruments regulated in the Convention (the courts having jurisdiction to examine the case at the given stage of the proceedings, in particular the regional and district courts). Nevertheless, it should be emphasized that – following the content of the declaration submitted by Poland pursuant to Article 24 of the Convention – for the purposes of the Convention, it was assumed that the public prosecutors (competent regional public prosecutors) are also recognized as “judicial authorities”<sup>44</sup>.

#### 1.3.2. Central authorities

Did your MS designate “central authorities” (within the meaning of the instruments)? If so, which authorities and what are their respective competences? What is the role of the central authority in choosing the form of cooperation?

#### (a) FD 2002/584/JHA

In the notification submitted pursuant to Article 7 of the FD 2002/584/JHA the Minister of Justice (the General Prosecutor) was designated as the central authority supporting the competent judicial authorities and as the “authority responsible for receiving transit requests and the necessary documents”. The competence of the Minister of Justice (the General Prosecutor) is

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<sup>43</sup> Declarations of Poland – Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, <https://www.ejn-crimjust.europa.eu/ejn/libshowdocument/EN/629/EN> (last visited: 5 Apr. 2024), p. 1-2.

<sup>44</sup> Government declaration of 5 July 1999 on the ratification by the Republic of Poland of the European Convention on Mutual Assistance in Criminal Matters, done at Strasbourg on 20 April 1959, and the Additional Protocol to that Convention, done at Strasbourg on 17 March 1978 (Journal of Laws 1999, No. 76, Item 855). See also Turek, *Prokuratura w standardach prawnych Rady Europy* (Wolters Kluwer Polska, 2022, Warsaw), p. 165.

limited to the possibility of transmitting EAWs issued by the authorities of other Member States to the competent prosecutor's offices, as well as other official correspondence relating to cooperation in the field of EAW<sup>45</sup>. The Minister of Justice does not play any role in deciding on the issuing or execution of an EAW.<sup>46</sup>

**(b) FD 2008/909/JHA**

Article 2(1) of the FD 2008/909/JHA establishes obligation for each Member State to inform which authority or authorities, under its national law, are competent in cases where that Member State is the issuing or executing state.

The FD 2008/909/JHA does not contain a separate basis for appointing central authorities.

However, it should be noted that in cooperation based on this instrument the Minister of Justice plays a certain role. According to § 376(1) of the Regulation of the Minister of Justice – Rules on the operation of common courts of 18 June 2019<sup>47</sup>, the regional court in connection with requesting the competent authority of another Member State for the enforcement of a final judgment on a custodial sentence is obliged to send to the Minister of Justice: a copy of a final and enforceable judgment imposing penalty of imprisonment; a copy of the request regarding the execution of a penalty of imprisonment; a copy of the form submitted to another MS and containing all relevant information enabling the proper execution of the judgment. This obligation stems also from Article 611t § 6 *in fine* CCP.

In turn, § 377 of the same Regulation of the Minister of Justice states that if the Member State requests the enforcement of a legally imposed penalty of imprisonment in Poland, the regional court shall send a copy of the decision on the execution of judgment to the Ministry of Justice within 14 days from the date of issuance of the decision. The same obligation stems from Article 611tj § 5 of the CCP.

The information on requests for execution of the penalty submitted to other MS as well as on those sent to Poland by other MS is gathered by the Department of Execution of Court's Decisions and Probation of the Ministry of Justice which supervises and coordinates execution of penalties in Poland. It is used mainly for coordination and statistical purposes since the Minister of Justice plays an important role in European cooperation based on the FD 2008/909/JHA. In particular, the Minister of Justice may submit a motion to the competent regional court and request initiation of the procedure of enforcement of the penalty in another MS. The relevant provisions are as follows:

*"Article 611t § 1. In the case of a final judgment issued by a Polish court in relation to a Polish citizen or a foreigner, providing for a penalty of imprisonment subject to execution, the regional*

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<sup>45</sup> Notification under Article 7 (1) (2) and Article 25 (2) of the FD EAW made by Poland in 2007, <https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/329> (last visited: 1 January 2025), p. 10.

<sup>46</sup> See, M. Wąsek-Wiaderek, A. Zbiciak, *op. cit.*, p. 263-264.

<sup>47</sup> Consolidated text: Journal of Laws 2024, Item 867.

*court in whose region the judgment has been issued, upon consent of the sentenced person, may make a request for its execution directly to the competent court or another authority of the Member State of the European Union, [...], provided that handing over of the judgment for execution would enable the achievement of educational and preventive objectives of the penalty to a greater extent.*

*§ 2. The request referred to in § 1 may be made also upon motion of the Minister of Justice, a competent court or another authority of the ruling executing state or the sentenced person.”*

Furthermore, the Minister of Justice may also request the competent regional court to initiate the proceedings aimed at enforcement of a foreign judgment in Poland. The relevant provisions of the CCP are the following:

*“Article 611tg § 1. If a Member State of the European Union [...] makes a request for execution of a final judgment on deprivation of liberty in the Republic of Poland, the judgment shall be subject to execution by a regional court.*

*§ 2. The regional court may, at the request of the Minister of Justice, the sentenced person or ex officio, request the competent court or another authority of the ruling issuing state to hand the judgment referred to in § 1 over for execution, where this will allow achieving the educational and preventive objectives of the penalty to a greater degree.”*

Minister of Justice is also competent to decide (to consent) to the transfer of the convicted person through the territory of the Republic of Poland (see Article 611tp CCP) and to request the competent authorities of other MS for consent to transfer a person concerned through their territories (Article 611tf § 2 CCP).

#### **(c) FD 2008/947/JHA**

FD 2008/947/JHA does not provide the opportunity for appointing a central authority.

Unlike in case of FD 2008/909/JHA, with reference to this instrument the Regulation of the Minister of Justice – Rules on the operation of common courts of 18 June 2019 does not provide for obligation to report to the Minister of Justice about issuing or executing of the decision concerning penalties covered by FD 2009/947. This conclusion is justified by the fact that § 376(1) of the Regulation mentions such obligation only with regard to execution of the enforceable penalty of imprisonment while the suspended penalty of imprisonment is not “enforceable” as deprivation of liberty.

#### **(d) FD 2009/829/JHA**

The possibility to designate a central authority within the framework of cooperation regulated in FD 2009/829/JHA is provided in its Article 7(1). It is permissible, if required by the legal system of a given Member State, to designate several central authorities to support the authorities competent to take fundamental decisions regarding cooperation. Pursuant to Article 7(2) of the FD 2008/829/JHA, the responsibility for the administrative transmission and reception

of decisions on supervision measures together with certificates, as well as all official correspondence relating thereto, may be entrusted to the competence of the central authority or authorities. It is possible to use the assistance of a central authority or authorities in relations to communications, consultations, exchanges of information, enquiries and notifications between competent authorities.

In this context, it should be noted that Poland did not use the option reserved in Article 7(3) of the FD 2009/829/JHA and has not designated a central authority regarding cooperation through ESO<sup>48</sup>.

#### (e) Directive 2014/41/EU

Article 7(3) of the Directive 2014/41/EU states that each Member State may designate one or more central authorities to assist the competent authorities. It also provides that Member States may, if it is necessary due to the organization of their judicial system, entrust a central authority with the task of administrative transmission and receipt of EIOs as well as other official correspondence relating to EIOs.

In the information submitted to the European Commission pursuant to Article 33(1) (c) in conjunction with Article 7(3) of the Directive 2014/41/EU, Poland designated International Cooperation Office of the National Public Prosecutor's Office as the central authority, narrowing the scope of its competences only to cases pending at the stage of preparatory proceedings. The submitted note also emphasized the lack of establishment of a central authority for cases on the stage of court proceedings. In this respect, the only reservation was made in the case of EIO issued at the judicial stage of proceedings, when the establishing of the competent court in Poland is not possible (including as part of inquiries addressed to the national Contact Points of the European Judicial Network). In such a situation, it is possible to transfer the EIO through the Ministry of Justice (Department of International Cooperation and Human Rights).

Taking into account the above observations, it should be concluded that the central authority does not play a significant role in cooperation in the field of EIO. The scope of its competence was not specified in the notification, so it seems that it is limited to technical issues generally indicated in Article 7(3) of the Directive 2014/41/EU. The central authority does not have any influence on the decision to initiate cooperation or the choice of its specific form.

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<sup>48</sup> Cf. Notification of the Framework Decisions on Prevention and on Supervision Measures Poland, <<https://www.ejn-crimjust.europa.eu/ejn/libshowdocument/EN/1038/EN>>, (last visited: 6 Apr. 2024); Notification of the implementation of Poland of Framework Decision on Supervision Measures (replacement of the notification of 30/11/12), < <https://www.ejn-crimjust.europa.eu/ejn/libshowdocument/EN/1153/EN>>, (last visited: 6 Apr. 2024).

#### (f) EU Convention on Mutual Assistance in Criminal Matters

In accordance with the notification submitted by Poland with reference to Article 24(1)(b) of the EU Convention on Mutual Assistance in Criminal Matters, the Ministry of Justice was indicated as the central authority<sup>49</sup>. In this context, the competence of the Ministry of Justice has been confirmed to: transferring requests for legal assistance or responses to them between the Ministry of Justice and a central or judicial authority of another Member State, if the requests or responses to them are not transmitted directly between the locally competent judicial authorities (Article 6(2) of the Convention); transmitting requests for the temporary transfer or transit of persons deprived of their liberty; forwarding notifications of convictions (Article 6(8) of the Convention).

#### (g) European Convention on Mutual Assistance in Criminal Matters

In the cooperation based on this Convention the central authority is the Ministry of Justice (as in the case of the EU Convention on Mutual Assistance in Criminal Matters). This stems primarily from Article 15(1) of the Convention providing that letters rogatory and applications referred to in Articles 3, 4, 5 and 11 of the Convention shall be addressed by the Ministry of Justice of the requesting party to the Ministry of Justice of the requested party and shall be returned in the same way. It should be noted, however, that after the changes introduced by the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, the possibility of direct exchange of requests for mutual assistance between the judicial authorities was introduced. The competence of the Ministry of Justice in the field of forwarding letters rogatory is therefore not exclusive. The government statement of 5 July 1999 provided that also in the event of direct transfer of requests to judicial authorities, a copy of the request should be sent to the Ministry of Justice<sup>50</sup>.

#### 1.3.3. Coordination

Are there any mechanisms (in law or in practice) for coordinating between:

- different (judicial) authorities that are competent under one and the same instrument/convention and;
- different (judicial) authorities that are competent under different instruments/conventions?

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<sup>49</sup> Declarations of Poland – Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, <<https://www.ejn-crimjust.europa.eu/ejn/libshowdocument/EN/629/EN>>, (last visited: 6 Apr. 2024), p. 1.

<sup>50</sup> Government declaration of 5 July 1999 on the ratification by the Republic of Poland of the European Convention on Mutual Assistance in Criminal Matters, done at Strasbourg on 20 April 1959, and the Additional Protocol to that Convention, done at Strasbourg on 17 March 1978 (Journal of Laws 1999, No. 76, Item 855).

The Polish law provides for the following mechanisms for coordinating cooperation in criminal matters.

#### Coordination within the public prosecutor's offices

First of all, the important role is played by the International Cooperation Office of the National Public Prosecutor's Office. The tasks of the International Cooperation Office are specified in § 17 of the Regulation of the Minister of Justice – Regulations of the internal order. In the analyzed scope these tasks include:

- 1) formal and legal analysis, dispatch and coordination of submitting requests for mutual assistance sent abroad through the intermediary of the International Cooperation Office and issued in the course of criminal proceedings conducted in the units of the public prosecution office and in other authorized organs;
- 2) at the request of the competent authorities – coordination of requests for mutual legal assistance forwarded by them directly to the authorities of foreign countries and coordination of the execution of requests for mutual assistance addressed to the Republic of Poland from abroad through International Cooperation Office;
- 3) transmission of EAWs coming from abroad and other official correspondence related to them to the competent public prosecutor's office;
- 4) formal and legal analysis, dispatch and coordination of requests for taking over the prosecution sent abroad in criminal cases conducted by the competent public prosecutor's offices; forwarding such requests for transfer of prosecution from abroad for execution and fulfilling the resulting information obligations;
- 5) coordinating the activities of the Contact Points of the European Judicial Network;
- 6) analysis of the case law of the Court of Justice of the European Union in criminal matters.

At the lower level of the structure of the public prosecutor's offices the key role is played by the special units established in all Regional Public Prosecutor's Offices (Prokuratury Okręgowe). Functioning of these "special units" means in practice that one or a few public prosecutors are focusing on international cooperation in criminal matters in their daily practice. Their role and functions are defined in § 30 (7) of the Regulation on internal order. They are responsible for international cooperation conducted in their own unit, i.e. in the given Regional Prosecutor's Office and in all subordinate district prosecutor's offices. It is rightly underlined in the literature that all international cooperation of district prosecutors' offices is conducted by these special units established in the Regional Prosecutor's Offices and the district prosecutor's offices cannot submit such request on their own<sup>51</sup>.

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<sup>51</sup> Błachnio, "Komentarz do § 30 Regulaminu wewnętrznego urzędowania powszechnych jednostek organizacyjnych prokuratury" in Drembowski (Ed.), *Prawo o prokuraturze. Regulamin wewnętrznego urzędowania powszechnych jednostek organizacyjnych prokuratury. Komentarz*, (Legalis, C.H. Beck, 2021), thesis no. 8.

### Application in practice

The interviewed public prosecutors from the above presented units underlined that they usually know each other and keep in contact with public prosecutors from other units focusing on international cooperation. Thus, they have their own network for the exchange of information and experiences concerning international cooperation. They also meet at various training meetings and conferences. The interviewed public prosecutors underlined the coordinative role of the International Cooperation Office of the National Public Prosecutor's Office.

With reference to the issuance of prosecution-EAWs, there is only little scope for coordination at the level of public prosecution offices. It is the task of the public prosecutor conducting or supervising the investigations to assess whether there is a need to apply to the competent court to issue a national arrest warrant, which is the indispensable condition for the subsequent issuance of the prosecution-EAW at this stage of the proceedings. The coordination with regard to this decision usually takes place at the level of the given public prosecution office, by conducting consultations with the head of the office.

### Coordination in courts

In courts such coordinative role should be played by "coordinators for international cooperation and human rights". The coordinator is appointed in the form of an order by the president of the regional court from among judges and trainee judges or court referendaries of a given regional court or district courts within its jurisdiction, who are distinguished by their knowledge of international cooperation, European law and human rights and who demonstrate appropriate knowledge of foreign languages (Article 16d § 4 of the Act of 27 July 2001 – the law on the organization of common courts<sup>52</sup>). The coordinator performs his duties in all courts within the jurisdiction of a given regional court (Article 16d § 3 of the Act of 27 July 2001).

Pursuant to Article 16d § 2 of the Act of 27 July 2001, the competences and duties of the coordinator for international cooperation and human rights in criminal matters include:

- 1) providing, at their requests, information to judges, trainee judges, court referendaries and assistant to judges:
  - a) on the terms and manner of obtaining information on the law and practices of a foreign country,
  - b) on working techniques and performing judicial administration activities essential for correct preparation of legal assistance requests, EAWs and other decisions subject to mutual recognition,
  - c) on the terms and manner of cooperation within the European Judicial Network,

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<sup>52</sup> Consolidated text: Journal of Laws 2024, Item 334, with amendments.



- d) on the terms and manner of determining the competent foreign authority for executing a request for legal assistance and obtaining the information concerning the status of execution of the said request,
- e) on the terms and manner of determining the competent foreign authority for executing an EAW or other decisions subject to mutual recognition, or on the information concerning the status of execution of the said warrant or decision,
- f) on the manner of obtaining information on the content of standards arising from the ECtHR;

The coordinator also has duties related to providing information to the president of the court or to the presidents of the chambers of the court on various issues related to the European standards. This includes, among others, informing about the standards arising from the case law of the ECtHR.

Although coordinators play an important role in providing information and technical assistance to all other judges, only the court, not the coordinating judge takes the decision on cooperation. It is the court's decision whether to seek the support of the coordinator in a specific case and how to use the information obtained from him. Moreover, the information provided by the coordinator is not binding, neither in the judicial nor administrative spheres. The Act of 27 July 2001 or any other legal act does not regulate the methods and forms of the coordinator's activities. It should therefore be assumed that the legally unspecified methods and forms of providing information will be shaped by the work practices in a given judicial region. It is assumed that information coming from the coordinator and falling within the scope of his competences and obligations may be transmitted to other judges orally, in writing, by e-mail or telephone<sup>53</sup>.

The function of coordinator should only be performed by a person with particularly extensive knowledge and experience in the field of international judicial cooperation. Nonetheless, their role cannot be overestimated – the majority of measures of cooperation are used by the court conducting judicial proceedings hence in practice, all the courts adjudicating cases in the first and second instance. For example, it is the court before which the case is pending that may issue an ESO or the EIO or which is responsible for ensuring that a defendant who is abroad, is properly notified of the hearing. Moreover, if this is a district court, it is its responsibility to apply to the regional court to issue the EAW.

In accordance with § 370 of the Regulation of the Minister of Justice – Rules on the operation of common courts of 18 June 2019<sup>54</sup>, when requesting information specified in this provision aimed at facilitating cooperation in criminal matters with the competent authority of the EU Member State in which the EJN contact point was established, the court applies to the national EJN contact point in the Ministry of Justice or in common organizational units of the

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<sup>53</sup> Domagała, *Praktyczny przewodnik w zakresie międzynarodowej pomocy prawnej w sprawach karnych* (Krajowa Szkoła Sądownictwa i Prokuratury, 2023), p. 29, 32.

<sup>54</sup> Consolidated text: Journal of Laws 2024, Item 867.

prosecutor's office. This seems important for: obtaining information on the law and practice of a given country; determining in a given state the authority competent to execute a request for legal assistance or to provide information regarding the status of execution of this request; determining in a given state the authority competent to execute the EAW or other decision subject to mutual recognition or providing information regarding the status of execution of this order, warrant or decision.

### Application in practice

The interviewed practitioners indicated two problems concerning the coordination of international cooperation in courts.

The first one is the system of random allocation of cases, which may result in the decision on the application of European cooperation instruments being made by judges who do not have the necessary experience in this field and specialization. However, it seems that the specificity of deciding on the use of cooperating tools in criminal cases requires delegating it to only a group of specialized judges. On the other hand, in the majority of regional courts, the system of random allocation of cases is allowed to choose the judges for cases concerning European cooperation in criminal matters only from among judges specializing in this issue. Nevertheless, one practitioner pointed out that the allocation of such cases (mostly cases concerning the issuance/execution of EAWs or those concerning the application of FD 2008/909/JHA) exclusively to one or two judges in the given regional court has its negative consequences. Such a judge may determine the way of interpreting the law concerning the instruments of mutual recognition and their application. This may jeopardize the exchange of views and development of case law in this area.

The second one is that not all the coordinators appointed in the courts fulfill their functions in the manner expected by other judges.

Some authors also stress the insufficient use of the effective, quick and informal cooperation tool, as offered by the European Judicial Network, which is a result of insufficient dissemination of information about it and the fact that contact points are located in the prosecutor's office<sup>55</sup>.

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<sup>55</sup> Domagała, *Praktyczny przewodnik w zakresie międzynarodowej pomocy prawnej w sprawach karnych* (Krajowa Szkoła Sądownictwa i Prokuratury, 2023), p. 33.

## 2. THE INSTRUMENTS AND INVESTIGATION/PROSECUTION

### 2.1. Applicability of the instruments according to EU law

#### 2.1.1. Pre-trial stage

##### 2.1.1.1. *Substage 1 (no detention on remand possible)*

###### (a) Person concerned present in issuing MS

#### - FD 2009/829/JHA (?)

We are of the opinion that FD 2009/829/JHA does apply to the pre-trial stage of the proceedings, even if no detention on remand is possible. This opinion is based on the wording of motive 4 of FD 2009/829/JHA, which states that “As a consequence, the present Framework Decision has as its objective the promotion, where appropriate, of the use of non-custodial measures as an alternative to provisional detention, **even where, according to the law of the Member State concerned, a provisional detention could not be imposed *ab initio*** [emphasis added]”. It seems that the term “as an alternative to provisional detention” should be understood simply as underlying the different, non-isolatory character of the measures that may be subject to this FD. It should not be considered as meaning that only if provisional detention is possible, the measures concerned may be applied. Yet another argument stems from the wording of Articles 1 and 9 FD 2009/829/JHA. None of these regulations stipulate that prior detention is a precondition for issuing the ESO. Instead, the general reference to “alternative to provisional detention” is made.

Additional support for this view stems from the reasons for the draft proposal for the FD concerning the ESO<sup>56</sup>. It was stated there as follows: “As regards the threshold, the European supervision order is an option whenever there is a possibility under the national law of the issuing Member State to order that a suspect be remanded in custody, irrespective of the fact that the thresholds vary between Member States. **However, the European supervision order is not only an alternative to pre-trial detention. It may also be issued in relation to an offence for which only less severe coercive measures (e.g. travel prohibition) than pre-trial detention are allowed, i.e. where the threshold may be lower than for remand in custody** [emphasis added]”<sup>57</sup>.

#### - Directive 2014/41/EU

As a rule, if a suspect is present in the issuing Member State and he is at liberty, there is no need to use the measures provided for in the directive 2014/41/EU.

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<sup>56</sup> COM(2006)0468, “Proposal for a Council framework Decision on European supervision order in pre-trial procedures between Member States of the European Union”, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A52006PC0468> (last visited: 5 Oct. 2024).

<sup>57</sup> Ibidem, p. 8.

#### - EU Convention on Mutual Assistance

Since this Convention is applicable only as far as sending to and serving documents on a suspect are concerned, there is no need to use it when the person concerned is present in the issuing state.

#### - European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

The European Convention on Transfer of Proceedings and the European Convention on Mutual Assistance in Criminal Matters may be used for the transfer of proceedings at the pre-trial stage of the proceedings, if no detention is possible. Since not all MS of the European Union are parties to the Convention on Transfer of Proceedings, this instrument of cooperation seems to play only a minor role in transferring of criminal proceedings within the EU.<sup>58</sup> Under this Convention the transfer of proceedings is available also if no detention of the person concerned is possible since detention of such a person is not necessary precondition for requesting the transfer of proceedings.

The CoE Convention on Mutual Assistance in Criminal Matters may also be used in the circumstances described in this Section. Article 21 of this Convention may be applied as a legal basis for the « laying of information ». As stated in the Explanatory Report to the Convention, « this provision enables any Contracting Party to request another Party to institute proceedings against an individual. It refers in particular to cases where a person, having committed an offence in the requesting country, takes refuge in the territory of the requested country and cannot be extradited” (p. 14 of the Explanatory Report). Although the Explanatory Report refers to “taking refuge in the territory of the requested country”, this provision may also be applied if the person concerned is present in the requesting state.

However, as already mentioned in this Report, the new Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters was adopted on 27 November 2024, which aims to harmonize the provisions governing this area of cooperation. As transpires from Article 33 of the Regulation, it will replace, within its scope of application, as from 1 February 2027, the corresponding provisions of the European Convention on the Transfer of Proceedings in Criminal Matters and the European Convention on Mutual Assistance in Criminal Matters of 1959, applicable between the Member States bound by this Regulation.

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<sup>58</sup> See, Ouwerkerk, “Are Alternatives to the European Arrest Warrant Underused? The Case for an Integrative Approach to Judicial Cooperation Mechanisms in the EU Criminal Justice Area”, 29 European Journal of Crime, Criminal Law and Criminal Justice (2021), 87-101, at 94-95.

## (b) Person concerned present in another MS

### - FD 2009/829/JHA (?)

As mentioned above, in our opinion, application of detention on remand is not a necessary precondition to issuing an ESO subsequently. However, the clear wording of Article 9 (1) FD 2009/829/JHA presumes that a person concerned is present in the issuing state. This provision states as follows: “A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, **consents to return to that State** [emphasis added].” Thus, it seems that this FD cannot be applicable if a person concerned is present in another MS.

### - DR 2014/41

The Directive 2014/41 may apply to the pre-trial stage of the proceedings if the person concerned (a suspect) is present in another MS and no detention on remand is possible. No doubt DR 2014/41 allows, among others, for issuing the EIO for the purpose of hearing a suspect (Article 10 (2) (c)), also by use of videoconference (Article 24) but the latter option depends on the consent of a suspect.

### - EU Convention on Mutual Assistance

The EU Convention on Mutual Assistance in Criminal Matters may be applied at the pre-trial stage of the proceedings if a person concerned is present in another MS and no detention is possible. It may be used for sending summons and service of procedural documents on a suspect (Article 5) and for spontaneous exchange of information (Article 7). It should be underlined that pursuant to its Article 34, the Directive replaced, as from 22 May 2017, the corresponding provisions of, among others, the EU Convention on Mutual Assistance in Criminal Matters. However, since the Directive 2014/41/EU does not apply to Denmark and Ireland, the cooperation with these MS is still based on the EU Convention on Mutual Assistance in Criminal Matters.

### - European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

Yes, both Conventions may apply in similar way as in situation described in section 2.1.1.1.(a) above.

### *2.1.1.2. Substage 2 (detention on remand possible)*

#### *(a) Person concerned present in issuing MS*

##### *(i) detention on remand possible but not ordered*

#### *- FD 2009/829/JHA (?)*

The FD 2009/829/JHA is applicable if the person concerned is present in the issuing MS and detention on remand is possible but not ordered. As mentioned above, the ESO is an alternative for provisional detention, but this does not mean that it can be ordered only with reference to a person who was detained on remand (i.e. as replacement for detention).

#### *- DR 2014/41*

Yes, the EIO may be issued if the person concerned is present in the issuing state and detention on remand is possible but not yet ordered. However, in such circumstances the EIO instrument applies in the same manner like in the proceedings concerning a suspect of Polish nationality present in Poland.

#### *- EU Convention on Mutual Assistance*

If a person concerned is in the issuing state, the provisions of the Convention concerning summoning and service of documents do not apply.

#### *- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.*

Yes, both Conventions are applicable in the same manner as described in subsection 2.1.1.1.(a) above.

##### *(ii) person in detention on remand in the issuing MS*

#### *- FD 2009/829/JHA*

The FD 2009/829/JHA is applicable if the person concerned is present in the issuing MS and detention on remand is ordered since the ESO is an alternative to provisional detention.

#### *- DR 2014/41*

The EIO may be issued at the pre-trial stage of the proceedings in order to obtain evidence from another MS. In particular, a suspect detained in the issuing state may participate in the investigative activities conducted with the use of videoconference (hearing of witnesses, experts, etc.) in the executing MS. Moreover, the EIO procedure may be issued for temporary transfer of a person held in custody in the issuing State for the purpose of carrying out an investigative measure with a view to gathering evidence for which his presence on the territory of the

executing State is required. However, the execution of the EIO may be refused if the person in custody does not consent (Article 23 of the DR 2014/41).

- EU Convention on Mutual Assistance

If a person concerned is in detention on remand in the issuing state, the provisions of the Convention concerning summoning and service of documents do not apply.

- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

The above-mentioned mechanisms apply in the same manner if the person concerned is present in the issuing state no matter whether detained or not.

(b) Person concerned present in another MS

*(i) detention on remand possible but not ordered*

- FD 2009/829/JHA (?)

As already stated, the clear wording of Article 9 (1) FD 2009/829/JHA presumes that a person concerned is present in the issuing state. This provision states as follows: “A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, **consents to return to that State** [emphasis added].” Thus, it seems that this FD cannot be applied if a person concerned is present in the executing MS.

- DR 2014/41

As stated above, DR 2014/41 may apply at the pre-trial stage of the proceedings if the person concerned (a suspect) is present in another MS and detention on remand is possible but not yet ordered. No doubt DR 2014/41 allows for, among others, issuing the EIO requesting that a suspect is interrogated in the executing state (Article 10 (2) (c)) also by videoconference (Article 24), but the latter option depends on the consent of the suspect.

- EU Convention on Mutual Assistance

Yes, this Convention may be applied at the pre-trial stage of the proceedings if a person concerned is present in another MS and detention is possible but not ordered. It may be used for sending summons and service of procedural documents on a suspect (Article 5) and for the spontaneous exchange of information (Article 7).

- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

All the above-mentioned mechanisms may be used if a person concerned is in another MS and his detention is possible but not yet ordered. They apply in the same manner as if a person concerned was in another MS and detention was not yet possible.

*(ii) detention on remand ordered*

- FD 2002/584/JHA (?)

**The key issue is whether in Poland is possible, under EU law,<sup>59</sup> to issue a prosecution-EAW with the sole purpose of interrogating the requested person as a suspect/accused?**

The general answer to this question is that in Poland it is not possible to issue a prosecution-EAW with the sole purpose of interrogating the requested person as a suspect, but it is possible to issue such an EAW **for the sole purpose of bringing charges against a suspected person, the key element of which is the interrogation of the requested person as a suspect.**

In this section, I provide only my interpretation of the FD EAW with reference to this problem. The same problem seen from the perspective of Polish law and practice will be discussed in Section 2.2.2.

Pursuant to Article 1 (1) FD EAW, the prosecution-EAW may be issued “for the purposes of conducting a criminal prosecution”. Furthermore, there must be a national arrest warrant as the basis for issuing the EAW and the offence indicated in the EAW must be subject to a custodial sentence for a maximum period of at least 12 months. There is no provision in the FD EAW which would define the notion of “criminal prosecution”. Furthermore, the FD EAW does not provide any guidelines when the national arrest warrant should be issued while this national arrest warrant constitutes the necessary condition for issuing the EAW. Consequently, it is justified to rely on common standards concerning lawful arrest and detention stemming from Article 5 of the ECHR. Under Article 5 para. 1 (c) ECHR, the national arrest warrant will be lawful also if issued “for the purpose of bringing him [a suspect] before the competent legal authority on reasonable suspicion of having committed an offence”. Moreover, pursuant to the well-established case law of the ECtHR, the “reasonable suspicion of having committed an offence” may form an

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<sup>59</sup> At various places the Annotated Index requires the NARs to put forward their opinion on the applicability of certain instruments to certain substages, either as a matter of EU law or as a matter of national law. These are different questions. It may well be that a certain instrument does apply as a matter of EU law, but does not apply as a matter national law, and vice versa. It may also be that a certain instrument allows a MS to refrain from providing for a certain measure but that a MS has chosen not to make use of that option. The answer to such questions may show that there are defects – (in the former situation) or legitimate choices (in the latter situation) that stand in the way of “effective and coherent” application of the instruments (see p. 3).



independent prerequisite for issuing the national arrest warrant, at least at the initial stage of applying detention on remand.<sup>60</sup>

All the above circumstances allow the conclusion that it would not be contrary to the European standards to issue a national arrest warrant concerning a person charged of having committed a serious offence (for example murder or a terrorist offence) and subsequently to issue the EAW for the purpose of prosecuting such an offence. Since the effective “prosecution of an offence” in some MS depends on interrogating a suspected person as a suspect with reference to the offence indicated in the EAW, one may argue that it is possible to issue a prosecution-EAW with the purpose of interrogating the requested person as a suspect. It should be taken into account that in the case of suspicion of having committed a serious offence, summoning a suspected person to appear before the investigative organs for the purpose of interrogation may prove ineffective and may result in him absconding or going into hiding.

The whole discussion concerning this issue seems to overlook the fact that in some jurisdictions, the **interrogation of a person as a suspect is not only evidentiary activity, i.e. aims not only at obtaining evidence, but is an important, indispensable element of initiating proceedings**. In Poland, the key element of the prosecution is the institution of bringing charges against a suspect. It is very formal and comprises the interrogation of a suspected person as a suspect after presenting him with the decision to bring charges against him and providing him with the letter of rights. Of course, such an interrogation may end and quite frequently does end with the suspect stating that “having been informed about the right to silence I exercise this right” or something similar.

Furthermore, the question “whether in Poland it is possible, under EU law, to issue a prosecution-EAW with the sole purpose of interrogating the requested person as a suspect” is misleading. If assessed from the perspective of the time of issuing the EAW, the answer to this question is a negative one, since issuing the national arrest warrant, which is a necessary condition for issuing an EAW, always depends on the need to protect the due course of the proceedings, and such a need is assessed with reference to the moment of issuing the warrant. Nonetheless, as may be inferred from the explanation to this question<sup>61</sup>, the release of the surrendered person after his/her interrogation in Poland for some practitioners constitutes a strong argument for the conclusion that the EAW was issued for the sole purpose of interrogation. Such a conclusion is not justified. A person may be released, for instance, when he/she decides to cooperate with the prosecutorial authorities and applies for the status of a so-called “crown witness” or “small crown witness” (Polish: mały świadek koronny), and owing to

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<sup>60</sup> Of course, after a certain lapse of time such “reasonable suspicion” no longer suffices. The Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. See, *inter alia*, ECtHR, *Stettner v. Poland*, Appl. no. 38510/06, judgment of 24 March 2015, para. 75.

<sup>61</sup> It was explained in the annotated agenda in the following words: “It is rumoured that the issuing judicial authorities of one MS issue an EAW just to hear the requested person. After having heard the surrendered person, he is then released”.

this fact, from that moment on there is no need to secure the proper course of the proceedings by applying detention on remand.

Summarizing, it is up to the issuing MS to decide which investigative measures are necessary elements of prosecution and therefore justify issuing the EAW. This view may be indirectly supported by the case law of the Polish Supreme Court. In the ruling of 20 July 2006, I KZP 21/06 (OSNKW 2006, no. 9, item 77), the Supreme Court somehow confirmed such a line of interpretation, although with reference to a different problem. The Supreme Court, in the context of the purpose of surrendering on the basis of a European arrest warrant, specified that the executing judicial authority may refuse to surrender the person who is the subject of the EAW, if it determines that the warrant was issued contrary to the premises of admissibility of the issue thereof. Also, according to that resolution, what determines whether the person who is the subject of the EAW is surrendered for the purpose of conducting a criminal prosecution, is not the law of the executing State, but the provisions of the issuing MS, interpreted in the light of the content of the FD EAW. The problem in this case was whether Polish judicial authorities shall surrender a minor to Belgium although no criminal proceedings were being conducted there against him as it had not yet been decided whether he would be judged as a minor or as an adult person. Finally, this person was surrendered to Belgium, although at the time of his surrender, it was not yet clear what kind of “prosecution” would be brought against him. Hence, taking this ruling into account, the executing authority is not allowed to examine the exact purpose of issuing the EAW, in particular, what kind of investigative measures are to be conducted with the participation of the requested person after their surrender.

The support for the above interpretation may also be drawn from the wording of Articles 18 and 19 FD EAW as amended by Article 6 of Regulation 2023/284462. Once the new wording of Article 18 FD EAW comes into force<sup>63</sup>, the issuing authorities will be allowed to interrogate the requested person as a suspect by videoconference if the decision on surrender is adjourned. Moreover, such interrogation will be exceptionally allowed, even despite the lack of consent of the person concerned (Article 6 para. 2 (3) of Regulation 2023/2844). The interrogation of a requested person as a suspect via videoconferencing or other distance communication technology may result in the withdrawal of the EAW. This measure cannot be substituted by the interrogation of a suspect via a videoconference based on the EIO since under the EIO mechanism

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<sup>62</sup> Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation (O.J. L 2023/2844).

<sup>63</sup> The Member States must transpose the amendments to FD 2002/584/JHA (among which the amendment of Article 18) within two years after the entry into force of the European Commission’s implementing act referred to in Article 10(3)(a) of Regulation 2023/2844) and must apply the national provisions from the first day of the month following the period of two years after the entry into force of that implementing act (Article 12 of Directive (EU) 2023/2843). In effect, the Member States must transpose the amended Article 18 and must apply the national provisions at the latest sometime in 2028.

a suspect being at liberty cannot be forced to appear before the judicial authorities in another MS for interrogation. As transpires from Article 24 (2) (a) DR 2014/41, execution of an EIO issued for the purpose of hearing a suspected or accused person by videoconference or other audiovisual transmission may be refused if the suspected or accused person does not consent.

**- FD 2009/829/JHA (?)**

As already argued, due to the wording of Article 9(1) of the FD 2009/829/JHA issuing an ESO is possible only if the person concerned consents to return to the MS in which that person is lawfully and ordinarily residing. Thus, in accordance with this provision it is not possible to issue the ESO if the person concerned is already detained in another MS.

**- DR 2014/41**

If a person concerned is detained in another MS, the EIO may be issued for the purpose of interrogating him as a suspect, also through videoconferencing, if he consents to this (Article 24) or for the purpose of temporary transfer of such a person to the issuing MS (Article 22). However, the latter option cannot be used for the purpose of prosecuting a person concerned in Poland but only for taking part in evidentiary activities. Moreover, the execution of the EIO issued for the purpose of temporary transfer may be refused if the person in custody does not consent (Article 22 (2) (a) DR 2014/41).

**- EU Convention on Mutual Assistance**

This Convention may be applied for the purpose of serving documents on a suspect or sending documents to the suspect.

**- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.**

As explained in subsection 2.1.1.1., both Conventions may be applied to transfer of proceedings if the person concerned is detained in another MS.

### 2.1.2. Trial Stage

#### (a) Person concerned present in issuing MS

##### *(i) detention on remand possible<sup>64</sup> but not ordered*

- FD 2009/829/JHA (?)
- DR 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

An ESO is 'an alternative to provisional detention' (Art. 1 FD 2009/829/JHA). Does this mean that, under EU law, detention on remand must be ordered as a precondition to issuing an ESO subsequently?

With reference to the first instrument, the opportunity of its use even if no detention was ordered prior to issuing the ESO was explained in Section concerning pre-trial stage of the proceedings.

As far as remaining above listed instruments are concerned, their application at the trial stage of the proceedings in case of a defendant present in the issuing MS is like this presented with reference to the pre-trial stage of the proceedings (Section 2.1.1.(a)).

##### *(ii) person concerned in detention on remand*

- FD 2009/829/JHA
- DR 2014/41
- EU Convention on Mutual Assistance
- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

As far as the above listed instruments are concerned, their application at the trial stage of the proceedings in case of a defendant present in the issuing MS is similar to that presented with reference to the pre-trial stage of the proceedings (2.1.1.(a)).

#### (b) Person concerned is present in another MS

##### *(i) detention on remand possible but not ordered*

- FD 2009/829/JHA (?)
- DR 2014/41 (?)
- EU Convention on Mutual Assistance

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<sup>64</sup> The focus on proceedings concerning an offence for which detention on remand is (ultimately) possible implies that it is possible to impose a sentence involving deprivation of liberty (*sensu stricto*). After all, detention on remand would not be proportionate and would, therefore, be contrary to Article 5 of the ECHR/Article 6 of the Charter, if only a non-custodial sanction could be imposed for the offence. Consequently, proceedings concerning an offence which only carries a non-custodial sanction are out of scope.

- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

FD 2009/829/JHA seems to require that the person concerned is present in the issuing MS as a precondition to issuing an ESO to the MS in which the person concerned is lawfully and ordinarily residing. According to Art. 9(1) 'A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State'. Is it possible under EU law to issue an ESO, if the person concerned already has returned to that MS?

As indicated above, Article 9(1) FD ESO seems to preclude application of this measure when the person concerned is already staying in another MS.

Although an EAW, in general, can be issued in the trial stage, it is not mentioned here, because detention on remand is not ordered.

Directive 2014/41 sets rules that apply to 'all stages of criminal proceedings, including the trial phase' (recital (25)). At the same time, these rules pertain to carrying out 'investigative' measures 'with a view to gathering evidence' (recital (25)).

Under Directive 2014/41, is a videoconference possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)?<sup>65</sup> If not: is such a videoconference possible without issuing an EIO?<sup>66</sup> Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

Article 24 of the Directive 2014/41 states that videoconferencing applies to the "hearing" of a suspect and such a hearing is understood as an "investigative measure". Moreover, the general aim of the EIO is to gather evidence, but not to offer an opportunity to take part in the proceedings, in particular, in the hearing at the trial stage of the proceedings. Therefore, if one takes into account the wording of Directive 2014/41, the answer to the question above should be that a videoconference is possible for the purpose of interrogating the accused at the trial but not for his participation in the trial as such.<sup>67</sup> Unfortunately, on 6 June 2024, the CJEU refused to examine the merits of two preliminary rulings concerning this issue (C-285/23 and C-255/23).

With reference to the question whether a videoconference is possible for the purpose of ensuring the participation of a defendant in the hearing and without issuing the EIO, the answer seems to be affirmative. If the law of both cooperating MS provides for the opportunity to conduct a hearing online and the defendant does not object to such a form of participation, the

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<sup>65</sup> Cf. Case C-285/23.

<sup>66</sup> Cf. Case C-255/23.

<sup>67</sup> See, similar opinion – Buczman, Kierzyńska (ed.), Stefaniak-Dąbrowska, *Wzajemne uznawanie orzeczeń karnych w Unii Europejskiej. Poradnik dla praktyków* (Wydawnictwo Krajowej Szkoły Sądownictwa i Prokuratury, 2023), p. 26-27.

judicial authorities may cooperate on this issue relying on the principle of reciprocity. As stated in the recent judgment of the CJEU, providing the accused, at his or her express request, with the opportunity to participate in the hearings in his/her trial by videoconference is not precluded by Article 8(1) of 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, provided that the right to a fair trial is guaranteed.<sup>68</sup>

Moreover, one interviewed practitioner pointed out that since the EIO Directive does not apply to providing a defendant with the opportunity to participate in the trial by videoconference, the CoE Convention may apply to this issue<sup>69</sup>, or general rules of international cooperation based on the reciprocity principle. Indeed, pursuant to the general clause expressed in Article 1 of the CoE Convention of 1959, “the Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences, the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party”. It seems that there are no obstacles to executing such a measure of mutual assistance, if the requested Party does not consider that execution of the request is likely to prejudice the sovereignty, security, public order or other essential interests of its country (Article 2 of the CoE Convention).

Under Directive 2014/41, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

If the person concerned is not detained in the executing state, the temporary transfer is not possible at all.

*(ii) detention on remand ordered*

- FD 2002/584/JHA<sup>70</sup>
- FD 2009/829/JHA (?)
- DR 2014/41 (?)
- EU Convention on Mutual Assistance

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<sup>68</sup> Case C-760/22, *FP and Others*, ECLI:EU:C:2024:574.

<sup>69</sup> Pursuant to Article 34 (1) of the Directive, it replaces only „the corresponding” provisions of the CoE Convention.

<sup>70</sup> The ultimate objective of a prosecution-EAW is surrender to the issuing MS in order to conduct a criminal prosecution (which includes the trial stage). Pending the decision on the execution of a *prosecution*-EAW, FD 2002/584/JHA provides for two forms of intermediate judicial cooperation in connection with the prosecution in the issuing MS: hearing the person concerned in the executing MS by a judicial authority of that MS (Art. 18(1)(a) and Art. 19 FD 2002/584/JHA) or temporarily transferring the person concerned to the issuing MS to be heard there (Art. 19(1)(b) and (2) FD 2002/584/JHA).

- European Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.

FD 2009/829/JHA seems to require that the person concerned is present in the issuing MS as a precondition to issuing an ESO to the MS in which the person concerned is lawfully and ordinarily residing. According to Art. 9(1) 'A decision on supervision measures may be forwarded to the competent authority of the Member State in which the person is lawfully and ordinarily residing, in cases where the person, having been informed about the measures concerned, consents to return to that State'. Is it possible under EU law to issue an ESO, if the person concerned already has returned to that MS?

As already stated, Article 9(1) FD ESO seems to preclude using an ESO in the circumstances mentioned in this Section of the Report.

Directive 2014/41 sets rules that apply to 'all stages of criminal proceedings, including the trial phase' (recital (25)). At the same time, these rules pertain to carrying out 'investigative' measures 'with a view to gathering evidence' (recital (25)).

Under Directive 2014/41, is a videoconference possible with the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? If not: is such a videoconference possible without issuing an EIO?<sup>71</sup> Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

Under Directive 2014/41, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

The fact that a person concerned is detained in another state does not modify my conclusion as to the use of FD 2009/829/JHA and Directive 2014/41 indicated in the previous section (under the heading "no detention ordered") with reference to videoconferencing.

As far as temporary transfer is concerned, it seems possible for the purpose of interrogating the accused at the trial by the trial court. Such an interrogation should be classified as evidence taking and the EIO was conceived as the measure for gathering evidence in another MS. Moreover, the accused may preclude using this measure by expressing a lack of consent to temporary transfer (Article 22(2)(a) of Directive 2014/41)). However, the nature of the EIO instrument allows me to conclude that it cannot be used for the sole purpose of ensuring the presence of the accused at the trial. On the other hand, as underlined in the literature, the scope

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<sup>71</sup> Cf. Case C-255/23 and Case C-285/23.

of evidentiary activities (interrogations) carried out during the trial may be extensive and in practice it may allow one to argue that the defendant temporarily transferred for the purpose of interrogation participates in the whole hearing, although this was not the original reason for issuing the EIO.<sup>72</sup>

If a person concerned is in detention in another MS, he is not able to appear voluntarily before the court in Poland. Then the 2000 Convention on Mutual Assistance in Criminal Matters may be used to send procedural documents to him/her via the competent authorities of the requested Member State (Article 5 of the Convention).

The transfer of proceedings, as described in previous sections of the Report, is also admissible at the trial stage of the proceedings, no matter whether the accused is detained or not.

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<sup>72</sup> See, Buczma, Kierzyńska (ed.), Stefaniak-Dąbrowska, *Wzajemne uznawanie orzeczeń karnych w Unii Europejskiej. Poradnik dla praktyków* (Wydawnictwo Krajowej Szkoły Sądownictwa i Prokuratury, 2023), p. 27.



## 2.2. Applicability and application of the instruments at the pre-trial stage according to national law

### 2.2.1. Substage 1 (no detention on remand possible)

In order to clarify the specificity of the Polish situation one introductory and general remark must be voiced at the beginning of this part of the Report. It is very difficult to define properly situations in which “no detention on remand is possible”. The obstacles to impose detention on remand are listed in Article 259 CCP which reads as follows:

*§ 1. If there are no special reasons to the contrary, provisional detention shall be waived, particularly if depriving the accused of their liberty:*

- 1) might seriously jeopardize the life or health of the accused;*
- 2) would entail an excessive burden on the accused or their next of kin.*

*§ 2. Provisional detention shall not be applied when the facts of the case permit to presume that the court would sentence the accused to the penalty of imprisonment with conditional suspension of execution, or to a milder penalty, or that the term of provisional detention would exceed the expected sentence of imprisonment without a conditional suspension.*

*§ 3. Provisional detention shall not be imposed where the criminal offence is punishable by imprisonment for a term not exceeding one year.*

*§ 4. The restrictions referred to in § 2 and § 3 shall not apply if the accused has remained in hiding, persistently failed to appear when summoned, impeded the proceedings in another illegal manner, or when their identity cannot be established. The restriction provided for in § 2 shall not apply also when there is a high probability of adjudicating a preventive measure consisting in placing the perpetrator in a closed psychiatric establishment.”*

It is clear from the above wording that in the circumstances indicated in the last paragraph (§ 4) of this provision, detention on remand is possible even if the offence is subject to penalty of imprisonment not exceeding one year. As from 1 October 2023 the Polish Criminal Code was amended by increasing penalties of imprisonment provided for many offences. Currently it is difficult to find in the CC any offence subject to penalty not exceeding 1 year of imprisonment.<sup>73</sup>

The specific grounds for applying detention on remand are as follows (Article 258 CCP):

*“§ 1. Provisional detention and other preventive measures may be applied if:*

- 1) there is a justified risk that the accused may take flight or go into hiding, particularly if their identity cannot be established or **the accused has no permanent residence in the country;***
- 2) there is a justified risk that the accused would induce other persons to give false testimony or attempt to obstruct the criminal proceedings in some other illegal manner.*

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<sup>73</sup> In April 2024 the new Minister of Justice appointed the Criminal Law Codification Commission – a group of experts in criminal law and practitioners - to elaborate the general reform of criminal justice, in particular to analyse all changes in the Criminal Code, the Code of Criminal Procedure and the Code on Execution of Criminal Sentences introduced over the last 8 years and assess their usefulness. The first draft act elaborated by this Commission proposes modifications (rationalisation) of sanctions for many offences regulated in the CC.

*§ 2. Where the accused has been charged with a felony or an offence punishable by imprisonment of a maximum of at least 8 years or where the court of the first instance has sentenced the accused to a penalty of imprisonment of not less than 3 years, the need to apply provisional detention for the purpose of securing the correct conduct of proceedings may be justified by the severe character of the penalty that may be imposed on the accused.*

*§ 3. In exceptional cases, a preventive measure may be applied also when there is a justified risk that the accused charged with a felony or an intentional delinquency would commit a criminal offence against life, health or public safety, particularly if they threatened to commit such a criminal offence.”*

It is worth underlining that Article 258 § 2 CCP offers independent grounds for applying detention on remand **based on the severity of the penalty of imprisonment which may be imposed on a defendant**. It is assumed that the risk of imposing a severe penalty of imprisonment may induce the accused to jeopardize the due course of the proceedings.<sup>74</sup> Since the penalties for many offences have been recently increased by the legislator, detention on remand based on Article 258 § 2 CCP may be applied in many proceedings concerning offences regulated in the CC (for example, ordinary theft is subject to penalty of deprivation of liberty for between 3 months and 5 years - Article 278 § 1 CC; burglary is subject to penalty of deprivation of liberty between one year and 10 years – Article 279 § 1 CC, but the forgery of an invoice may be subject to penalty for up to 8 years of imprisonment and in aggravated circumstances – for up to 20 years of imprisonment – Article 270a CC).

Having in mind the scope of this project, it must be emphasized that the lack of permanent residence in the country (in Poland) is also a prerequisite for applying detention on remand. Recently, the Criminal Law Codification Commission drafted amendments to the CCP aimed at removing this circumstance as a ground for detention. In accordance with the proposed wording of this provision, detention would be possible if a suspect does not have permanent residence/stay in general.

Summarizing, as is evident from these introductory remarks, the scope of situations in which “detention on remand is not possible” under Polish law is very narrow and somehow difficult to identify precisely *in abstracto*, without referring to the particular circumstances of the case.

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<sup>74</sup> See, *inter alia*, resolution of the Supreme Court of 9 January 2012, case no. I KZP 18/11, OSNKW 2012, No. 1, Item 1; decision of the Supreme Court of 17 June 2024, case no. II KZ 29/24, Legalis no. 3097214. The ground for applying detention on remand provided in Article 258 § 2 CCP is strongly criticised by some authors. See, Skorupka, “The limits of interference with the personal liberty of an individual and with the privilege against self-incrimination in criminal proceedings” in: Skorupka (Ed.), *The Model of Acceptable Interference with the Rights and Freedoms on an Individual in the Criminal Process* (C.H. Beck, 2019), pp. 549-557.

Nevertheless, in practice, courts tend not to use detention on remand in cases concerning minor offences.<sup>75</sup> They usually take into account and consider whether there will be a chance to deduct the time spent in detention from the penalty of imprisonment finally imposed on a defendant.

(a) Person concerned present in issuing MS

(bb) Ensuring that the suspect is available<sup>76</sup>

FD 2009/829/JHA (?)

ESO possible under national law?

The Polish law implementing the ESO instrument allows issuance of an ESO even if detention on remand is not possible. This is justified by the following reasons.

Article 607zd CCP states that if a Polish court or public prosecutor orders a preventive measure defined in Articles 272, 275, 275a or 276, and if the correct course of proceedings is ensured thereby, the court or the public prosecutor may apply for the execution of such a decision to the competent authority in the executing MS **“in which the accused has a legal permanent place of residence, provided that he stays in that country or declares his intention to return there”**.

Thus, this provision does not require that the person concerned be detained prior to issuing an ESO. The CCP provides for the general and specific grounds of preventive measures. The general grounds (i.e. 1) the high evidentiary threshold – “high probability that the accused committed the offence” - 2) the need to protect the due course of the proceedings and, 3) exceptionally – the need to prevent the person concerned from committing a new serious offence) are common for all preventive measures, i.e. provisional detention and non-isolatory preventive measures. On the other hand, most of the specific grounds for preventive measures indicated in Article 258 CCP (as listed above in quoted Article 258 CCP) apply to all such measures, while only one of them, indicated in Article 258 § 2 CCP, applies exclusively to provisional detention.

Nonetheless, there are so-called “obstacles” to applying provisional detention but not having an absolute character, listed in Article 259 CCP quoted above.

Summarizing, under Polish law there are prerequisites for provisional detention which create a higher threshold for applying this isolatory preventive measure and that do not apply to non-isolatory preventive measures. Consequently, one may argue that the European Supervision Order may also be applied if preventive detention is not possible.

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<sup>75</sup> However, the statistics prove that detention on remand is overused in Poland. See, Wierczyński, „Praktyka stosowania tymczasowego aresztowania w świetle danych statystycznych” in: Ganczewska, Górowski, Kładocny, Kubaszewski, Małecki, Wierczyński, Słomka, Tarapata, Zając, *Tymczasowe aresztowanie. Standardy, które nie przyjęły się w Polsce. Dlaczego jest źle? Jak powinno być?* (Krakowski Instytut Prawa Karnego, 2024), pp. 63-85.

<sup>76</sup> ‘(aa)’ does not apply here. The person concerned is present in the issuing MS. Therefore, there is no need to request judicial cooperation to execute investigative/prosecution measures.

It is also accepted in the literature that the issuance of an ESO is not conditional upon the prior imposition of detention on remand on the person concerned. Thus, an ESO may be issued both as an alternative to the detention on remand already applied or simply independently.<sup>77</sup> It is worth emphasising that, as a rule, detention on remand cannot be imposed simultaneously with the application of a non-isolatory preventive measure.

However, it should be underlined that under Polish law an ESO may be issued only with reference to a very limited number of non-isolatory preventive measures:

- 1) police supervision – Article 275 CCP: “A person under supervision shall be obliged to comply with the conditions set forth in the decision of the court or public prosecutor. This obligation may consist in the **prohibition of absents themselves from a designated area of residence, in their having to report, at specified time intervals, to the body under the supervision of which they remain, and to inform such a body of any intention to leave and the time of their return**; in a prohibition of contacting the victim or other persons; in a prohibition of approaching certain persons at a specified distance; in a prohibition of frequenting certain places, **as well as in other limitations of freedom of the accused necessary to exercise the supervision.**”
- 2) a guarantee of any trustworthy person (Article 272 CCP)
- 3) issuing an order to leave premises temporarily (in the case of a common household with the victim of domestic violence) or the prohibition of approaching the victim at a specified distance (Article 275a CCP)
- 4) suspension of the official function/performance of the profession/driving of a specific type of vehicle (Article 276 CCP).

Therefore, it is hardly possible to argue that the aim of issuing an ESO, i.e. “ensuring that the suspect is available” is fully reached by the Polish implementation of FD 2009/289/JHA. In practice, such aim may only be reached by two measures: police supervision and the guarantee of any trustworthy person.

At the pre-trial stage of the proceedings, an ESO may be issued by the public prosecutor conducting the investigations (in Polish – “śledztwo”) or supervising the inquiry (in Polish – “dochodzenie”) carried out by the Police or other competent organs. As mentioned in the first section of this report, the list of public prosecutors entitled to issue an ESO is provided by § 296 of the Regulation of the internal order of common organizational units of the prosecutor’s office of 7 April 2016.

#### Application in practice:

The above conclusion on the limited usefulness of the ESO is confirmed by the practice. In accordance with the available statistics, as from 2013 until 2020, the Polish procedural organs

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<sup>77</sup> Steinborn, “Komentarz do art. 607zd Kodeksu postępowania karnego” in Paprzycki (Ed.), *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego* (LEX, 2015).

issued altogether only 5 ESOs (2 in 2019; 1 in 2018; 1 in 2016; 1 in 2013).<sup>78</sup> All the practitioners interviewed for the purpose of the project stated that they have no experience in issuing an ESO. They considered this measure to be ineffective and almost useless. They argue that if there is no necessity to apply detention on remand, bail<sup>79</sup> may be an appropriate and effective measure for securing the proper course of the proceedings. Bail cannot be subject to the ESO mechanism, moreover, it may also be paid from abroad.

In our opinion, the proper implementation of this measure depends on the high level of mutual trust between the organs conducting the proceedings in the issuing MS and the organs executing an ESO. Moreover, as rightly mentioned by one interviewed academic, the differences between the systems of preventive measures in the MS constitute a considerable obstacle to effective application of this measure.<sup>80</sup>

#### (dd) Other (?)

If a person concerned is present in the issuing state, all investigative activities requiring his presence or participation may be conducted without initiating any form of cooperation with procedural organs of other MS.

To some extent the EIO mechanism may be explored in the described circumstances. As already stated, the EIO Directive was transposed into the Polish law without considerable modifications of its scope. Thus, this measure may be used to gather evidence abroad if the person concerned is present in Poland and no detention is possible. The EIO may be issued not only *ex officio*, but also upon the motion of the parties to the pre-trial proceedings, i.e. a suspect and his defence lawyer or the victim and his lawyer (Article 589w § 1 CCP). However, Poland applies the general clause that « issuing the EIO is inadmissible if this is not required by the interest of justice » (Article 589x (1) CCP).

#### (b) Person concerned is present in another MS

##### (aa) Executing investigative measures/prosecution such as interrogating the suspect

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<sup>78</sup> See statistics published in: Buczma, Kierzyńska (ed.), Stefaniak-Dąbrowska, *Wzajemne uznawanie orzeczeń karnych w Unii Europejskiej. Poradnik dla praktyków* (Wydawnictwo Krajowej Szkoły Sądownictwa i Prokuratury, 2023), p. 160-161.

<sup>79</sup> Article 266 CCP reads as follows: § 1. A bail in the form of cash, securities, pledge or mortgage may be deposited by the accused or by another person. § 1a. The source of bail cannot be a donation to the accused or any other person posting bail, made for that purpose. The acceptance of bail may be conditioned by the court or public prosecutor on the person posting bail proving its source. § 2. The amount, type, and conditions of the bail, and particularly the time limit for depositing it, shall be specified in the decision, with due regard to the financial condition of the accused and the person depositing the bail, the gravity of the damage inflicted, and the character of the act committed.

<sup>80</sup> On this issue, see: Neira-Pena, "The Reasons Behind the Failure of the European Supervision Order: The Defeat of Liberty Versus Security", 5(3) *European Papers* (2020), pp. 1493-1509 (European Forum, 4 November 2020); available at: [https://www.europeanpapers.eu/en/system/files/pdf\\_version/EP\\_EF\\_2020\\_I\\_042\\_Ana\\_Maria\\_Neira\\_Pena\\_00402.pdf](https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2020_I_042_Ana_Maria_Neira_Pena_00402.pdf) (last visited: 29 September 2024).

- DR 2014/41<sup>81</sup>

Directive 2014/41 was fully implemented into the Polish law. In accordance with Article 589g § 1 CCP, the EIO may be issued for the purpose of **obtaining evidence**. This provision states that if it is necessary to examine or obtain evidence that is located or may be examined within the territory of another MS, **the court hearing a given case or the public prosecutor conducting the investigation** may issue, *ex officio* or at the request of a party, defence counsel or attorney, an EIO, unless it is not applicable in that state. Thus, at the pre-trial stage of the proceedings the public prosecutor conducting or supervising the proceedings is competent to issue an EIO (for details – see, Section 1.3.1. (e)).

Furthermore, Article 589x CCP clearly provides that there are only two general obstacles to issuing an EIO – using this measure is not allowed if 1) it does not serve the interests of justice; 2) Polish law does not permit examining or obtaining given evidence. Thus, taking into account only the wording of regulations on issuing an EIO by Polish authorities, doubts may be voiced as to whether **this measure may be used for the purpose of executing the prosecutorial activities like bringing charges against a suspected person**<sup>82</sup>.

In Poland the pre-trial proceedings may be conducted in the form of “investigation” (śledztwo) or “inquiry” (dochodzenie). The investigation is conducted by the public prosecutor or under his supervision and is very formal. The inquiry is less formal and concerns less serious offences. The key element of both forms of pre-trial proceedings is the procedural act of “bringing charges” against a suspect. Pursuant to Article 313 § 1 CCP, “if the data existing at the time the investigation is initiated or collected during its course provide sufficient grounds to suspect that an act has been committed by a specific person, a decision to bring charges shall be issued and announced without delay to the suspect, who shall then be questioned, unless the announcement of the decision or the questioning of the suspect is impossible because the suspect is hiding or staying abroad”.

During the investigations, the charges are brought in a very formal manner. This comprises a set of three procedural acts: 1) drafting a decision on bringing charges; 2) announcement of this decision to the suspect, accompanied by providing him with the letter of rights and 3) the first interrogation of the suspect. As transpires from the above cited provision, if a suspect is staying abroad, the charges are not announced to him and he is not interrogated. Thus, in such circumstances, the sole drafting of the charges creates the suspect in the proceedings and allows preventive measures to be applied against him.

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<sup>81</sup> Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the “coherent and effective” application of the instruments.

<sup>82</sup> Before conducting the research for the purpose of this project I expressed the view that “the whole procedural act of bringing charges against a suspect cannot be made using an EIO”. See, Wąsek-Wiaderek, Zbiciak, “The Practice of Poland on the European Arrest Warrant” in Barbosa, Glerum, Kijlstra, Klip, Peristeridou, Wąsek-Wiaderek, Zbiciak, *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, 23 Maastricht Law Series (2022), p. 319.

During inquiry, the charges are brought in less formal way – Article 325g §§ 1 and 2 CCP stipulates that the preparation of a decision on the presentation of charges is not required unless the suspect is subject to provisional detention. Hence, charges are brought by the interrogation of a suspect, which shall start with notifying him of the content of the charge entered into the questioning record. Such a person shall be considered a suspect from the beginning of the interrogation.

However, regardless of the form of the pre-trial proceedings, the case cannot be brought to trial without announcement of the charges to the suspect and his interrogation as a suspect. This principle applies to almost all offences prosecuted *ex officio* by a public prosecutor.<sup>83</sup> As a consequence, if a suspected person is staying abroad, the public prosecutor shall take the necessary measures to announce to him the charges and interrogate him. Article 22 § 1 CCP specifies that the proceedings shall be suspended if a long-term impediment arises that prevents the proceedings from being conducted, and in particular, if the accused cannot be apprehended.

Summarizing, as transpires from the above presentation, 1) bringing charges against a suspect is a complex investigative measure; the interrogation of a suspect is only one element thereof; 2) bringing charges is an indispensable condition for initiating the trial stage of the proceedings; 3) since this investigative measure is not limited to hearing a suspect, doubts may be voiced as to the possibility to use an EIO for the purpose of bringing charges against a person.

#### Application in practice:

All the interviewed practitioners acting at the pre-trial stage of the proceedings (i.e. public prosecutors responsible for international cooperation in Regional Public Prosecutor Offices) explained that **they use the EIO to bring charges against suspects residing in another MS**. It is common practice in cases where detention on remand is not necessary (i.e. with reference to less serious offences)<sup>84</sup>. In cases concerning the most serious offences, like organized crime, terrorist offences or drug offences, they rather apply for a national arrest warrant, and subsequently, for the issuance of an EAW.

The application of the principle of proportionality with reference to bringing charges against suspects staying abroad is as follows:

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<sup>83</sup> In Poland there is a possibility to bring subsidiary bill of indictment to the court by a victim of an offence prosecuted *ex officio*. It is possible only exceptionally, if prosecutorial organs refuse to initiate investigations or discontinue them what is subject to the judicial review. Furthermore, in special proceedings concerning fiscal offences the case may be brought to trial without prior announcement of charges to a suspect (so-called “in absentia” proceedings regulated in Articles 173-177 of the Code of Fiscal Offences of 10 September 1999, Journal of Laws 1999, No. 83, Item 931, with amendments).

<sup>84</sup> Information on the use of the EIO for this purpose is also confirmed by the research conducted within the framework of the MEIOR project. See the Polish Report on the use of the EIO, not published, p. 54.

1) With reference to a suspect staying abroad and having **Polish citizenship** – a public prosecutors may rely on Article 586 § 1 CCP<sup>85</sup> and consular law; Article 26 of the Consular Law<sup>86</sup> provides that at the request of a court or a prosecutor, the consul: 1) delivers letters and other documents; 2) interrogates the parties, participants in the proceedings, witnesses and suspects, which also includes the presentation of images of objects to the interrogated person with the purpose of recognition<sup>87</sup>; 2a) is present at the place of residence of the witness being questioned in the manner specified in Art. 177 § 1a CCP (i.e. via videoconference); 3) forwards motions for legal assistance to courts and other authorities of the receiving country. Nevertheless, the above activities may be executed only if the person concerned voluntarily accepts the letter or other document or voluntarily provides a testimony or explanation; furthermore, this path may be used only if the public prosecutor is aware of the address of the suspected person abroad since he/she must be summoned to appear voluntarily before the consular officer. Nonetheless, as indicated by some practitioners, some MS do not accept such a practice of Polish consulates. For example, Sweden, Denmark and the Czech Republic do not consent to the interrogation of suspects and hearing of witnesses by consuls upon the motions of Polish public prosecutors.<sup>88</sup> For this reason, before requesting consular assistance with reference to the above mentioned procedural activities, public prosecutors should first consult the appropriate Departments of the Ministry of Justice on the issue whether the given consulate is allowed to grant the requested assistance taking into account the rules applied by the hosting Member State.<sup>89</sup> As transpires from the available data, the effectiveness of the motions for consular assistance varies between 26%-38%.<sup>90</sup>

The consular path is not used for the interrogation of a suspected person as a suspect if at the same time other procedural activities must be executed abroad, for example, the search

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<sup>85</sup> Article 586 § 1 CCP reads as follows: “§ 1. A request to have a document served upon a person who is a Polish citizen and is staying abroad, or to have such a person questioned as an accused, a witness or an expert witness, shall be addressed by the court or public prosecutor to a Polish diplomatic mission or consular office”.

<sup>86</sup> Consolidated text: Journal of Laws 2023, Item 1329.

<sup>87</sup> See, Dygulska-Cierpiatka, „Wniosek konsularny w praktyce prokuratorskiej”, 2 Prokuratura i Prawo (2024), 145-158, at 148-149.

<sup>88</sup> Dygulska-Cierpiatka, „Wniosek konsularny w praktyce prokuratorskiej”, 2 Prokuratura i Prawo (2024), 145-158, at 151-152. See also Sowiński, “The Involvement of Consuls and Consular Officers in Evidence Gathering under Articles 177 § 1b(2), 586 § 1, and Article 177 § 1 in conjunction with Articles 582 § 1 and 581 § 1 of the Polish Code of Criminal Procedure”, 4(17) Ius Novum (2023), pp. 40-59.

<sup>89</sup> Dygulska-Cierpiatka, „Wniosek konsularny w praktyce prokuratorskiej”, 2 Prokuratura i Prawo (2024), 145-158, at 152-153.

<sup>90</sup> A. Dygulska-Cierpiatka made a research concerning effectiveness of the motions for consular assistance but only in one region of Poland - Tarnobrzeg Region. Her research concerns all motions submitted by public prosecutors (not only these concerning interrogation of suspects) and all countries to which motions were directed from Tarnobrzeg Region. According to this research, the effectiveness of such motions was the following: in 2020 -31 %; in 2021 – 38 %; in 2022 - 25,97% (but some motions submitted in 2022 were still examined during the research). See, Dygulska-Cierpiatka, „Wniosek konsularny w praktyce prokuratorskiej”, 2 Prokuratura i Prawo (2024), 145-158, at 156-157.



of premises. In such cases, the EIO should be issued with reference to all evidentiary activities requested by the public prosecutor.

**2)** With reference to suspects staying in another MS (also Polish citizens who cannot be interrogated by consuls or with reference to whom the consular path has not been used by public prosecutors) – the public prosecutors first mentioned the use of an SIS notice to establish the address of a suspect (under Article 34 of the SIS Regulation). As a second step, they mentioned the issuance of an EIO. **In part C of the EIO-form, they indicate all the procedural activities which should be conducted for the purpose of bringing charges against a suspect; their order (that the interrogation should start from presenting the content of the decision on charges to the suspect; that he should be informed about his rights) and formal requirements,** noting that the interrogation of a suspect must be recorded in writing; also the wording of Article 143 CCP is usually quoted concerning the requirements of a written record of interrogation. All the necessary documents translated into the language of the executing MS, and if necessary, also into the language of the suspect if this is different than the language of the executing MS, are attached to the EIO; the set of documents usually comprises: two copies of the decision on bringing charges (the second copy, signed by the suspect, should be returned to the issuing public prosecutor); a letter of rights<sup>91</sup> in two copies (the second copy, signed by the suspect, should be returned to the issuing public prosecutor); written reasons for the decision to bring charges (pursuant to the CCP, it is drafted and submitted to the suspect only upon his motion; however, in practice it is attached to the EIO just in case the suspect submits such a request once informed about the opportunity to receive written reasons for the decision on charges). The suspect is also informed that he is entitled to ask for a review of the material gathered against him at the end of the investigations (Article 321 CCP). The interviewed public prosecutors stated that if the person concerned is at liberty, they also ask the executing authority to provide him with the information on the date of procedural action mentioned in Article 321 CCP, and that he may appear voluntary before the public prosecutor in Poland to take part in such a procedural activity. Providing such information substitutes sending separate summons to the suspect to appear before the public prosecutor.

The interviewed public prosecutors mentioned that they drafted the standard form for filling out part C of the EIO form with reference to the interrogation of a suspect. It is very clear and indicates all the subsequent procedural steps which should be followed by the executing authority in another MS.

Of course, there are certain difficulties in using the EIO system to bring charges against a suspect in the executing MS. The practitioners listed the following difficulties:

- the high formalities of bringing charges are often not clear for the executing MS;
- sometimes the executing authorities do not return documents signed by the suspect;

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<sup>91</sup> A suspect is informed of his rights in writing by providing him with a document listing all the rights and obligations indicated in Article 300 § 1 CCP.

- in Sweden they do not usually draft written records of an interrogation; they usually record interrogations; thus, as a consequence, the written records of interrogations are simply drafted as transcripts of recorded interrogations and are not signed by the interrogated person; however, it is a formal requirement for the written record under Polish law.<sup>92</sup>
- in response to the EIO issued for the purpose of interrogating a suspect, some executing authorities provide the Polish issuing public prosecutor with a written notice that the person concerned (a suspect) informed the executing authority in the course of a phone conversation that he is not interested in participating in any procedural activities. The executing authorities consider such a document (a written notice) as an execution of the EIO. In such cases, the issuing public prosecutor usually asks for further attempts to explain to the suspect that he is only expected to appear before the executing authority in order to refuse to testify and to sign the written record containing the information that he refuses to take part in the interrogation. Nevertheless, the executing authorities argue that even repeated contacts with the suspects may be considered as putting pressure on them, which is not allowed in the course of execution of such an EIO. Unlike in the case of a suspected person present in Poland, the competent authorities executing the EIO are not entitled to arrest the suspected person if he/she does not appear, despite being duly summoned to do so.
- “The executing State often does not deliver the decision to bring charges against the suspect and have it signed by the suspect as requested by Poland. In such cases, courts often return the case to the public prosecutor as the suspect has not been duly notified, and therefore cannot become a defendant under Polish law. Polish public prosecutors have been advised by the central authority to very clearly explain the importance of this crucial formality in the EIO”<sup>93</sup>.

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<sup>92</sup> Already in 2002 Polish Supreme Court issued a ruling concerning written records drafted in Sweden and used in the Polish criminal proceedings against the suspects. The Supreme Court stated that it is admissible to read at the hearing to the appropriate extent, in accordance with the principles set out in Art. 391 of the Code of Criminal Procedure, records of a witness's testimony given by him in pre-trial proceedings conducted by a prosecutor of a foreign country or an authority acting under his supervision or before a court of a foreign country, if the manner of carrying out these activities is not contrary to the principles of the legal order in the Republic of Poland, even though these activities were not undertaken at the request of a Polish court or prosecutor (Article 587 of the Code of Criminal Procedure) or before the prosecution is taken over (Article 590 § 4 of the Code of Criminal Procedure) – resolution of 28 March 2002, case no. I KKN 122/00, OSNKW 2002, no. 7-8, item 60.

<sup>93</sup> This is a difficulty reported not by interviewed practitioners but indicated in the *Evaluation Report on the 10th Round of Mutual Evaluations on the implementation of the European Investigation Order (EIO). Report on Poland*, Document 13516/1/24 REV 1, issued on 2 October 2024, p. 39, <https://www.consilium.europa.eu/en/documents/public-register/public-register-search/?AllLanguagesSearch=false&OnlyPublicDocuments=false&DocumentNumber=13516%2F24&DocumentLanguage=EN> (last visited: 30 April 2025).

**3)** If bringing charges against a suspect by means of an EIO appears to be impossible, as a third step, before requesting issuance of the EAW, public prosecutors sometimes try to summon the person to appear in Poland. Sometimes, such summoning is used prior to issuing an EIO for the purpose of bringing charges. Summons are sent in an ordinary way (by post) to the identified address of the person abroad.

**It is a common view of all the interviewed practitioners that the above-described opportunity to use the EIO cooperation instrument for bringing charges resulted in considerable decrease of the number of EAWs issued for the purpose of prosecution.**

The opinion of the practitioner is confirmed by available statistics. Below we present the total number of EAWs issued in the last 7 years:

- 2016 – 2177 EAWs;
- 2017 – 2455 EAWs;
- 2018 – 2263 EAWs;
- 2019 – 2281 EAWs;
- 2020 – 1795 EAWs;
- 2021 – 1531 EAWs;
- 2022 – 1509 EAWs;
- 2023 – 1383 EAWs.

Since the entry into force of the law implementing the EIO (2018) we may notice considerable decrease of the general number of EAWs issued by Polish courts. Of course, the majority of them are execution-EAWs, not prosecution-EAWs. But also the analyses of the statistics concerning the number of motions of the public prosecutors for issuing the EAWs (such motions are mainly submitted to the competent regional courts at the pre-trial stage of the proceedings) confirm this tendency. The frequency of applying for issuing the EAWs by public prosecutors was as follows:

- 2016 – 365 motions;
- 2017 – 467 motions;
- 2018 – 477 motions;
- 2019 – 488 motions;
- 2020 – 443 motions;
- 2021 – 442 motions;
- 2022 – 379 motions;
- 2023 – 393 motions.

To compare: in 2011 the Polish regional courts issued altogether 3792 EAWs. The public prosecutors applied to the courts for issuing the EAWs in 900 cases.<sup>94</sup>

The use of the EIO procedure for the purpose of bringing charges against a suspected person was positively assessed by one interviewed defence lawyer. However, she noticed that it is very difficult to convince public prosecutors to replace an “old”, unexecuted EAW with the EIO. Thus, although at the pre-trial stage of the proceedings the public prosecutors are competent to withdraw the national arrest warrant (which should also result in the withdrawal of the EAW), they are reluctant to do that and to issue the EIO for the purpose of bringing charges.

The above presented practical use of the EIO mechanism for the purpose of interrogating a suspected person as a suspect should be assessed positively since it reduces the number of the prosecution-EAWs issued by the Polish judicial authorities. It is also difficult to find arguments against this practice based on the need to protect the rights of a suspect. Additionally, interrogation, i.e. the activity aimed at gathering evidence, is a key element of this mechanism.

However, the latest opinion of the Advocate General Collins delivered on 4 October 2024 (in the case C-583/23, *Delda*<sup>95</sup>) undermined the extensive interpretation of the term “investigative measure”. AG Collins proposed to interpret the relevant provisions of the Directive as precluding the judicial authorities of a Member State to issue or to validate an EIO, the purpose of which is, first, “to serve on the person concerned an indictment, which also includes an incarceration order and an order to make a bail payment, and, second, to hear that person so that he or she may, in the presence of his or her lawyer, make any relevant observations on the matters set out in the indictment, if the purpose of that hearing is not in fact to obtain evidence, which is for the national court to determine”.

On 9 January 2025 the CJEU delivered its judgment in *Delda* case<sup>96</sup>, which follows the AG opinion to a considerable extent. The CJEU stated that since the concept of “investigative measures” is not defined in Directive 2014/41, nor is any reference made therein to the laws of the Member States to define that concept, it must be given an autonomous interpretation in EU law. The CJEU opted for strict and ordinary meaning of that concept as covering “any investigative act intended to establish a criminal offence, the circumstances in which it was committed and the identity of the perpetrator” (para. 28 of the judgment).

The preliminary ruling in the *Delda* case concerned the question whether Directive 2014/41 may be interpreted “as allowing the judicial authorities of a Member State to issue or validate a European Investigation Order the purpose of which is, first, to serve on the person concerned an indictment, which also includes an incarceration order and an order to make a bail payment and, second, to hear that person so that he or she may, in the presence of his or her

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<sup>94</sup> See statistics gathered by the Ministry of Justice: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/> (last visited: 30 Jun. 2024).

<sup>95</sup> ECLI:EU:C:2024:863.

<sup>96</sup> ECLI:EU:C:2025:6.

lawyer, make any relevant observations on the matters set out in the indictment?” This question is of key importance for the Polish practice of using an EIO for bringing charges against a suspected person since it also comprises two different activities: serving a suspected person a decision on bringing charges and interrogation of such a person as a suspect. With reference to the French system of serving a person with an indictment, the CJUE ruled that an order by which a judicial authority of one Member State requests a judicial authority of another Member State to serve on a person an indictment relating to him or her does not, as such, constitute a European Investigation Order within the meaning of the Directive 2014/41. Despite this clear-cut answer to the preliminary ruling, the reasoning of the CJEU is more nuanced. It seems that what matters for the final assessment of the possibility of using an EIO for serving a person concerned with an indictment (the charges), is the purpose of an interrogation of a suspect. As transpires from paras. 43 and 44 of the judgment, if the request for an interrogation does not have as its purpose the gathering of evidence, then the EIO cannot be used for hearing a suspect. However and by contrast, if the purpose of that request for a hearing is to gather evidence and such aim of interrogation is indicated in an EIO, and if at the same time under the national law of the issuing MS the hearing of a person concerned could take place only after the indictment or charges were served on this person, “it would have to be considered that [...] such service could be requested by means of a European Investigation Order” (para. 44 of the judgment). The CJUE supported its conclusion by referring to Article 9(2) of Directive 2014/41 that the executing authority is, in principle, required to comply with the formalities and procedures expressly indicated by the issuing authority.

The wording of paras. 43 and 44 of the *Delda* judgment allows for the following conclusion for the Polish practice. Since the interrogation of a suspected person as a suspect in the Polish criminal procedure has also the aim of gathering of evidence (explanations of a suspect provided in the course of such interrogation are treated as evidence) and since according to Polish law such interrogation could take place only after providing a suspected person with the decision on bringing charges and the letter of rights, an EIO may be used for bringing charges against a suspect.

### Temporary transfer<sup>97</sup>/videoconference

Temporary transfer is possible only if a person concerned is detained in the MS executing an EIO issued by the Polish issuing authorities. For this reason, it cannot be considered as a remedy under this section which presupposes that “no detention on remand is possible”.

### Videoconference

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<sup>97</sup> It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS (see p. 9).

The CCP does not regulate the opportunity to interrogate a suspect by videoconferencing in the course of investigations, providing only for such option at the trial stage of the proceedings.<sup>98</sup> In the course of investigation or inquiry the Code of Criminal Procedure allows only for remote participation of a suspect in a session of a court organized for deciding on his/her detention on remand (Article 250 § 3b - § 3h, introduced to the CCP during Covid-19 pandemic). However, the aim of such participation is rather to allow the suspect expressing his opinion on detention order. Therefore, since the EIO may be issued only if a given investigative activity is provided in the Polish law (the above quoted Article 589x CCP clearly stipulates that using this measure is not allowed if the Polish law does not permit examining or obtaining given evidence), there is a common opinion that the EIO cannot be issued by Polish authorities to interrogate a suspect via videoconferencing.<sup>99</sup> Nonetheless, Polish judicial authorities are entitled to execute the EIO issued for the purpose of conducting the interrogation of a suspect by videoconferencing if the suspect consents to such an interrogation. Article 589zj § 2 (7) CCP specifies that the enforcement of an EIO may be refused if the EIO concerns questioning with the use of technical devices enabling the measure to be carried out remotely, with simultaneous direct transmission of image and sound, and the accused, who is to be questioned, does not consent to this. This lack of equilibrium in access to this form of interrogation should be removed from the CCP.

### Application in practice

All the interviewed practitioners stated that they do not have any experience in issuing the EIO for the purpose of interrogating a suspect via videoconference in the course of investigations since it is not allowed by Polish law.<sup>100</sup> At the same time, they all argue that such

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<sup>98</sup> For the first time the opportunity to interrogate the accused by videoconference was introduced to the CCP on 1 July 2015 but only with reference to the trial stage of the proceedings (Article 377 § 4 CCP). Furthermore, during the Covid-19 pandemic the legislator decided to introduce to the CCP the opportunity of conducting the hearing by videoconference. However, for years the legislator was reluctant to the use of videoconference for interrogating a suspect. Therefore, reservation was made - on the basis of Article 10(9) of the 2000 Convention – that Poland will not submit or execute the requests to interrogate a suspect or accused person by videoconference.

<sup>99</sup> Kierzyńska, in Buczman, Kierzyńska, *Europejski nakaz dochodzeniowy. Nowy model współpracy w sprawach karnych w Unii Europejskiej* (C.H. Beck, 2018), p. 265-266; B. Augustyniak, in Świecki (Ed.) *Kodeks postępowania karnego. Komentarz. Tom II. Art. 425-673*, (Wolters Kluwer, 2024), p. 954. See also Evaluation Report on the 10th Round of Mutual Evaluations on the implementation of the European Investigation Order (EIO). Report on Poland, document 13516/1/24 REV 1, p. 47 and 58; available at:

<https://www.consilium.europa.eu/en/documents/public-register/public-register-search/?AllLanguagesSearch=false&OnlyPublicDocuments=false&DocumentNumber=13516%2F24&DocumentLanguage=EN> (last visited 30 April 2025).

<sup>100</sup> The public prosecutors voiced doubts as to the admissibility to execute the EIO requesting the interrogation of a suspect. Practitioners argue that Polish reservations submitted to the Second Additional Protocol to the CoE Convention of 1959 and to the 2000 Convention that Polish authorities will not issue or execute motions for interrogation of a suspect by videoconferencing have not been withdrawn. Of course, such reservations apply only to these MS which are not part of the EIO system of gathering of evidence. Moreover, pursuant to Polish law no

an opportunity should be introduced to the CCP, and once provided, would be used by them as very useful measure.

- EU Convention on Mutual Assistance (Inviting him for an interrogation or confrontation ect. (sending/service documents))

This Convention has limited scope of application since it was replaced to a large extent by the EIO Directive. However, it is applicable in the cooperation with Ireland and Denmark and with other MS – only with regard to summoning and service of documents.

Pursuant to Article 138 CCP, a party, as well as a person not being a party, whose rights have been infringed, not staying in the country or in another Member State of the European Union, shall be obliged to designate an addressee for the service of letters in the country or in another Member State of the European Union; if they fail to do so, a letter sent to their last known address in the country or in another Member State of the European Union or, if there is no such address, enclosed with the case file, shall be deemed to have been served. This provision is consistent with Article 5 (1) of the 2000 Convention on Mutual Assistance. Having regard to the wording of this provision, it can be used for direct service of documents or direct summoning of a suspect staying in another MS by the Polish investigative authorities.

However, if proof of summoning is necessary, the investigative organs apply Article 5(2) of the 2000 Convention on Mutual Assistance and send simplified requests for legal assistance concerning service of summons or documents. As was mentioned above, with reference to Polish citizens residing in another MS summons may also be served by the consul (Article 26 (1) of the consular law).

#### Application in practice

Practitioners confirmed that they use this Convention in cooperation with Denmark and for the purpose of summoning of a suspect in cases concerning less serious offences. This was a general remark of interviewed public prosecutors that the choice of the measure (direct summoning, issuing the EIO, issuing the EAW) for the purpose of bringing charges and interrogating the suspect depends on the circumstances of the case, i.e. the severity of the offence concerned and also criminal record of a suspect.

One public prosecutor mentioned that with reference to the use of this Convention for the purpose of summoning of a suspect from abroad, simplified letters rogatory may also be prepared and sent by district public prosecutors although, as a rule (mentioned above in Chapter I of the Report) all international cooperation in criminal matters is conducted at the level of the regional public prosecutor's offices.

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interrogation of a suspect by videoconference is possible at the pre-trial stage of the proceedings. However, in practice such EIOs are executed by Polish authorities.

## - Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Convention on Transfer of proceedings was not ratified by Poland. Also the European Convention on Mutual Assistance in Criminal Matters does not provide for ordinary transfer of proceedings. As discussed above in the Section concerning applicability of this instrument in EU law, Article 21 of the CoE Convention of 1959 may be applied for the purpose of conducting simultaneously two proceedings in two countries and to obtain information on the outcome of the proceedings conducted in another MS. Hence the effect equal to transferring of proceedings (i.e. the discontinuation of the investigation conducted in Poland) may be achieved only if all prerequisites of European *ne bis in idem* are fulfilled by issuing a decision on criminal responsibility of a person concerned in another MS. Thus, this instrument, although used by practitioners, does not bring the effect equal to ordinary transfer of prosecution.

It should be noted that the Polish translation of Article 21 of the CoE Convention is incorrect. While the English text provides for “laying information [...] with a view of proceedings”, in the Polish version of Article 21 (1) of the CoE Convention the notion “motions for initiation of investigations” is used. This is misleading and suggests that the acceptance of such “motion” by another Contracting Party results in taking over the investigations and allows for discontinuation of the investigations in Poland which should not be the case. One practitioner stated that this incorrect translation may generate improper practical use of this institution.

By November 2024 no legislative act has been adopted in the EU to regulate the transfer of proceedings.<sup>101</sup> However, in Poland transfer of proceedings may take place in the course of investigations on the basis of the CCP. Chapter 63 of the CCP regulates taking over and transferring the criminal prosecution and indicates the Minister of Justice as an organ competent to request the transfer of prosecution and initiating taking over the prosecution. The prerequisites for transfer of proceedings from Poland to another state (including Member States of the EU) are regulated in Article 591 of the CCP which reads as follows:

„Article 591 § 1. In the case of a criminal offence committed by an alien within the territory of the Republic of Poland, the Minister of Justice shall, in the interest of the administration of justice, direct to a relevant authority of a foreign country:

- 1) of which the wanted person is a citizen,
  - 2) in which the wanted person has their permanent place of residence,
  - 3) in which the wanted person is serving or shall serve a penalty of imprisonment,
  - 4) in which criminal proceedings have been instituted against the wanted person
- a request to take over the criminal prosecution or may accept such a request from a relevant authority of the foreign country.

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<sup>101</sup> The Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters was adopted on 27 November 2024. It is not yet applicable.



§ 2. If the victim is a Polish citizen, a request for taking the prosecution over may only be submitted with their consent.

§ 3. Prior to submitting the request referred to in § 1 or resolving such a request from an authority of a foreign state, the competent authority shall allow a wanted person staying in the Republic of Poland to take a position orally or in writing concerning the transfer of prosecution.

§ 4. When the request for taking over the prosecution regarding a person under preventive detention within the territory of the Republic of Poland is granted, the Minister of Justice shall request the competent authority to undertake immediate actions aimed at surrender and transfer of such a person to the authorities of the foreign state. The case files shall be transmitted together with the person being transferred, unless they have already been transmitted together with the request.

§ 5. The Minister of Justice shall request the relevant authority of a foreign country for information on the final outcome of the criminal proceedings.

§ 6. The transfer of the criminal proceedings shall be regarded as the discontinuation of the criminal proceedings under the Polish law; it shall not prevent new criminal proceedings in the event that prosecution abroad is abandoned without foundation.”

It is only worth adding, in the context of the situation when a detention on remand was ordered in Poland, that the doctrine on the basis of the provision of Article 591 § 1 of the CCP raises doubts about the constitutional nature of this solution, i.e. whether it does not constitute a circumvention of the provisions on extradition, and consequently, whether it does not conflict with Article 55 Section 1 and 5 of the Constitution of the Republic of Poland. S. Steinborn argues that if it is assumed that Article 591 § 4 of the CCP provides for a procedure of transferring not only the proceedings but also the requested person to another country, and this procedure is separate from extradition or the EAW<sup>102</sup>, its application could result in a violation of the guarantees arising from the above-mentioned Constitutional provisions.<sup>103</sup> Thus, consequently, he is of the opinion that this provision, although unclear, should be interpreted as meaning that following the transfer of proceedings, another measure aimed at surrendering persons concerned, should be taken (extradition or surrender on the basis of an EAW). However, these remarks apply only to the situation when the person concerned is in detention in Poland. In the majority of cases, the transfer of proceedings from Poland to another MS takes place if the suspect is not present in Poland.

It should be noted that the transfer of proceedings may also be based on bilateral agreements between Poland and other MS. Currently, the provisions concerning the transfer of criminal proceedings are included in bilateral agreements between Poland and the following UE

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<sup>102</sup> It is stated in the literature that this procedure is separate from extradition proceedings – see, Kołodziej, „Przejęcie i przekazanie postępowań karnych” in: Gemra (Ed.), *Metodyka pracy w sprawach karnych ze stosunków międzynarodowych*, ed. J. Gemra, (C.H. Beck, Krajowa Szkoła Sądownictwa i Prokuratury, 2013), 55-60, at 55.

<sup>103</sup> Steinborn, “Komentarz do art. 591 Kodeksu postępowania karnego” in Paprzycki (Ed.), *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego* (LEX, 2015).

MS: Austria<sup>104</sup>, Bulgaria<sup>105</sup>, Czech Republic<sup>106</sup>, Estonia<sup>107</sup>, Greece<sup>108</sup>, Lithuania<sup>109</sup>, Latvia<sup>110</sup>, Romania<sup>111</sup>, Slovakia<sup>112</sup>, Sweden<sup>113</sup>, Hungary<sup>114</sup>.

#### Application in practice:

In general, the transfer of proceedings is not applied if a suspect cannot be interrogated by the use of other above discussed measures. It is not considered as an alternative for issuing the EIO or the prosecution-EAW. The provisions of the CCP concerning transfer of prosecution are applied mostly in connection with procedures aimed at solving conflicts of jurisdiction.

As transpires from the statistics provided by the Ministry of Justice, during the past 5 years the scope of the use of transfer of proceedings between Poland and other MS was the following:

- with reference to Sweden  
from 2019 to 2023 – 4 cases concerning transfer of proceedings were examined; 1 case concerned transfer of proceedings from Poland to Sweden (in 2023); 3 cases concerned taking over the proceedings by Poland (2 in 2022; 1 in 2020);
- with reference to Hungary:  
from 2019 to 2023 - 3 cases of taking over the proceedings by Poland were examined;
- with reference to Estonia:  
from 2019 to 2023 – 1 case: in 2021 the Minister of Justice, upon the motion of the public prosecutor, requested the Estonian authorities to take over the proceedings with reference to 2 persons; the request was based on Article 60 of the bilateral agreement on legal assistance in civil, criminal and labor matters adopted in 1998.
- with reference to Austria  
from 2019 to 2023 – 36 cases concerning taking over of investigations by Poland were decided (in 2023 – 7 cases; in 2022 – 10 cases; in 2021 – 6 cases; in 2020 – 8 cases; in 2019 – 5 cases).  
In majority of cases the transfer of proceedings was based on the bilateral agreement

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<sup>104</sup> This is a bilateral agreement adopted in 2003 facilitating the use by both countries of the CoE Convention of 1959 – Journal of Laws 2005, No. 75, Item 662.

<sup>105</sup> Journal of Laws 1963, No. 17, Item 88, with amendments.

<sup>106</sup> Journal of Laws 1989, No. 39, Item 210, with amendments.

<sup>107</sup> Journal of Laws 2000, No. 5, Item 49.

<sup>108</sup> Journal of Laws 1982, No. 4, Item 24.

<sup>109</sup> Journal of Laws 1994, No. 35, Item 130.

<sup>110</sup> Journal of Laws 1995, No. 110, Item 534.

<sup>111</sup> Journal of Laws 1962, No. 63, Item 301.

<sup>112</sup> Journal of Laws 1999, No. 76, Item 856.

<sup>113</sup> Journal of Laws 1990, No. 63, Item 368.

<sup>114</sup> Journal of Laws 1960, No. 8, Item 54.

between Poland and Austria from 2003. It provides for direct exchange of motions between judicial organs, without participation of the Minister of Justice.<sup>115</sup>

### **(bb) Ensuring that the suspect is available**

#### **- FD 2009/829/JHA (?)**

As explained above, an ESO may be issued also if no detention of a suspect is possible. It is also accepted in the literature that issuing an ESO is not conditional upon prior imposition of detention on remand on the person concerned. Thus, an ESO may be issued both as an alternative to the detention on remand already applied or simply independently.<sup>116</sup>

Moreover, unlike the FD 2009/829/JHA, the CCP does not limit the use of the ESO mechanism only to situation when the person is present in the issuing state. Article 607zd § 1 CCP provides that if a Polish court or public prosecutor orders a preventive measure defined in Articles 272, 275, 275a or 276, and if the correct course of proceedings is ensured thereby, the court or the public prosecutor may apply for the execution of the decision to the competent court or other authority of a MS of the EU, in which the accused has a legal permanent place of residence, **provided that they stay in that country or declare their intention to return there** [emphasis added].”

Thus, the ESO may be issued also if a person concerned is staying in another MS.

#### Application in practice

Practitioners reported a lack of experience in using this measure. Moreover, they assess it as not effective or even useless.

#### **- EU Convention on Mutual Assistance**

This Convention may be applied for this purpose in the same manner as explained above, in Section (aa).

#### **- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters**

As already stated in this Report, the Convention on Transfer of Proceedings does not apply in Poland. As far as the CoE Convention is concerned, it may be applied for this purpose in the same manner as explained above, in Section (aa).

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<sup>115</sup> Presented information was provided by the Ministry of Justice upon the request submitted within the framework of the MR 2.0 project. See, the reply to the request for access to public information dated 18 July 2024, no. BK-VII.082.307.2024. The obtained data are general and do not report about the practice at the particular stages of the criminal proceedings.

<sup>116</sup> Steinborn, „Komentarz do art. 607zd Kodeksu postępowania karnego” in Paprzycki (Ed.), *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego* (LEX, 2015).

(dd) Other (?)

If a suspect is at liberty in another MS, his availability for procedural organs in Poland may also be secured by issuing the guarantee of safe conduct (literally translated as “the iron letter”). On the scope of application of “the iron letter” – see Section 2.2.2. (b) (i) (aa) below.

2.2.2. Substage 2 (detention on remand possible)

(a) Person concerned present in issuing MS

*(i) detention on remand possible but not ordered<sup>117</sup>*

(bb) Ensuring that the suspect is available

- FD 2008/829/JHA (?)

As already explained, the ESO instrument may be used in Poland in such circumstances. However, it is not used in practice.

(dd) Other (?)

I do not see other instruments of international cooperation to be useful for ensuring that the suspect is available for criminal proceedings.

*(ii) person concerned in detention on remand*

In this situation, there is no need for judicial cooperation because the suspect is already available for investigative/prosecution measures.

(b ) Person concerned is present in another MS

*(i)detention on remand possible but not ordered*

(aa) Executing investigative measures/prosecution such as interrogating the suspect

- DR 2014/41<sup>118</sup>

As already mentioned, the EIO mechanism may be issued for the purpose of bringing charges to the suspect staying in another MS (see, explanations in Section “Substage I”). However, this measure is voluntary. So, a suspected person may only be asked to appear before the executing authorities. No pressure or force may be imposed on him to participate in the execution of such EIO.

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<sup>117</sup> ‘(aa)’ does not apply here. The person concerned is present in the issuing MS. Therefore, there is no need to request judicial cooperation to execute investigative/prosecution measures.

<sup>118</sup> Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the “coherent and effective” application of the instruments.

### Application in practice:

All the public prosecutors reported that they apply the principle of proportionality. Nevertheless, in investigations concerning serious crimes where the risk of obstructing the due course of the proceedings is very high, they do not usually use the EIO first, but they immediately apply for a national arrest and an EAW.

In less serious cases, the EIO is used first or even after attempts to summon the person concerned to appear before the public prosecutor. As reported by one of the interviewed public prosecutors, in such cases about 60 % of the EIOs issued for the purpose of bringing charges against the suspect are successful. In the remaining cases, they usually suspend the investigations waiting for the opportunity to use other measures (for instance they wait for the return of the suspect to Poland). Sometimes a person alerted by attempts to execute the EIO and aware that investigations are being conducted against him, asks for a so-called “letter of safe conduct” (also the term “iron letter” is used for this institution), i.e. a guarantee that he will not be detained if he declares to appear in court or before the public prosecutor on a specified day. Granting the safe conduct may depend upon the posting of bail (Articles 281-283 CCP). The exclusive competence to grant a “letter of safe conduct” is entrusted to the regional courts in Poland. Nonetheless, at the pre-trial stage of the proceedings, this measure may be granted only if the public prosecutor does not object.<sup>119</sup>

Pursuant to Article 282 CCP:

§ 1. Safe conduct shall grant the accused the right to remain at liberty until the moment at which the proceedings are finally concluded, provided that the accused:

- 1) appears at the time designated by the court, and in the investigation – also at the time designated by the public prosecutor
- 2) does not leave their chosen place of stay in the country unless permitted to do so by the court
- 3) does not induce witnesses to give false testimony or explanations or attempt in any other manner to obstruct the criminal proceedings.

§ 2. In the event that the accused does not appear when summoned or violates other conditions specified in § 1, the regional court having territorial jurisdiction shall decide to revoke the safe conduct.

§ 3. During the investigation, safe conduct may be revoked at the motion of the public prosecutor.

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<sup>119</sup> The new wording of Article 281 § 2 CCP was introduced on 22 June 2021 (Journal of Laws 2021, Item 1023). Prior to this date the public prosecutor did not have the competence to block issuing the letter of safe conduct at the pre-trial stage of the proceedings. Despite this new wording, the Gdańsk Court of Appeal stated that the objection raised by a public prosecutor cannot be binding upon the court since contrary interpretation would contravene the constitutional standards. See, decision of the Gdańsk Court of Appeal of 29 March 2022, case no. II AKz 222/22, LEX no. 3334354. On the application of “the iron letter” by Polish courts, see Gajowniczek-Pruszyńska, *Instytucja listu żelaznego w polskim postępowaniu karnym* (Wolters Kluwer, 2022), p. 227-237.

The CCP does not limit the application of the letter of safe conduct only to Polish citizens or a person having permanent residence in Poland. However, as transpires from Article 282 § 1 CCP, the person granted this guarantee should choose the place of stay in Poland and should not leave it unless permitted by the court.

The “letter of safe conduct” may be granted even if the suspect or the accused is subject of the national arrest warrant, but under the condition that such warrant is not actually enforced (he/she is still at liberty)<sup>120</sup>. Also, the fact that the EAW was issued for the purpose of the prosecution of a suspect or the accused does not prevent the court from granting “the latter of safe conduct” to such a suspect or the accused. However, this is possible only if the process of execution of such EAW has not started yet<sup>121</sup>.

As transpires from the available statistics, motions for granting “safe conduct” are quite frequently submitted to regional courts. From 2020 until 2023, all the regional courts in Poland examined altogether 708 motions for granting a letter of safe conduct (in 2020 – 190; in 2021 – 177; in 2022 – 139 and in 2023 – 202).<sup>122</sup> Unfortunately, the available statistical reports of the Polish regional courts provide only information on the total number of motions but not on the results of their examination.

#### Temporary transfer<sup>123</sup>/videoconference

The temporary transfer to the issuing MS is not possible if detention on remand has not yet been ordered. Thus, this measure cannot be applied at this stage of the proceedings.

As to the use of videoconference, see Section “Stage I”.

#### - EU Convention on Mutual Assistance

Inviting him for, e.g., an interrogation (sending/service documents)

#### - Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

The above-mentioned instruments may be used in a similar manner as for suspects staying abroad whose detention is not possible.

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<sup>120</sup> See, *inter alia*, decision of the Rzeszów Court of Appeal of 29 October 2018, case no. II AKz 362/18, LEX no. 2576220; decision of the Białystok Court of Appeal of 2 August 2018, case no. II AKz 299/18, LEX no. 2531897

<sup>121</sup> See, decision of the Katowice Court of Appeal of 26 October 2016, case no. II AKz 566/16, LEX no. 2312317.

<sup>122</sup> The presented statistical data were gathered within the framework of the project and are based on the information provided by all 47 Regional Court in Poland in statistical reports published at the websites of these courts.

<sup>123</sup> It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS (see p. 9).

With reference to Denmark ordinary letters rogatory are issued based on 2000 Convention on Mutual assistance in Criminal Matters and at least two interviewed public prosecutors declared that this does not cause considerable problems or inconvenience.

(bb) Ensuring that the suspect is available

- FD 2008/829/JHA (?)

An ESO is 'an alternative to provisional detention' (Article 1 FD 2009/829/JHA). Is it possible under national law to issue an ESO, if detention remand is possible but not ordered?

Yes, see explanations concerning this measure presented in previous sections of this Report.

- EU Convention on Mutual Assistance

Keeping in contact with him while he's abroad (sending/service documents)

- Convention on Transfer on Proceedings/European Convention on Mutual Assistance in Criminal Matters - Transferring the proceedings to that MS.

The above-mentioned instruments may be applied in a similar manner for suspects staying abroad whose detention is not possible.

(dd) Other (?)

As already mentioned in previous Section of the Report, "the iron letter" may be used as a measure of securing the availability of a suspect residing in another MS to the Polish procedural authorities.

*(ii) detention on remand ordered*

(aa) Executing investigative measures/prosecution such as interrogating the suspect

- FD 2002/584/JHA (?)

Under national law, is it possible to issue a prosecution-EAW for the sole<sup>124</sup> purpose of interrogating the requested person as a suspect?

This question is to some extent misleading. Prior to issuing the prosecution-EAW, the Polish court must issue a national detention order. Thus, the court must establish that: 1) there is a need to secure the proper course of the proceedings; 2) there is a reasonable suspicion that a person concerned has committed an offence (these are the general grounds for imposing

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<sup>124</sup> It is rumoured that the issuing judicial authorities of one MS issue an EAW just to hear the requested person. After having heard the surrendered person, he is then released.

detention on remand). Furthermore, the court must establish at least one of the specific grounds for detention on remand (Article 258 CCP quoted in this Report) and must also examine potential obstacles to apply this preventive measure (Article 259 CCP quoted in this Report above). Of course, interrogation of a suspect is not indicated as a basis for detention on remand. On the other hand, bringing charges against a person which includes also his interrogation, is the condition of **effective prosecution** and bringing accusation before the court. This issue was already discussed in Section 2.1.1.2.(b)(ii) of the Report. Summarizing, in cases concerning serious offences the EAW may be issued if this is the only way to bring charges against the suspect. Presentation of charges to the suspect and his interrogation (i.e. bringing charges) **are not only the investigative activities but at the same time the key element of prosecution.**

However, the fact that after surrender the person is interrogated and subsequently released, does not necessary mean that the EAW was issued just to hear the requested person. The release may be justified by various reasons. In particular, after surrender the suspect may admit all charges and declare cooperation with investigative authorities. In such circumstances one of the important prerequisites for detention – the risk of jeopardizing the proper course of the proceedings - is no longer valid and release seems to be the consequence thereof. The release of a suspect in such circumstances does not mean abandonment of his prosecution.

It is worth to notice some difficulties in execution of Polish prosecution - EAWs stemming from the above circumstances. For instance, the general indication of the aim of the prosecution-EAW<sup>125</sup> may result in considering that it was issued exclusively for the investigative purposes and not for prosecution purposes.

#### Application by practitioners

A few public prosecutors admitted the practice that in serious cases the EAW may be issued in order to have a person surrendered for bringing charges against him, while the interrogation is part of this activity. They argue that otherwise they could not conduct the investigations effectively.

Pending the decision on the execution of a prosecution-EAW, the person concerned could be heard in the executing MS or be temporarily transferred to the issuing MS on the basis of Art. 18 and 19 FD 2002/584/JHA.

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<sup>125</sup> "For the purpose of conducting the investigative proceedings under way at the District Prosecutor's Office in Siedlce..." [...] "APM is in hiding from the judicial authorities, outside the national borders, and therefore it is not possible to carry out activities with his participation that are necessary for the investigative proceedings in the case...being conducted by the District Prosecutor's Office in Siedlce" – see judgment of the Italian Supreme Court of 20 April 2022, case no. 14937, available at: <https://canestrinilex.com/en/readings/proportionality-check-in-polish-eaw-case-ita-supreme-court1493722> (last visited: 6 Oct. 2024).



The institution of the transfer of a requested person temporarily to the issuing MS pending the execution of a prosecution-EAW is regulated in the CCP, but only with reference to the situation described in Article 24 (2) FD EAW. Article 607o § 2 CCP provides for the opportunity to transfer the requested person temporarily to the issuing state only if after the decision on execution of the EAW the surrender is postponed because the requested person may be prosecuted in Poland or should serve in Poland a sentence passed for an act other than that referred to in the EAW. There is no provision in the CCP regulating temporary transfer **prior** to deciding on execution of the EAW.

Moreover, Article 607o § 2 CCP regulates temporary transfer only with reference to Polish courts acting as the executing authorities. No similar provision is included in the Chapter of the CCP concerning issuing the EAW. Nevertheless, in my opinion, the use of this provision *per analogiam* seems to be admissible also in the case of Poland acting as the issuing MS.

The problem of incorrect implementation of the FD EAW with reference to the temporary transfer of a requested person pending the decision on surrender and also incorrect transposition of the conditions for the hearing of the requested person pending the decision on surrender is subject to the infringement procedure initiated by the Commission against Poland.<sup>126</sup>

#### Application in practice

The above conclusion is partly confirmed by some interviewed practitioners. The first interviewed public prosecutor reported the use of temporary transfer based on FD EAW in her practice. She indicated Article 607o § 2 CCP as also applicable to the situation when Poland is the issuing state. She also reported the use of temporary transfer based on Article 9 of Protocol II to the 2000 Convention on Mutual Assistance in Criminal Matters.

Nonetheless, another public prosecutor argued that there is a lack of implementation of Article 18 FD EAW with reference to Polish judicial authorities acting as issuing authorities and for this reason, she does not use this measure. Two other public prosecutors reported a lack of experience in using the measure as the issuing authorities. However, they reported experience in the execution of such measures issued by another MS.

#### Hearing a requested person in the executing state upon the request of the issuing state.

Articles 18 and 19 FD EAW were not properly implemented into the CCP. Article 607k § 5 CCP allows for interrogation of a requested person upon the request of the issuing authorities before the EAW is examined but only if carrying out such questioning is requested already in the EAW as such (i.e. “If simultaneously with the issuance of the EAW”).<sup>127</sup> The questioning shall be

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<sup>126</sup> See, procedure no. INFR(2020)2308; information published at: [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_23\\_3445](https://ec.europa.eu/commission/presscorner/detail/en/inf_23_3445) (last visited: 30 Sept. 2024).

<sup>127</sup> See, critics of this provision: Steinborn, “Komentarz do art. 607k Kodeksu postępowania karnego” in Paprzycki (Ed.), *Kodeks postępowania karnego. Komentarz* (LEX, 2015), comments no. 19-20.

executed by the regional court responsible for execution of the EAW. No similar provision regulating the opportunity to request interrogation of the requested person by Polish issuing authorities was introduced into the CCP.

#### Application in practice

No practical use of this measure was reported by practitioners acting as issuing judicial authorities.

- DR 2014/41<sup>128</sup>

#### Temporary transfer<sup>129</sup>/videoconference

It is not clear from the wording of Article 598z § 1 CCP who is competent to issue the EIO for the purpose of temporarily transferring a suspected person to Poland. *Prima facie* one could argue that at the pre-trial stage of the proceedings such an EIO may be issued by a public prosecutor.<sup>130</sup> Nevertheless, as will be explained later in the section of the Report concerning the trial stage of the proceedings, some authors are of the opinion that only the regional court may issue such an EIO. This is supported by the argument that once such an EIO is executed, only the regional court having jurisdiction over the place of carrying out the investigative activity indicated in the EIO is competent to decide on placing the person concerned in an indicated penitentiary facility (Article 589z § 1 CCP in conjunction with Article 589a CCP).

The temporary transfer of a person held in custody in the executing state to Poland as the state issuing the EIO is possible for the purpose of “carrying out an investigative measure”. Article 589z § 1 CCP does not indicate what kind of investigative measure may be conducted after the temporary transfer. No doubt, such a person may be transferred to take part in an identification parade or other evidence activities. Some authors indicate the interrogation of a suspect as an investigative measure that may be carried out in such circumstances.<sup>131</sup> Others argue that the EIO cannot be used for the purpose of prosecuting a person.<sup>132</sup> Indeed, it is clear from the wording of motive 25 of the EIO Directive that the EIO cannot be used instead of the prosecution-EAW. Nonetheless, as stated in the joint note of Eurojust and EJM, “the EIO DIR could be used for the transfer of persons with a view to obtaining evidence from the person concerned. Since this

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<sup>128</sup> Please note that Denmark and Ireland are not bound by Directive 2014/41/EU. Please take on board whether this causes problems from the perspective of the “coherent and effective” application of the instruments.

<sup>129</sup> It should be remembered that a temporary transfer to the issuing MS is only possible if the person concerned is in custody in the *executing* MS (see p. 9).

<sup>130</sup> The competence of a public prosecutor to issue the EIO was accepted by the CJEU; see judgment of 8 December 2020, C-584/19, A and others, ECLI:EU:C:2020:1002.

<sup>131</sup> Kusak, *Dowody zagraniczne. Gromadzenie i dopuszczalność w polskim procesie karnym. Przewodnik z wzorami* (Wolters Kluwer, 2019), p. 42.

<sup>132</sup> Buczma, Kierzyńska, *Europejski nakaz dochodzeniowy. Nowy model współpracy w sprawach karnych w Unii Europejskiej* (C.H. Beck, 2018), p. 221.

measure concerns the deprivation of liberty, a judge in the issuing Member State should be involved in the practical arrangements under Article 22(5) EIO DIR.”<sup>133</sup> I do not see any evident obstacle in the wording of the Directive to issue an EIO for the temporary transfer of a person for the purpose of bringing charges against him in Poland, since the key element thereof is the interrogation of a suspect, which is a measure aimed at gathering of evidence. One should not neglect the fact that Article 22 of the EIO Directive specifies that temporary transfer may be used for conducting “an investigative measure with a view to gathering evidence for which the presence of that person on the territory of the issuing State is required”. Moreover, as a rule, the use of this measure depends on the consent of the person concerned as Article 22 (2)(a) provides for additional non-mandatory grounds for non-recognition/non-execution of the EIO<sup>134</sup>.

### Application in practice

Some interviewed practitioners declared that they use this measure to carry out investigative activities requiring participation of the suspect. However, at the same time they denied experience in using this measure for the purpose of interrogating a suspected person as a suspect (i.e. for bringing charges against a suspect). They argued that the use of temporary transfer under the EIO Directive for bringing charges against the suspect is inadmissible since it is equal to the prosecution of a suspect for which only the prosecution-EAW may be used.

#### - EU Convention on Mutual Assistance

Summoning him, e.g., to an interrogation while he’s abroad (sending/service documents)

#### - Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

In general, the application of the above-mentioned instruments with reference to the suspect detained in another MS is similar to already described use of them with regard to persons staying abroad if no detention is possible. However, the direct summoning of a suspect to appear voluntary cannot be applied in such circumstances.

#### (bb) Ensuring that the suspect is available

#### - FD 2002/584/JHA

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<sup>133</sup> Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order, <[https://www.ejn-crimjust.europa.eu/ejnupload/news/2019-06-Joint\\_Note\\_EJ-EJN\\_practical\\_application\\_EIO\\_last.pdf](https://www.ejn-crimjust.europa.eu/ejnupload/news/2019-06-Joint_Note_EJ-EJN_practical_application_EIO_last.pdf)>, p. 15 (last visited: 6 Oct. 2024).

<sup>134</sup> As transpires from the statistics obtained from the Ministry of Justice, since 2018 by the end of 2023 all regional courts in Poland issued only one request for temporary transfer to Poland of the person deprived of liberty in another MS for the purpose to carry out investigative measures (art. 589z § 1 CCP). It took place in 2023. See, the reply to the request for access to public information dated 18 July 2024, no. BK-VII.082.307.2024.

The prosecution-EAW is an appropriate measure to have the requested person available in Poland as the issuing state if detention has been ordered by Polish court.

- FD 2008/829/JHA (?)

ESO possible under national law?

As already mentioned, under the Polish law issuing an ESO is possible even if a person concerned is already staying in another MS. There is also a legal basis for changing national detention order into the decision to apply non-isolatory preventive measure. However, as already stressed, this measure is not used in practice. Thus, practitioners could not provide us with information concerning practical use thereof.

- EU Convention on Mutual Assistance

Keeping in touch with him while he's abroad (sending/service documents)

- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Transferring the proceedings to that MS. This is not an instrument that provides for ensuring that a suspect is available for investigation/prosecution in the issuing MS. However, given that the person concerned is present in another MS, transferring the proceedings to the MS of residence may be an option.

In general, the application of the above-mentioned instruments with reference to the suspect detained in another MS is similar to already described use of them with regard to persons staying abroad if no detention is possible.

(dd) Other (?)

It is hardly possible to indicate other instruments of cooperation which could be used to ensure that the suspect is available. As already mentioned, the "iron letter" could be granted also to the person subject to detention order but only as long as its implementation has not commenced. Thus, since this Section of the Report concerns the situation when a suspect is already detained on remand, granting the letter of safe conduct is not an option available to him.

### **2.3. Applicability and application of the instruments at the trial stage according to national law**

This part of the Report shall start from short presentation of the regulations concerning presence of the accused before the trial court in Poland. As a rule, participation of the accused in the trial (meant as the hearing – Polish "rozprawa") is a right and not an obligation of a defendant. There are only two narrow exceptions to this principle: 1) in very serious cases concerning felonies (Polish "zbrodnia") a defendant must participate in the initial stage of the hearing, including his

interrogations; however, he is not obliged to provide any statement, so after being acquainted with the instruction as to the right to silence, he may give some statements in the case or may rely on his right to silence; 2) in all other cases the court is entitled to decide that the presence of a defendant is mandatory. Furthermore, even in the circumstances indicated under 1) it is still possible to conduct the hearing without the presence of the accused in the circumstances described in Articles 376 and 377 CCP, even if a defendant has not been interrogated yet in the course of judicial proceedings.

This short presentation allows for the conclusion that at the trial stage of the proceedings courts must apply measures forcing a defendant to be present in the court room only exceptionally. In the majority of cases the proceedings may be conducted without the presence of the accused, duly summoned to the hearing.

- (a) **Person concerned present in issuing MS**
- (i) **detention on remand possible but not ordered**
- (bb) **Ensuring that the suspect is available**

- FD 2009/829/JHA

An ESO is 'an alternative to provisional detention' (Art. 1 FD 2009/829/JHA). Is it possible under national law to issue an ESO, if detention on remand is possible but not ordered, and, if so, under what conditions?

## **ESO**

According to Article 607zd § 1 CCP, if the Polish court or the public prosecutor orders a preventive measure defined in Articles 272, 275, 275a or 276, and if the correct course of proceedings is ensured thereby, that court or the public prosecutor may apply for the execution of such preventive measure to the competent court or other authority of a MS of the European Union, in which the accused has a legal permanent place of residence, provided that he stays in that country **or declare his intention to return there.**

At the judicial stage of the proceedings an ESO is issued by the court before which the case is pending.

In a situation where the accused is not deprived of liberty during the court proceedings but declares his willingness to return to one of the EU Member States where he has a permanent, legal place of residence, the ESO instrument can undoubtedly be an alternative to detention on remand. **The CCP does not require that detention on remand must be applied before issuing an ESO.** As already mentioned in the Report, in accordance with Article 258 § 1 of the CCP, the grounds for applying each of the preventive measures are the same, apart from the fear of imposing a severe penalty (Article 258 § 2 of the CCP), which applies only to detention on remand.

Under this provision, where the accused has been charged with a felony or other offence subject to penalty of imprisonment for a maximum of at least 8 years or where the court of the first instance has sentenced the accused to a penalty of imprisonment of not less than 3 years, the need to apply **provisional detention** for the purpose of securing the correct conduct of proceedings may be justified by the severe character of the penalty that may be imposed on the accused.

All the other conditions listed in Article 258 § 1 and 3 CCP (fear of escaping or hiding, fear of unlawful obstruction of proceedings, fear of committing a new crime against life, health or public safety) may be the basis for applying all preventive measures. The doctrine also indicates that previous application of detention on remand is not a condition for issuing the ESO.<sup>135</sup> Nevertheless, the opposite opinion is sometimes presented with reference to interpretation of the FD ESO.<sup>136</sup>

Summarizing, it is possible to issue an ESO for execution of a supervision measure with regard to an accused remaining at liberty in Poland and declaring his willingness to return to another Member State. Nonetheless, due to the limited number of preventive measures that can be executed using the ESO mechanism, the goal analyzed here, i.e. "Ensuring that the suspect is available" will be difficult to achieve with this instrument. This opinion has already been voiced in the Report with regard to the use of the ESO at the pre-trial stage of the proceedings.

In practice, only two measures can be used to ensure that the accused is available to the court despite returning to another MS., i.e. the guarantee of a trustworthy person (Article 272 of CCP) which is hardly used even in internal practice, and the police supervision, combined with specific duties (Article 275 of the CCP). The latter measure seems to be the most useful to achieve the goal of, above all, controlling the whereabouts of the accused. Pursuant to Article 275 § 2 CCP a person under supervision shall be obliged to comply with the conditions outlined in the decision of the court or public prosecutor. This obligation may consist of the prohibition of leaving a defined place of stay, the obligation of reporting to the supervising authority at specified intervals and informing it of any intended departure and date of return, the prohibition of contacting the victim or other persons, the prohibition of approaching certain persons at a specified distance, the prohibition of frequenting certain places, as well as of other limitations on freedom of movement of the accused necessary to exercise the supervision. Therefore, in practice, only police supervision can significantly ensure the availability of the accused at the stage of court proceedings.

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<sup>135</sup> Steinborn, „Komentarz do art. 607zd” in Paprzycki (Ed.), *Kodeks postępowania karnego. Komentarz* (LEX, 2015), thesis 2.

<sup>136</sup> Ryan, “The Interplay Between the European Supervision Order and the European Arrest Warrant: An Untapped Potential Waiting to Be Harvested”, 5(3) *European Papers* (2020), 1531-1542, at 1533-1534.

The effectiveness of the ESO instrument largely depends on the attitude of the accused toward this measure. Hence, before deciding on the use of the ESO mechanism, the court should become acquainted with the opinion of the accused on this measure.<sup>137</sup>

Summarizing, the condition for issuing an ESO at the stage of court proceedings, in a situation where detention on remand is possible but not applied, is therefore the existence of general grounds for applying preventive measures under Article 249 § 1 CCP (the need to secure the proper conduct of the proceedings, and in exceptional situations also the need to prevent commission of a new serious criminal offence by the accused). They may be applied only if the collected evidence indicates a high probability that the accused has committed a criminal offence. Moreover, at least one special condition under Article 258 § 1 or § 3 CCP must be fulfilled.

### Application in practice

Practitioners, including judges, reported that the instrument discussed here is not used at all in practice. There are two main reasons. Firstly, low awareness of the existence of the ESO. Secondly, practitioners are not convinced of the effectiveness of this instrument or its usefulness in achieving the goals of the procedure. Practitioners reported that to ensure the availability of the accused, the most effective methods, apart from detention on remand, are a ban on leaving the country and a property bail. In their opinion, the preventive measures covered by the ESO according to the CCP, are only effective if they are executed in Poland.

#### **(ii) person concerned in detention on remand**

In this situation, there is no need for judicial cooperation because the suspect is already available for investigative/prosecution measures and availability for trial is ensured.

#### **(b) Person concerned is present in another MS**

##### **(i) detention on remand possible but not ordered**

##### **(aa) executing investigative measures/prosecution such as interrogating the suspect**

- DR 2014/41 (?)

Temporary transfer

#### **EIO**

Under national law, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?

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<sup>137</sup> Augustyniak, „Komentarz do art. 607zd Kodeksu postępowania karnego” in Świecki (Ed.), *Kodeks postępowania karnego. Komentarz. Tom II. Art. 425–673* (Wolters Kluwer, 2024), thesis 8.

A temporary transfer may apply only with reference to a person detained on remand. Thus, it cannot be discussed in this Section which concerns the situation if detention on remand is possible but not ordered.

Under national law, is a videoconference possible with the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? If not: is such a videoconference possible without issuing an EIO? Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

### **EIO/Conventions/videoconference**

The provisions of the CCP implementing Directive 2014/41 do not regulate issuance of an EIO in order to interrogate a defendant by videoconferencing. As was already pointed out in other parts of the Report, the EIO may be issued when it is necessary to take or obtain evidence abroad (Article 589w § 1 CCP). This means that videoconferencing may be used to interrogate a defendant but only if this specific form of interrogation is admissible for “domestic” interrogations.

It should be noted at this point that Poland has made a reservation to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 1959, according to which it will not execute requests for legal assistance involving the hearing of suspects and accused persons by videoconference. A similar reservation was made to the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its Protocol. This does not mean, however, that these reservations to the Conventions prevent videoconferencing under Directive 2014/41 by using EIO.<sup>138</sup> The above mentioned reservations are applicable only to cooperation with these MS which do not use the EIO system of gathering evidence.

Unlike at the pre-trial stage of the proceedings, interrogation of the accused at the stage of court proceedings via videoconference is possible in the following two situations.

1) The legislator provided for the possibility of remote participation of a defendant in the hearing, which, obviously, also covers his interrogation during that hearing (Article 374 §§ 4-8 CCP). Nevertheless, this form of participation was provided only to the accused who is placed in a penitentiary facility. The “online” participation in the hearing was not provided for defendants being at liberty. For this reason, this issue will be discussed in the subsequent part of the Report under the heading - “detention on remand ordered”.<sup>139</sup>

<sup>138</sup> Buczma, Kierzyńska (ed.), Stefaniak-Dąbrowska, *Wzajemne uznawanie orzeczeń karnych w Unii Europejskiej. Poradnik dla praktyków* (Wydawnictwo Krajowej Szkoły Sądownictwa i Prokuratury, 2023), pp. 18-19.

<sup>139</sup> One should mention also Article 390 § 4 CCP which exceptionally allows for participation of the accused in part of the hearing remotely, if this is justified by the need to protect a witness giving testimony before the court. An accused may be removed from the courtroom and granted remote participation in the hearing exactly for the time



2) In “domestic” circumstances, the interrogation of a defendant by videoconferencing is also allowed under Article 377 § 4 CCP, but is subject to the following conditions: 1) presence of a defendant at the hearing is mandatory according to the law; 2) he did not appear before the court although duly summoned and aware of the date of the hearing; 3) he has not yet provided explanations (statements) before the court in the course of judicial proceedings. In such circumstances the court may read out his statements given at the pre-trial stage of the proceedings or may interrogate him via videoconference (Article 377 § 4 of the CCP and the reference therein to Article 396 § 2 CCP and Article 177 § 1a CCP<sup>140</sup>).

Nonetheless, it is worth emphasizing that Article 377 § 4 CCP concerns only the first interrogation of the accused (“who has not yet provided explanations”). Such limitations seem to be unjustified. The accused has the right to provide explanations regarding any evidence taken in the case (Article 386 § 2 CCP) and the court may also consider it necessary to conduct a supplementary hearing of the accused.

Having the above in mind, the question is whether, despite the lack of an appropriate regulation in the CCP, the court may issue an EIO to interrogate the accused via videoconferencing, which is a possibility provided for in Article 24 (1) of Directive 2014/41 and whether it can only be “the first hearing”.

The CCP in the Chapter concerning an EIO does not specify the type of evidence for which an EIO may be used. Article 589w § 1 CCP indicates only that the EIO may be issued “When it is necessary to examine or obtain evidence that is located or may be gathered within the territory of another Member State of the European Union”. No doubt, the scope of application of the EIO depends on the law of the Member States, which independently defines the investigative activities permitted during criminal proceedings. However, it cannot be said that the scope of application of the EIO is indefinite.<sup>141</sup>

As mentioned already in the Report, Article 589x (2) of the CCP allows the issuance of an EIO only if the same evidence could be taken in an internal case. In our opinion, this means that

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needed for hearing testimony of such a witness. It seems that this provision applies also to defendants who are not deprived of liberty during the trial.

<sup>140</sup> Article 377 § 4 CCP: If the accused deprived of liberty has not yet given their explanations before the court, either Article 396 § 2 may be applied or reading of the explanations submitted earlier by the accused may be deemed sufficient. The accused may be questioned with the use of the means referred to in Article 177 § 1a.

Article 396 § 2 CCP: The court may order that a witness be questioned by a judge designated from the panel or by another court appointed for that purpose in the region in which the witness stays, in the event that the witness has failed to appear due to some insurmountable obstacles.

Article 177 § 1a CCP: Questioning of a witness may take place with the use of technical devices enabling this procedural action to be conducted remotely on the basis of a simultaneous direct transmission of image and sound. In preparatory proceedings, in a procedural action conducted by a public prosecutor, in the place of stay of the witness shall be present an apprentice prosecutor, an assistant to the public prosecutor, or an official employed by the public prosecutor's office; in questioning conducted by the court, in the place of stay of a witness shall be present a judicial apprentice, court clerk, judicial assistant, or an official employed at the court in whose region the witness stays.

<sup>141</sup> Krysztofiuk, “Europejski nakaz dochodzeniowy”, 12 *Prokuratura i Prawo* (2015), 74-98, at 83.

issuing an EIO is undoubtedly inadmissible if the CCP clearly prohibits obtaining or taking certain evidence (i.e. the evidentiary prohibition is formulated, for instance, the inadmissibility of hearing a defense counsel as a witness about the facts communicated to him while giving legal advice or conducting a case - Article 178(1) CCP) or if a certain form of evidence is not regulated at all for domestic cases). As rightly argued in the literature, this ground for the inadmissibility of issuing an EIO is intended to prevent the circumvention of national rules of evidence and the so-called "laundering of procedural rules", i.e. a situation when national authorities will request evidentiary activities that are inadmissible under national law by sending the EIO to countries where it is possible to carry out these activities.<sup>142</sup> Nevertheless, the interrogation of the accused is, of course, an evidentiary activity expressly provided for in the Polish CCP, and the issue analyzed here concerns only the form of carrying out this activity (the admissibility of conducting it via videoconference).

All the above considerations allow us to conclude that it is possible to issue an EIO not only to conduct "the first interrogation" in the judicial proceedings but simply every interrogation which is necessary for evidentiary purposes. Nonetheless, the Polish law does not grant the accused the right to be interrogated by videoconferencing. This form of interrogation is seen as an exception from the direct taking of evidence and may not be requested by a defendant who simply does not wish to appear in person before the court.

The second part of the question concerning the admissibility to use the EIO for the sole purpose of enabling a defendant participation in the hearing must be answered in negative way. A defendant staying in another MS should not be granted more procedural rights than a defendant in purely domestic proceedings. Thus, if a defendant residing in Poland and not detained is not allowed to ask to provide him with the opportunity to participate in the hearing via videoconferencing, the same should apply to a defendant staying in another MS. Moreover, as already mentioned, the EIO cannot be issued for the sole purpose of ensuring the presence of the accused at the trial.

### Application in practice

As practitioners and members of the academia pointed out during the interviews, it is not possible to use the EIO to ensure participation of the accused in the trial. They underlined the purpose of the EIO which is to obtain evidence.

All the judges interviewed for the purpose of the project reported a lack of experience in issuing the EIO for the purpose of providing a defendant staying in another MS with the opportunity to participate in the hearing conducted in Poland by videoconference.

A few practitioners underlined that the legal basis for ensuring the participation of the accused in the trial (hearings) by videoconferencing may be found in the Second Additional

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<sup>142</sup> Kusak, "Cele i przesłanki wydania europejskiego nakazu dochodzeniowego" in Kusak (ed.) *Dowody zagraniczne. Gromadzenie i dopuszczalność w polskim procesie karnym. Przewodnik z wzorami* (Wolters Kluwer, 2019), p. 23.

Protocol to the European Convention on Mutual Assistance in Criminal Matters of 1959 and in the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and its Protocol. However, Poland made reservations to these Conventions with reference to the hearing of the accused by means of videoconference. Thus, they argue that the main obstacle for the use of this way of participation of the accused in the hearing is rooted in the Polish law and the above-mentioned reservations.

#### - EU Convention for Mutual Assistance

##### Inviting him for an interrogation (serving summons abroad)

#### Application in practice

Practitioners indicate that the basic way of serving correspondence to an accused staying in the territory of another EU Member State is the method referred to in Article 5 (1) of the 2000 Convention on legal assistance in criminal matters between the Member States of the European Union. Thus, the correspondence is sent directly by post. The obligation to send correspondence to the address indicated by the accused as the address for service in the territory of another EU Member State also results directly from Article 138 CCP. Practitioners confirm that this obligation is fulfilled in the manner referred to in Article 5 (1) of the 2000 Convention.

A significant issue is the correct delivery to the accused of summons to the trial date. In most cases, the accused's appearance at the trial is not obligatory, but the trial cannot be held if the accused was not properly notified of its date. Moreover, in accordance with Article 132 § 4 CCP, for effective notification of the **first date of the hearing**, it is required that the accused receives the notification in person (which he confirms with his own signature on the return receipt confirmation of correspondence). Other types of summoning, i.e. a delivery of the notification to an adult member of the household, via e-mail or to the accused's place of work to the person authorized to receive correspondence, are excluded. Therefore, if the accused receives the notice of the trial date in person, the trial may proceed regardless of his failure to appear (unless his presence is mandatory in felony cases at the initial activities or due to the decision of the court or the presiding judge). Nevertheless, a fundamental problem becomes apparent when the accused does not receive correspondence at the residential address or correspondence address indicated by him. In such a case, the Polish CCP allows for "the fiction" of correct delivery. This means that it is assumed that the returned, uncollected correspondence left in the case files was properly delivered to the addressee. Nonetheless, the condition here is to repeat the delivery attempt after 7 days from leaving the correspondence during the first delivery attempt (Article 133 § 1 CCP – § 1 reads as follows: If the service cannot be effective as prescribed in Article 132 CCP, the document dispatched by a post operator within the meaning of the Act of 23 November 2012 – the Postal Law, shall be left at the nearest post office of that operator, and a document served in a different manner shall be left at the nearest unit of the Police, or at a competent

municipal office; § 2. The person serving a court document shall notify the addressee that the document has been left elsewhere, as prescribed in § 1, by affixing a prominent notice to the door of the addressee's apartment or in another visible place, setting forth where and when the document has been left and stating that it shall be collected within 7 days; in the case of an ineffective lapse of this time frame, the notification procedure shall be carried out once again).

As reported by practitioners, postal services in other MS are unfamiliar with this practice of an attempt to re-deliver after 7 days from the first, unsuccessful attempt. In such a case, to meet the requirement of proper summoning of the accused to the trial, the possibility referred to in Article 5 (2) of the 2000 Convention is used, and therefore the notice of the trial (especially its first date) is served through the appropriate authority of a Member State. If it is still impossible to effectively (in person) deliver the correspondence to the accused, there are two options.

First, as mentioned in the doctrine<sup>143</sup>, if the accused does not receive correspondence at the address indicated by him in one of the MS, an official note from a secretariat employee about sending the summons to the address indicated by the accused in another MS must be sufficient, assuming that the summons was sent in advance, allowing for its early delivery. However, such an annotation should be supplemented with information from the postal operator regarding the delivery status of the summons. The delivery date should be the day provided by the operator. Nevertheless, it is pointed out that a lack of information from the postal operator should result in an attempt at repeated delivery using mutual legal assistance instruments<sup>144</sup>. As a rule, the service of summons delivered by the latter way shall be assessed as effective once it was made in accordance with the provisions of *lex loci*.

The second potential option is to ask the authority providing legal assistance to comply with the requirement arising from Article 133 §§ 1 and 2 of the CCP, i.e. the requirement to make a double attempt to deliver the summons after 7 days from the first attempt, leaving information about the possibility of collecting the summons at this authority and ordering the summons to be returned if it is not collected after the next 7 days.

It is worth noting, however, that only the 1959 Convention provides a solution (in Article 7 (1)) according to which, if the requesting Party expressly so requests, service shall be effected by the requested Party in the manner provided for the service of analogous documents under its own law or in a special manner consistent with such a law. There is no analogous provision in the 2000 Convention.

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<sup>143</sup> Buczma, Kierzyńska (ed.), Stefaniak-Dąbrowska, *Wzajemne uznawanie orzeczeń karnych w Unii Europejskiej. Poradnik dla praktyków* (Wydawnictwo Krajowej Szkoły Sądownictwa i Prokuratury, 2023), p. 28.

<sup>144</sup> For more information on service of summons in criminal proceedings in Poland – see: Wąsek-Wiaderek, Zbiciak, “The Practice of Poland on the European Arrest Warrant” in Barbosa, Glerum, Kijlstra, Klip, Peristeridou, Wąsek-Wiaderek, Zbiciak, *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, 23 Maastricht Law Series (2022), pp. 316-319.

## - Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Is it possible under national law to transfer proceedings that are at the trial stage, and if so, under what conditions?

As already mentioned, Poland is not a party to the European Convention on the Transfer of Proceedings in Criminal Matters.

### Application in practice

Practitioners interviewed did not encounter the transfer of proceedings at the stage of court proceedings based on the provisions of the European Convention on Mutual Assistance in Criminal Matters (of 1959).

One of the interviewed judges indicated that in recent years he had twice encountered the situation of transferring proceedings on the basis of bilateral agreements with the Czech Republic<sup>145</sup> and Hungary.<sup>146</sup>

However, as already stated in the Report, the issue of transferring proceedings from Poland to another country is regulated in Article 591 of the CCP<sup>147</sup>. This possibility applies mainly to foreigners who have committed a crime on Polish territory. An appropriate request to take over the prosecution is submitted by the Minister of Justice on the initiative of the court or prosecutor. This means that it is also possible to submit a request to take over the prosecution at the stage of court proceedings. The doctrine indicates that the transfer of prosecution by the Polish justice system may take place until the final conclusion of the court proceedings.<sup>148</sup>

The regulations of the CCP regarding the transfer of proceedings are supplemented by the Regulation of the Minister of Justice of 28 January 2002, on detailed activities of courts in matters relating to international civil and criminal proceedings in international relations.<sup>149</sup> Under § 71 of this Regulation, in cases concerning a crime committed in the territory of the Republic of Poland by a foreigner against whom an indictment was brought, the court determines the admissibility and assesses the advisability of submitting a request to the competent authority of a foreign state to take over the prosecution. In case of positive assessment, the court prepares an application and submits it in two copies to the Minister of Justice.

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<sup>145</sup> Poland and Czech Republic are parties to the bilateral agreement adopted in 1987 concerning legal assistance in civil and criminal matters. It contains detailed provisions concerning transfer of prosecution. See, Journal of Laws 1989, No. 39, Item 210.

<sup>146</sup> Statistics concerning transfer of proceedings, without division as to the stage of the proceedings at which the request was made, were presented in the previous Section of this Report concerning the pre-trial stage of the proceedings.

<sup>147</sup> The wording of this provision was quoted in previous section of this Report.

<sup>148</sup> Janczur, „Przejęcie i przekazanie ścigania karnego”, 5 *Prokuratura i Prawo* (1999), 61-85, at 84-85.

<sup>149</sup> Journal of Laws 2014, Item 1657.

The practitioners interviewed have only insignificant experience with the institution of transfer of proceedings, but it can be an alternative to the use of the European Arrest Warrant, after meeting the conditions provided for by the Polish law.

### **(bb) Ensuring that the suspect is available**

- FD 2009/829/JHA(?)

Is it possible under national law to issue an ESO, when the person concerned is in the MS of his lawful and ordinary residence and detention is not ordered?

As was already explained in Section of the Report concerning the pre-trial stage of the proceedings, under Polish law it is possible to issue an ESO if the person concerned is staying in another MS and no detention was ordered.

It should be underlined that an ESO may also be used for keeping in contact with a defendant. The accused must be effectively notified of the date of the trial. To ensure that correspondence is sent to the correct and current address, and therefore that, if necessary, the court will have a real opportunity to establish effective written contact with the accused, the court may use information stemming from the execution of the ESO in another MS. It should be recalled that the ESO may concern, among others, a measure of police supervision (Article 275 § 1 and 2 CCP), which may include the prohibition to leave a specific place of stay, reporting to the supervising authority at specified intervals, notifying it of intended travel and the date of return. These obligations guarantee that the accused, who remains at liberty and whose presence is not required by the court at the trial, will be available upon request if such a need arises.

Under Article 75 § 1 CCP, the accused is obliged to notify the authority conducting the proceedings of each change of his place of residence or stay in another place lasting for a period longer than 7 days, including also as a result of imprisonment in connection with another case. Under Article 139 § 1 CCP, if a party to the proceedings has changed their place of residence and failed to give notification of his new address or does not stay at the designated address – also as a result of imprisonment with regard to another case – a document dispatched to the address last designated by such a party shall be considered to have been served.

Returning correspondence uncollected by the accused and leaving it in the case files with the effect of delivery to the court may be sufficient to recognize that the accused has been effectively notified of the trial date, of course only in the absence of mandatory appearance of the accused. Nevertheless, if the court wants to communicate with the accused to obtain a response from him, as well as make him appear and participate in a specific activity, then the fiction of proper delivery would be useless. Hence, it seems that only an ESO regarding a preventive measure in the form of police supervision could be a real, effective alternative to the use of detention on remand and subsequent issuing of the EAW. Then the court will have a real

chance to know where the accused permanently resides and at what address he can be efficiently contacted.

The similar role may be played by the letter of safe conduct (literally translated from Polish as “the iron letter”) discussed in the previous Section of the Report.

#### - EU Convention on Mutual Assistance

Keeping in contact with him while he’s abroad (sending/service documents).

See, comments concerning summoning made above.

#### - Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Is it possible under national law to transfer proceedings that are at the trial stage, and if so, under what conditions?

See the answer to this issue in part aa above.

#### (cc) Ensuring the suspect’s presence at trial

##### General remarks

At this point, only cases of obligatory presence of the accused at the trial should be considered, as this is implied by the phrase "ensuring presence".

Under Article 374 § 1 and § 1a of the CCP, the accused has the right to participate in the trial. The presiding judge or the court may consider the presence of the accused mandatory. In cases related to felonies, the presence of the accused during the actions referred to in Articles 385 and 386 CCP is mandatory. Therefore, only in cases of felonies during the first activities with the accused, i.e. when briefly presenting the charges against the accused, giving instructions and receiving explanations (if the accused wants to give them) the presence of the accused at the trial is required by law. In all other cases, the obligation of the accused to participate in the trial depends on the decision of the court or the presiding judge. At this point in the Report, we continue to analyze the situation in which the accused remains at liberty in the territory of another EU Member State and detention on remand has not been ordered.

In cases other than those concerning felonies, the court or the presiding judge may decide that the presence of the accused at the hearing is mandatory. However, the mandatory presence must always have a specific purpose. In felony cases, this will include the performance of the above-mentioned preliminary steps, including the first interrogation of the accused in the judicial proceedings. In other cases, the decision about the mandatory presence of the accused at the trial should be issued for some specific reasons, for instance to ensure the participation of the

accused in a confrontation, a presentation or subsequent interrogation. Thus, it should not be ordered just for ensuring the mere presence of the accused in the courtroom. The doctrine<sup>150</sup> even states that the court should justify why it departs from the rule of optional presence of the accused at the trial since the accused has a right but not the obligation to take part in the hearing. It is argued that the obligation of the accused to be present at the trial based on the court's decision should be limited to the specific activities which require participation of the accused. Moreover, such decision cannot under any circumstances be arbitrary but should be justified by the specific circumstances of the case. Such interpretation is fully justified if one takes into account that mandatory presence of the accused in the hearing may be secured by using coercive measures involving deprivation of liberty in the event of the accused's failure to appear when summoned by the court. Thus, it may result even in the subsequent issuance of an EAW.

- FD 2009/829/JHA (?)

Is it possible under national law to issue an ESO when the person concerned is in the MS of his lawful and ordinary residence and no detention on remand is ordered?

The previous considerations (part aa) regarding the application of the ESO mechanism and the delivery of correspondence based on the provisions of the 2000 Convention remain fully valid also with reference to the issue discussed here. If the accused's participation in the trial is to be ensured using alternative measures to deprivation of liberty, it will be essential to deliver the summons by post to the current address of the accused in another EU Member State.

- DR 2014/41 (?)

Is it possible under national law to employ an EIO for the purpose of ensuring presence at the trial (either through a videoconference or a temporary transfer)?

As was indicated above (see part aa of this Section), *de lege lata* according to the Polish CCP an accused may be interrogated by the use of videoconference if he is deprived of liberty since the whole hearing may be conducted in the form of videoconference only with reference to an accused who is deprived of liberty. The only exception to this rule is the possibility to conduct the first interrogation of an accused by the court with the use of videoconference if the accused does not appear at the hearing despite the fact that his presence is mandatory (Article 377 § 4 CCP). However, it should be noted again that an EIO cannot be issued in order to ensure solely the participation of the accused in the trial. The same applies to issuing the EIO concerning participation of an accused in the hearing conducted in the form of videoconference.

In felony cases, since the mandatory presence applies to, among others, the first interrogation of the accused (preceded by a concise presentation of the prosecution's charges

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<sup>150</sup> Świecki, „Komentarz do art. 374 Kodeksu postępowania karnego” in Świecki (Ed.), *Kodeks postępowania karnego. Komentarz. Tom I. Art. 1–424* (Wolters Kluwer, 2024).



and instruction on basic rights), the use of videoconferencing (as part of the EIO) will be possible solely for the purpose of such obligatory activities with the accused. This is also the opinion of the interviewed practitioners, but it is worth noting that this is their opinion, not their experience in using this measure.

In other cases where the presence of an accused in the hearing is mandatory on the basis of the court's decision and the accused duly summoned to the hearing fails to appear without justification, the court may resort to deprivation of liberty of the accused.

#### Application in practice

The interviewed judges stated that with reference to a defendant staying in another MS they usually do not order his participation in the trial mandatory.

With reference to the temporary transfer, all interviewed practitioners reported that it is not possible to apply a temporary transfer of the accused solely for ensuring his participation in the trial. As mentioned above, the EIO does not serve to implement the accused's procedural rights.

**Is it possible under national law to transfer proceedings that are at the trial stage, and if so, under what conditions?**

The interviewed practitioners indicated that the transfer of proceedings is an institution used very rarely. It is impossible to justify the need to transfer the proceedings abroad solely to guarantee the accused's participation in the trial (especially if all the evidence is in Poland).

#### **- EU Convention on Mutual Assistance**

With reference to summoning the accused abroad – see remarks presented in Section 2.3.(b)(i)(bb).

#### **- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters.**

See remarks presented in Section 2.3.(b)(i)(bb).

#### **(dd) Other (?)**

The guarantee of safe conduct (so called “iron letter”) may also be used to secure the defendant's presence at the trial.

#### **(ii) detention on remand ordered**

**(aa) executing investigative measures/prosecution such as interrogating the suspect;**

- FD 2002/584/JHA

Prosecution-EAW. Is it possible under national law to issue a prosecution-EAW just to execute investigative measures, such as an interrogation? Pending the decision on the execution of a prosecution-EAW, the person concerned could be heard in the executing MS or be temporarily transferred to the issuing MS on the basis of Art. 18 and 19 FD 2002/584/JHA.

At the stage of court proceedings, the regional court before which the proceedings are pending or in whose district the district court conducting the proceedings is located is competent to issue an EAW<sup>151</sup>.

A prosecution-EAW may be issued in connection with criminal proceedings conducted against the requested person for an offence subject to the penalty of imprisonment for more than one year (Article 607a CCP and Article 607b (1) CCP). The CCP does not further specify the purpose of issuing the prosecution-EAW. The interviewed practitioners agreed that a prosecution-EAW at the stage of court proceedings may be issued whenever the court deems the presence of the accused at the trial to be mandatory. The accused has several obligations to which he must comply during the proceedings conducted against him. They include, among others, the obligation to submit themselves to an external examination of their body and other examinations not involving any infringement of bodily integrity; psychological and psychiatric examinations as well as examinations involving certain tests conducted upon their body, except surgical procedures, provided that the examinations are carried out by an authorized health care specialist according to the principles of medical knowledge and do not constitute any threat to the health of the accused, provided that such examinations are indispensable; in particular, the accused shall be obliged, in conformity with the above-mentioned conditions, to submit blood, hair and excretory samples.

There is no doubt that issuing an EAW to enable the above-mentioned activities to be performed with the accused at the stage of court proceedings is admissible when the accused duly summoned fails to appear before the authorities competent to conduct such activities or when there is a risk that summoning to appear would be ineffective. However, in cases concerning less serious offences the EIO may primarily be used to effectively perform most of these activities.

In the case of issuing an EAW for the purpose of interrogating the accused at the hearing (in case of his mandatory participation in the hearing), a fundamental problem is that the accused has the right to refuse to provide explanations or answer questions, including during a confrontation with a witness. Even in felony cases, the obligation of the accused to be present in

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<sup>151</sup> Steinborn, „Komentarz do art. 607a” in Paprzycki (Ed.), *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego* (LEX, 2015).

the courtroom expires from the moment the accused decides to exercise his right to silence and declares not to give explanations.

Thus, issuing an EAW exclusively for the purpose of the accused's interrogation at the trial may be assessed as contrary to the accused's right to silence and the principle of *nemo se ipsum accusare tenetur*, provided in Article 74 § 1 CCP. It must therefore be concluded that the issuance of an EAW solely for the purpose of interrogating the accused who is not obliged to give explanations, except in the case of the accused's mandatory *ex lege* presence in felony cases in activities preceding his interrogation, would be disproportionate. Therefore, due to the lack of interest of the justice system, the issuance of an EAW in such a case should be considered inadmissible within the meaning of Article 607b of the CCP.

It should be highlighted that, unlike at the pre-trial stage of the proceedings, during judicial proceedings interrogation of the accused is conducted exclusively for evidentiary purposes. It cannot be classified any more as aimed at "prosecution" of the accused.

The principle of proportionality in the context of the lack of "the interest of justice" in issuing an EAW can also be understood in this way: if a given activity can be carried out by the use of an EIO – even in the form of a videoconference – then such an instrument should be used, and not the EAW involving the deprivation of liberty. The doctrine explicitly states that the EAW should be treated as the *ultima ratio*.<sup>152</sup>

It is worth noting that the regional courts which are competent to decide on EAWs, quite frequently refuse to request surrender of the accused with the argument that other, less severe measures have not been exhausted first. They also rely on the principle of proportionality and stress that before applying for the EAW, attempts should be made to deliver the correspondence directly to the accused's address in the territory of another Member State or even to determine such an address. Only if these efforts prove unsuccessful is it possible to consider again the motion to issue the EAW.<sup>153</sup>

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<sup>152</sup> Steinborn, „Komentarz do art. 607a” in Paprzycki (Ed.), *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego* (LEX, 2015).

<sup>153</sup> Decision of the Regional Court in Konin of 25 March 2020, case no. II Kop 2/20 - In the justification for the decision to refuse to issue an EAW, the court indicated the need to attempt to deliver correspondence by traditional post and to consider using the EIO. Decision of the Regional Court in Częstochowa of 14 April 2020, case no. II Kop 12/20 - When refusing to issue an EAW, the court pointed to its prematurity and the need to attempt to deliver correspondence to the accused's known residential address abroad, similarly the Regional Court in Słupsk in its decision of 8 April 2020, case no. II Kop 6/20. The Regional Court in Konin in its decision of 7 March 2020, case no. II Kop 3/20, refusing to issue an EAW, pointed out the need to attempt to deliver correspondence first. These judgments have not been published, they were made available to the author as part of access to public information. On the application of the principle of proportionality in issuing the EAWs in Poland - see also: Wąsek-Wiaderek, Zbiciak, "The Practice of Poland on the European Arrest Warrant" in Barbosa, Glerum, Kijlstra, Klip, Peristeridou, Wąsek-Wiaderek, Zbiciak, *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, 23 Maastricht Law Series (2022), p. 256-262.

Pending the decision on the execution of a prosecution-EAW, the person concerned could be heard in the executing MS or be temporarily transferred to the issuing MS on the basis of Art. 18 and 19 FD 2002/584/JHA.

For more information on this issue – see the Section of the Report concerning pre-trial stage of the proceedings. As mentioned there, the Polish law implementing the FD EAW with regard to this issue is incorrect. It will have to be amended during the upcoming years in order to implement the Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalization of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation<sup>154</sup> and the Directive (EU) 2023/2843 of the European Parliament and of the Council of 13 December 2023 amending Directives 2011/99/EU and 2014/41/EU of the European Parliament and of the Council, Council Directive 2003/8/EC and Council Framework Decisions 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, as regards digitalization of judicial cooperation<sup>155</sup>.

The practitioners interviewed had no experience with requesting during judicial proceedings the interrogation of the accused in another MS while waiting for the execution of the EAW. However, they quite frequently conduct such hearings as the executing authorities in the EAW proceedings.

- DR 2014/41 (?)

Temporary transfer /videoconference

Under national law, is a videoconference possible with the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? If not: is such a videoconference possible without issuing an EIO? Is a videoconference possible for the purpose of interrogation of the accused at the trial by the trial court? If not: is such a videoconference possible without issuing an EIO?

#### Videoconference

The Polish law provides for conducting the main hearing via videoconferencing, only if two conditions are fulfilled concerning the defendant: 1) his presence at the hearing is mandatory in accordance with the law; 2) he is deprived of liberty and takes part in the hearing from the penitentiary unit where he is staying (Article 374 § 4-9 of the CCP).<sup>156</sup> Hence, a defendant being

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<sup>154</sup> O.J. L 2023/2844, 27.12.2023.

<sup>155</sup> O.J. L 2023/2843, 27.12.2023.

<sup>156</sup> Article 374 § 4. The presiding judge may waive the obligation to appear at the trial with respect to the defendant, auxiliary prosecutor or private prosecutor if they are imprisoned, provided that their attendance at the trial is ensured with the use of technical devices enabling the attendance at the trial to be conducted remotely on the basis of a simultaneous direct transmission of image and sound.

at liberty as a rule is not allowed to request **participation** in the hearing by videoconferencing.<sup>157</sup> The only exception seems to be provided by Article 390 § 4 CCP, which allows removal of the accused from the courtroom and granting him remote participation in the part of the hearing if it is indispensable for protection of a witness giving testimony before the court.

Since in domestic cases it is allowed to provide the accused with the opportunity to take part in the hearing by videoconferencing, of course under the above-mentioned conditions, under national law, there should be no obstacles to issue the EIO for the same purpose, at least *prima facie*.

**However, since the purpose of the EIO is to gather and obtain evidence, an EIO issued for the sole purpose of securing the participation of the accused in the hearing must be assessed as inadmissible<sup>158</sup>.**

On the other hand, it must be noted that at least in felony cases, the presence of the accused in the hearing is mandatory exactly during his interrogation (the hearing starts from concise presentation of the charges against the accused; instructing the accused about his basic rights; then the presiding judge asks the accused whether the charges are clear to him and asks whether he would like to make statements or answer questions). These activities, for expediency reasons, should be treated as integral activities of the first interrogation of the accused, having

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§ 5. In the situation specified in § 4, a court clerk or assistant judge employed by the court in whose district the party has its place of stay, or a representative of the administration of the prison or the remand centre, if the party is in a prison or a remand centre, shall be present at the trial at the place of stay of the party.

§ 6. The defence counsel shall attend the trial held as per § 4 at the place of stay of the defendant, unless they appear in court for this purpose.

§ 7. If the defence counsel is present at the trial while being in a different location than the defendant, the court may order an adjournment for a definite period of time at the motion filed by the defendant or the defence counsel in order to resume the trial on the same day and allow the defence counsel to contact the defendant by phone, unless granting the motion clearly does not serve the purpose of exercising the right to defence and especially aims to disrupt or extend the trial without due cause.

§ 8. If there is a need for a translator to be present at the trial held as per § 4, the translator shall be present at the trial at the place of stay of the defendant who is not sufficiently fluent in Polish or at the place of stay of the person with regard to whom the circumstances specified in Article 204 § 1 (1) apply, unless the presiding judge rules otherwise.

§ 9. The provisions of Article 517ea shall apply accordingly.

<sup>157</sup> On conducting the hearing by videoconference in Poland, see: Sakowicz, Zieliński, “Towards a Digitalized Criminal Justice System: Lessons from Poland”, 10(2) *Revista Brasileira de Direito Processual Penal* (2024), vol. 10, no. 2, e995, <https://doi.org/10.22197/rbdpp.v10i2.995> (last visited: 8 Oct. 2024).

<sup>158</sup> Similar opinion was expressed in the *Evaluation Report on the 10th Round of Mutual Evaluations on the implementation of the European Investigation Order (EIO). Report on Poland*, Document 13516/1/24 REV 1, issued on 2 October 2024, <https://www.consilium.europa.eu/en/documents/public-register/public-register-search/?AllLanguagesSearch=false&OnlyPublicDocuments=false&DocumentNumber=13516%2F24&DocumentLanguage=EN> p. 59 (last visited: 30 April 2025): “Under Polish law, it is not possible to issue or execute an EIO in order to ensure the participation of the accused person throughout the main trial. The EIO is an instrument intended to gather evidence and cannot be used to ensure the participation of a party in the proceedings. However, during the visit, the replies from the practitioners were more nuanced and one of the Polish judges mentioned that she would order the execution of such an EIO. This gave the evaluation team the impression that different practitioners from the judiciary might have different views on this issue.”

the nature of investigative activities in the broad sense. Consequently, **since the above activities are closely connected with interrogation of the accused as such, one may argue that issuing an EIO for the purpose of ensuring the accused the opportunity to participate in the hearing, once his participation is obligatory, is admissible as long as the hearing concentrates on interrogation and the above-mentioned activities preceding such an interrogation.**

It is important to analyze the term “participation” in the hearing. The linguistic interpretation of Article 374 § 4 CCP does not prevent the recognition that the accused's "participation" in the trial should also include his interrogation. This conclusion is also consistent with the teleological interpretation – it is hardly possible to argue that in Article 374 § 4-9 CCP the legislator only wanted the accused to be able to remotely participate at the trial and listen to what is taking place there, possibly ask questions to witnesses or make statements regarding the evidence presented, but in order to question the accused and receive explanations from him, he would have to be brought to the trial for his personal appearance there. The conclusion that participation of the accused in the hearing conducted by videoconferencing includes also his interrogations made during such a hearing is also supported by the wording of the whole provision of Article 374 CCP, in particular by Article 374 § 7 CCP concerning contacts of the accused with his defence counsel during the hearing conducted remotely.

#### Application in practice

Most of the interviewed practitioners reported a lack of experience in using videoconference for conducting the hearing with the participation of the accused staying abroad. They underlined the lack of clarity of the existing national regulations as to the scope of the possible use of videoconferencing. The interviewed judges stressed that only exceptionally are they confronted with the need to conduct a hearing in such a way. If the proceedings concern a very serious offence, the defendant is usually detained on remand already from the beginning of the proceedings, so he is usually already surrendered to Poland at the pre-trial stage of the proceedings. In other cases, there is still the possibility to conduct the hearing without the participation of the accused.

**Under national law, is a temporary transfer possible for the sole purpose of ensuring the presence of the accused at the trial (i.e. without the purpose of gathering evidence)? Is a temporary transfer possible for the purpose of interrogation of the accused at the trial by the trial court?**

It is possible to issue an EIO for the temporary transfer of a person deprived of liberty in another EU country, even if no decision on detention on remand has been ordered in Poland. This is possible among others, if the person concerned is serving a sentence in the executing MS. Polish law does not require that detention on remand must be ordered for the application of temporary

transfer under the EIO instrument. As already indicated, the accused must, however, be deprived of liberty (e.g. be serving a prison sentence in another country).

Issuing an EIO is possible also at the trial stage of the proceedings. In general, then an EIO is issued by the court before which the case is pending. Nevertheless, with reference to temporary transfer, the regional court of the place where the evidence activity is performed is competent to decide on placing a person temporarily transferred under the EIO in a prison in Poland, regardless of whether the main proceedings are pending before this court, and regardless of which court or other authority is to perform the activity with the participation of this person.<sup>159</sup> The competence of the regional court stems from the reference made in Article 589z § 1 CCP to Article 589a CCP. In the absence of a different, particular regulation on this issue, it seems that for guarantee reasons, the regional court will also be competent to issue an EIO for the temporary transfer of the accused, even if the proceedings are pending before a district or appellate court. This conclusion is even more justified since the regional court would have to decide on placing the accused in a particular prison, in the event of his temporary transfer, in accordance with Article 589a § 1 CCP in conjunction with Art. 589z § 1 CCP. Of course, this will not be the application of detention on remand, but a decision to temporarily place in a Polish prison a person who is deprived of liberty in another EU Member State.

As already stated with reference to the pre-trial stage of the proceedings, it is underlined in the literature, that the EIO concerning temporary transfer cannot be issued for the purpose of prosecuting the person concerned but only for evidentiary purposes.<sup>160</sup> Nonetheless, since the interrogation of the defendant at the hearing serves evidentiary purposes, in my opinion the issuance of an EIO is admissible in such circumstances.

However, merely providing the accused with the opportunity to participate in the trial – without interrogating him – does not fall within the concept of "investigative measure".

### Application in practice

The majority of the interviewed practitioners reported a lack of experience with temporary transfer of the accused under the EIO regime. They consider this measure troublesome and time-consuming.

They emphasised the potential high costs of organizing the temporary transfer of the accused and other problems of an organizational nature (organization of convoys, communication

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<sup>159</sup> Głogowska, „Komentarz do art. 589z Kodeksu postępowania karnego” in Zagrodnik (Ed.), *Kodeks postępowania karnego. Komentarz* (Wolters Kluwer, 2024). See also *Evaluation Report on the 10th Round of Mutual Evaluations on the implementation of the European Investigation Order (EIO). Report on Poland*, Document 13516/1/24 REV 1, issued on 2 October 2024, p. 14; available at: <https://www.consilium.europa.eu/en/documents/public-register/public-register-search/?AllLanguagesSearch=false&OnlyPublicDocuments=false&DocumentNumber=13516%2F24&DocumentLanguage=EN> (last visited: 30 May 2025).

<sup>160</sup> Kuczyńska, in Skorupka (Ed.), *Kodeks postępowania karnego. Komentarz* (C.H. Beck, 2020), p. 1603.

with the authority of the country where the accused is staying) were pointed out. At the same time, it was mentioned that providing the accused with the opportunity to participate in the hearing through videoconferencing would be much more purposeful and sufficient, although the interviewees had no experience in using it for this purpose.

Such an attitude of practitioners with reference to this measure may be explained by the fact, that as a rule, the defendant does not have to participate in the hearing. Thus, it is not necessary to use this measure to obtain his statements at the trial. All the more so, the statement of the defendant given at the pre-trial stage of the proceedings may be read out at the hearing (Article 389 CCP).

#### - EU Convention on Mutual Assistance

The information provided in the part of the Report regarding the accused who is not subject to detention on remand in terms of serving correspondence and transfer of proceedings remains valid also for situations where the accused is deprived of liberty during the trial stage of the proceedings.

#### - Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

##### Is it possible under national law to transfer proceedings that are at the trial stage?

Yes, it is possible under the Polish law to transfer the proceedings at the trial stage. For more information, see the considerations in the part of the Report regarding the situation in which detention on remand is not ordered.

#### (bb) Ensuring that the suspect is available

The considerations made in the previous parts of the Report in relation to the accused for whom detention on remand is not ordered are largely valid here.

The following are only supplementary comments on two points.

#### - FD 2002/584/JHA - Prosecution-EAW

The question here is whether it is possible to issue an EAW solely to ensure the availability of the accused, without the purpose of conducting any evidentiary activity with him. *Prima facie*, it seems that the general concept of conducting proceedings against the accused (as one of the two purposes of issuing an EAW) could also be understood as a guarantee that, as a result of surrender based on the EAW, the accused is simply available for the proceedings. However, it is difficult to see proportionality or the existence of an interest of justice (Article 607b of the CCP) in issuing an EAW only for this purpose. There must be a specific reason for which a prosecution-EAW involving deprivation of liberty is issued. Such a goal is the presence of the accused at the



trial, if this is mandatory under the law (Article 374 § 1a CCP) or conducting preliminary activities with the accused and the first interrogation (during which the accused may, of course, refuse to provide explanations). The issuance of an EAW to ensure the availability of an accused at trial without an additional specific purpose may be assessed as disproportionate.

#### - FD 2009/829/JHA (?)

Is it possible under national law to issue an ESO when the person concerned is in the MS of his lawful and ordinary residence?

As was already mentioned in this Report, there are no obstacles to issuing an ESO if the accused is not staying in Poland. Although in accordance with Article 249 § 3 of the CCP, before applying a preventive measure, the court applying the measure should interrogate the accused, but in the same provision, the legislator allows waiving the interrogation of the accused if it is impossible due to his hiding or absence from the country. It follows from Article 607zd CCP that the condition for issuing an ESO is simply the prior application of one of the preventive measures, provided that the accused is staying in one of the EU Member States where he has a legal permanent residence or declares the intention to return there.

Therefore, the legislator provided for the possibility of issuing an ESO both with reference to the accused staying abroad (this is indicated by the phrase: "if the accused stays") and to the accused staying in Poland (this is indicated by the phrase: "or **declares** that he intends **to return** there"). It is only necessary to consider whether the possibility of waiving the requirement to interrogate the accused, referred to in Article 249 § 3 of the CCP – the inability to interrogate the accused due to his absence from the country – may be replaced by conducting his interrogation activities as part of the EIO, e.g. in the form of a videoconference. The answer here is not clear – cut since the decision to apply preventive measures - especially liberty measures (speaking of the ESO instrument) - should be made swiftly, without undue delay, which in this case could be associated with initiating the procedure for using the EIO. Furthermore, the interrogation of the accused in such circumstances does not aim at gathering or obtaining evidence (which is the aim of the EIO) but rather for obtaining his statement concerning the application of preventive measures. This leads to the conclusion that the absence of the accused in the country makes it possible to waive his interrogation before the application of a non-custodial preventive measure, regardless of the potential possibility of interrogating him as part of the EIO in the form of a videoconference, or even through consular authorities in case of a Polish citizen. Therefore, the answer to the question about the possibility of further application of ESO in such a case is affirmative.

#### - EU Convention on Mutual Assistance

Keeping in contact with the person concerned while he is abroad (sending/service of documents)

The application of the EU Convention on Mutual Assistance in Criminal Matters for the purpose of keeping in contact with the defendant residing in another MS and deprived of liberty there does not differ much from the application of this instrument to the defendant staying in another MS and being at liberty. Hence, the analyses of the part of the Report regarding the situation in which detention on remand is not ordered are also valid here.

#### - Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters

Is it possible under national law to transfer proceedings that are at the trial stage?

As was already mentioned in this Report, transfer of criminal proceedings is also possible at their judicial stage. For more information, see the considerations in the part of the Report regarding the situation in which detention on remand is not ordered.

#### (cc) Ensuring the suspect's presence at trial

- FD 2002/584/JHA

#### Prosecution-EAW

See the considerations about the EAW provided above.

#### Application in practice

Practitioners reported that at the stage of court proceedings, a prosecution-EAW is most often issued to ensure the accused's mandatory appearance at the trial. One of the judges noted that she has never applied the prosecution-EAW just because in her opinion the presence of the accused at the hearing was mandatory, i.e. without the real need to conduct certain procedural activities requiring his presence. Thus, only if the presence of the accused in the hearing is mandatory *ex lege*, or there is a real need to carry out certain procedural activities requiring his participation, the EAW may be issued to secure such presence (as was already explained, Article 374 CCP indicates that presence of the accused is mandatory in cases concerning felonies and apart from that – if the presiding judge or the court orders his presence mandatory).

- FD 2009/829/JHA (?)

Is it possible under national law to issue an ESO when the person concerned is in the MS of his ordinary residence?

It was already explained in this Report that the Polish law provides for the opportunity to issue an ESO when the person concerned is in the MS of his ordinary residence (see the considerations in the part of the Report regarding the situation in which detention on remand is not ordered (part a, subsection bb)). However, when the accused person is deprived of liberty in

another MS, the execution of the ESO issued by Polish authorities is hardly possible (for instance, it is hardly possible to execute the measure of police supervision with reference to a person deprived of liberty).

- DR 2014/41 (?)

Is it possible under national law to employ an EIO for the purpose of ensuring the presence of the accused at the trial (either through a videoconference or a temporary transfer)?

At this point it is worth paying attention to the possibility of the participation of an accused deprived of liberty in the entire trial from the penitentiary facility where he is staying, not only in the act of interrogating him (Article 374 § 4 of the CCP). By applying this provision, it is possible to ensure the participation of, among others, the accused in the trial using technical devices enabling participation in the trial remotely with simultaneous direct transmission of image and sound. This means that the accused deprived of liberty may participate in the entire trial remotely, including asking questions to interrogated persons, referring to the content of evidence, etc. This possibility, however, is provided for only in cases of mandatory appearance of the accused at the trial. In Article 374 § 4 of the CCP the legislator indicated that "the presiding judge **may exempt an accused who is deprived of liberty from the obligation to appear at the trial** if his participation at the trial is ensured using technical devices enabling remote participation at the trial with simultaneous direct transmission of image and sound." Thus, the accused deprived of liberty does not have the "right" to participate in the trial in this way. He/she may only be exempted from the obligation to be brought to the courtroom if the court decides that carrying out the hearing by means of videoconference is possible and desirable in the circumstances of the case. Moreover, it should be emphasized that an accused deprived of liberty, whose appearance at the trial is not obligatory, in accordance with the clear wording of Article 374 § 4 of the CCP, has no "right to participate in the trial remotely".

Summarizing, the Polish law provides for the opportunity to conduct the main hearing by means of videoconference and to secure "remote" participation of the accused in such a hearing. Although this depends fully on the decision of the court and may be exercised only in clearly defined circumstances, such a way of conducting the judicial proceedings is recognized by the Polish system of criminal justice. Thus, one cannot argue that issuing the EIO to ensure participation of the accused detained in another MS in a hearing conducted in Poland by videoconferencing is covered by the exclusionary provision of Article 589x CCP, stating that "issuing of the EIO is inadmissible if Polish law does not allow the taking or acquisition of given evidence."

However, the problem is located in another area and focuses on the question whether participation in the trial is covered by the term used in Article 589w § 1 CCP. This provision clearly states that the purpose of issuing an EIO is "to take evidence". Thus, only if interpreted very

broadly, it may also cover participation of the accused in the hearing. One may argue that the taking of evidence justifying the issuance of an EIO also occurs when the authority issuing an EIO wants to ensure the participation of the accused in the taking of evidence, e.g. in the examination of a witness at the trial. It seems that from the point of view of linguistic interpretation, such understanding of the concept of "taking evidence" is fully justified, especially considering the lack of a definition of "investigative activity" in Directive 2014/41. However, as mentioned in this Report several times, an EIO cannot be issued for the sole purpose of securing the presence of the accused at trial. It should aim at gathering evidence.

#### Application in practice

The interviewed judges were rather skeptical with reference to the above-presented broad understanding of the scope of the EIO. As already mentioned, they do not report experience in conducting the hearing via videoconferencing with the remote participation of the accused from another MS.

At the same time, the interviewed judges, apart from one of them, argue that they would use this measure in practice once regulated properly and clearly, since they have good experiences with hearing witnesses and expert witnesses by videoconferencing.

Nevertheless, one interviewed defence lawyer argued that participation of the accused detained in another MS in the hearing conducted in Poland by videoconferencing should take place only upon the consent or motion of the accused. Otherwise, it could be contrary to the right to defence, in particular when the defence counsel is present in the courtroom in Poland.

Finally, it is worth bearing in mind the possibility of temporarily transferring an accused who is deprived of liberty to "conduct an investigative act" (Article 598z of the CCP). Again, carrying out an investigative act may be understood broadly, not only in relation to the accused, but also *in genere*. In such a case, transferring the accused to enable him to participate in the trial and be interrogated would be admissible. But again, this is our interpretation, while practitioners argue that the aim of the EIO Directive is not to secure the presence of the accused at the trial.

#### - EU Convention on Mutual Assistance

##### Summoning the person concerned abroad

All previous considerations regarding the delivery and use of the Convention remain valid here as well.

#### - European Convention on Transfer /European Convention on Mutual Assistance in Criminal Matters

Is it possible under national law to transfer proceedings that are at the trial stage?

All previous considerations regarding the potential transfer of proceedings remain valid here as well. Provision of the CCP concerning the transfer of proceedings apply until final adjudication of the case, so also at the judicial stage of the proceedings.<sup>161</sup>

## **Chapter 3 THE INSTRUMENTS AND SENTENCE ENFORCEMENT**

### **General introduction**

At the stage of enforcement proceeding, European cooperation in criminal matters concerns the execution of judgments/decisions that are final and enforceable. Thus, the following instruments of mutual recognition are taken into account:

- the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States Union (art. 607a – 607j of the CCP);
- the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European (art. 611t – 611tf of the CCP);
- the Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (art. 611u – 611uc of the CCP);

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<sup>161</sup> See, Kołodziej, „Przejęcie i przekazanie postępowań karnych” in: Gemra (Ed.), *Metodyka pracy w sprawach karnych ze stosunków międzynarodowych*, ed. J. Gemra, (C.H. Beck, Krajowa Szkoła Sądownictwa i Prokuratury, 2013), 55-60, at 55.

- the Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 and the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 along with additional protocols.

### **3.1. Applicability of the instruments or conventions according to EU law**

#### Enforcement – competent authorities according to EU law

Without repeating the issues already discussed in chapter 1.3 (letters a, b, c, f), it should be noted that in European law, the authorities competent to cooperate at the stage of enforcement proceedings have been defined in a general manner.

Pursuant to Article 6(1) of FD 2002/584/JHA, the competent authority is the judicial authority of the issuing Member State which is competent to issue an EAW by virtue of the law of that state. It should be noted, however, that in the scope of the EAW issued at the stage of enforcement proceedings, i.e. for the purpose of executing a custodial sentence or a detention order, there is a different, lower standard for allowing a given type of authority to be understood as a judicial authority authorized to issue an EAW. According to the case law of the CJEU, in relation to a prosecution-EAW, the concept of “the issuing judicial authority” within the meaning of Article 6(1) of the FD EAW, does not include public prosecutor’s offices of Member States, which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive<sup>162</sup>. Nonetheless, even the possibility of recognizing the prosecutor as an “issuing judicial authority” does not necessarily mean that the surrender of the requested person for the purposes of conducting the proceedings is admissible if the EAW, as well as the judicial decision constituting the basis for its issuance, cannot be subject to judicial review in the issuing state<sup>163</sup>. It can be concluded from the case law of the CJEU that such obstacles no longer exist with reference to execution-EAWs.<sup>164</sup>

In turn, in FD 2008/909/JHA and in FD 2008/947/JHA, the competence of the issuing authority is not reserved exclusively to “judicial authorities”. Article 2(1) of FD 2008/909/JHA provides that the competence of the issuing authority should be determined by the national law of the Member State. A similar solution was adopted in Article 3(1) of FD 2008/947/JHA, which presumes that decisions may be made by the authority or authorities competent under national law. However, a different approach – compared to the one expressed in FD 2008/909/JHA – is

<sup>162</sup> Joined Cases C-508/18, *OG* and C-82/19, *PI*, ECLI:EU:C:2019:456. Cf. Joined Cases C-566/19, *PPU* and C-626/19, *PPU*, ECLI:EU:C:2019:1077; Case C-648/20, *PPU*, ECLI:EU:C:2021:187.

<sup>163</sup> Case C-648/20, *PPU*, ECLI:EU:C:2021:187.

<sup>164</sup> Case C-627/19, *PPU*, ECLI:EU:C:2019:1079. See also in this context: Case C-425/16, *PPU*, *Pórtorak*, ECLI:EU:C:2016:858, which states that – in terms of issuing the EAW for the purposes of executing sentence – “the issuing judicial authority” within the meaning of Article 6(1) of the FD/2002/584/JHA cannot be a police service.

noticeable in the context of Article 3(2) of FD 2008/947/JHA. According to this provision, the possibility of assuming the jurisdiction of non-judicial authorities exists only where they are competent to take similar decisions under their national law and procedures.

The issue of designating competent authorities in the field of cooperation based on instruments included in the EU Convention on Mutual Assistance in Criminal Matters is different. With reference to the comments already made in Section 1.3.1., it should be emphasized that these authorities are designated by individual Member States pursuant to Article 24(1) of the Convention in notifications submitted under Article 27(2) of the Convention. Apart from the authorities indicated in the notifications submitted under Article 27(2) of the Convention, the authorities listed in the European Convention on Mutual Assistance in Criminal Matters and in the Benelux Treaty are also competent.

#### **(a) Person concerned is present in issuing MS**

##### **- FD 2008/909/JHA**

According to Article 4(1) of the FD 2008/909/JHA, the transfer of a penalty of imprisonment to be executed in another Member State is permissible also when the person concerned is staying in the issuing state. The generally defined subjective scope of the analyzed cooperation measure is specified in Article 4 (1) (a-c) of the FD 2008/909/JHA.

In general, under this instrument the final judgment may be transferred for execution of the sentence of imprisonment upon the consent of the sentenced person, but Article 6(2) of the FD 2008/909/JHA allows for certain exceptions to this principle. If the convicted person stays in the territory of the issuing state the consent is not required if the judgment together with the certificate is forwarded: to the Member State of nationality in which the sentenced person lives; to the Member State to which the sentenced person will be deported once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure consequential to the judgment.

When assessing the need to forward a custodial sentence or a measure involving deprivation of liberty for enforcement to another Member State attention should be paid to Article 4(2) of the FD 2008/909/JHA. According to this provision, a decision to transfer the judgment is admissible when the competent authority is certain that the enforcement of the sentence in the executing state will serve the purpose of facilitating the social rehabilitation of the sentenced person. As stated in Article 4(3-4) of the FD 2008/909/JHA, arrangements in the indicated scope may or – in the situation under art. 4(1) (c) of the FD 2008/909/JHA – must be carried out in consultation with the competent authority of the executing state.

##### **- FD 2008/947/JHA**

Yes, this instrument of mutual recognition may be applied if the person concerned is present in the issuing MS. This transpires from Article 5 (1) FD 2008/947/JHA providing that the competent authority of the issuing State may forward a judgment and, where applicable, a probation decision to the competent authority of the Member State in which the sentenced person is lawfully and ordinarily residing, in cases where the sentenced person has returned **or wants to return to that State**. In turn, Article 5(2) FD 2008/909/JHA provides the possibility of transferring the judgment or the probation decision – at his request – to a Member State other than Member State in which he has his permanent residence, on condition that authority of this latter Member State has consented to such forwarding.

#### **- Convention of Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters**

The European Convention on the Transfer of Proceedings in Criminal Matters creates the possibility of transferring “sanctions”. Under this concept, any punishment or other measure incurred or pronounced in respect of an offence or in respect of a violation of the legal provisions listed in Appendix III to the Convention is understood (Article 1 (b) of the Convention). The possibility to transfer the enforcement proceedings to another MS stems directly from Article 8 (1) and (2) of this Convention. It should be noted, however, that pursuant to Article 8(2) of the Convention, “Where the suspected person has been finally sentenced in a Contracting State, that State may request the transfer of proceedings in one or more of the cases referred to in paragraph 1 of this article only if it cannot itself enforce the sentence, even by having recourse to extradition, and if the other Contracting State does not accept enforcement of a foreign judgment as a matter of principle or refuses to enforce such sentence.” Thus, it seems that this Convention may apply only subsidiary to other measures of taking over the enforcement proceedings. Such conclusion is supported by the wording of Article 26 FD 2008/909/JHA which does not indicate the European Convention on the Transfer of Proceedings as replaced by this Framework Decision.

Regarding cooperation in enforcement proceedings, Article 21 of the European Convention on Mutual Assistance in Criminal Matters seems to be applicable also at enforcement stage of the proceedings. However, the Explanatory Report to Article 21 of the Convention suggest clearly that this provision should be applied in the course of proceedings aimed at issuing a final judgment concerning criminal responsibility of a defendant.<sup>165</sup>

Some authors argue that such a solution is optimal in the context that it allows – unlike the Convention on Transfer of Proceedings – to send relevant applications directly between the judicial authorities of individual Member States. Indeed, Article 6 of the EU Convention on mutual

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<sup>165</sup> See, Explanatory Report to the European Convention on Mutual Assistance in Criminal Matters, <<https://rm.coe.int/16800c92bd>> (last visited: 29 Jun. 2024).



legal assistance states that judicial authorities can send requests based on Article 21 of the 1959 Convention directly to the judicial authorities of another Member State<sup>166</sup>.

– **Is it possible under EU law to ‘divide’ composite sentences and to deal with the unconditional part under FD 2008/909/JHA and with the conditional part under FD 2008/947/JHA?**

In the light of FD 2008/909/JHA and FD 2008/947/JHA, the possibility of transferring composite sentences for execution in another Member State is not excluded, partly in the case of penalty of imprisonment, on the basis of FD 2008/909/JHA, and in the remaining scope in relation to decisions referred to in FD 2008/947/JHA<sup>167</sup>. Even though such option was not provided for in the above-mentioned framework decisions, it can be drawn, for example, from Article 1(3) (a) FD 2008/947/JHA, which emphasizes the need to distinguish the subject of FD 2008/947/JHA, in relation to that designated by the provisions of FD 2008/909/JHA. Therefore, considering the need to ensure efficiency and a complementary approach in European judicial cooperation in criminal matters, it seems justified to adopt the joint application of individual cooperation instruments, adequate to the areas in which they may be applied<sup>168</sup>.

**(b) Person concerned is present in another MS**

**- FD 2002/584/JHA**

Pursuant to Article 1(1) of the FD 2002/584/JHA, at the stage of enforcement proceedings the EAW may concern a person who is to be arrested and transferred for the purpose of executing a custodial sentence or a detention order. The above-mentioned regulation therefore applies, among others, to a person staying in another Member State who has been finally convicted in the issuing MS.

However, it should be noticed that the execution-EAW may only be issued for the purpose of execution of the penalty of imprisonment lasting at least four months (Article 2(1) of FD 2002/584/JHA).

**- FD 2008/909/JHA**

Pursuant to Article 4(1) of the FD 2008/909/JHA, the transfer of a penalty of imprisonment is also possible when the sentenced person is staying in the executing state. As already mentioned

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<sup>166</sup> Verrest, Lindemann, Mevis, Salverda, *The transfer of criminal proceedings in the EU. An exploration of the current practice and of possible ways for improvement based in practitioners' views*, <[https://pure.eur.nl/ws/portalfiles/portal/92748304/final\\_report\\_the\\_transfer\\_of\\_criminal\\_proceedings\\_in\\_the\\_eu.pdf](https://pure.eur.nl/ws/portalfiles/portal/92748304/final_report_the_transfer_of_criminal_proceedings_in_the_eu.pdf)>, (last visited: 14 Apr. 2024), p. 24.

<sup>167</sup> Cf. Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Springer, 2017), p. 268-269.

<sup>168</sup> Cf. Handbook on the transfer of sentenced persons and custodial sentences in the European Union, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC1129\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC1129(01)), p. 36 (last visited: 8 Oct. 2024).

in relations to the case where a given person remains in the territory of the issuing state, in general the application of this instrument depends on the consent of the convict.

**- FD 2008/947/JHA**

As already mentioned above, this instrument of cooperation may apply “in cases where the sentenced person **has returned or wants to return to that State**”, i.e. to the state in which he is lawfully and ordinarily residing (Article 5(1) of the FD 2008/947/JHA).

**- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters**

The remarks provided in the previous Section apply also here.

**– Is it possible under EU law to ‘divide’ ‘composite sentences’ and to deal with the unconditional part under FD 2008/909/JHA and with the conditional part under FD 2008/947/JHA?**

See the above comments on this subject under (a).

**3.2. Applicability and application of the instruments and conventions according to national law**

**Preliminary remarks**

It must be emphasized that in enforcement proceedings, the choice of cooperation instruments that can be used is limited, and sometimes there is no choice at all, depending on the subject of the transfer or due to the decision taken as to where a penalty of imprisonment or other measures are to be enforced, i.e. in Poland or in another Member State. The place of residence of the convicted person is also important in this context.

**Enforcement – competent authorities in Poland**

Pursuant to Article 1 § 2 of the Criminal Enforcement Code of 6 June 1997<sup>169</sup>, the enforcement of judgments in criminal proceedings, in proceedings concerning fiscal crimes and fiscal petty offences is carried out in accordance with the provisions of this Code, unless provided otherwise. In turn, Article 1 § 2 of the CEC stipulates that in matters not regulated by the CEC, the provisions of the CCP shall apply accordingly. The above-mentioned regulations in conjunction with the regulations of the CCP implementing the discussed measures of cooperation, allow identification of the authorities competent to take relevant decisions on the subject matter.

Article 3 § 1 of the CEC provides for the general rule that the court which issued a judgment/decision in the first instance is also competent to execute such a judgment/decision.

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<sup>169</sup> Consolidated text: Journal of Laws 2024, Item 706; hereinafter referred to as: “CEC”.

There are also some competences given to the penitentiary court. Whenever the penitentiary court has the competence, it is exercised by the penitentiary court of the region in which the sentenced person is staying, unless provided otherwise. The penitentiary court is formed at the level of regional courts.

With reference to instruments of mutual recognition applicable at the enforcement stage of the proceedings, the rules concerning the competence of the issuing authorities are as follows.

1) sometimes the CCP clearly indicates the court acting as the issuing authority in provisions concerning the implementation of a given mechanism of cooperation

2) sometimes the provisions of the CCP constituting the implementation of a given FD simply state that “a court” is competent to issue a particular measure. Then the competence of the concrete court should be established in accordance with the above-presented rules of the CEC.

Consequently:

- with reference to execution-EAWs – the issuing authorities are all regional courts. They act *ex officio* (i.e. if the regional court was the court which adjudicated the case in the first instance, this court is competent to issue the EAW) or upon the motion of a district court (if the sentence of imprisonment to be executed was imposed in the case where the district court acted as the first instance court).
- The situation is similar in the context of cooperation using the instrument of enforcement of a penalty of imprisonment (FD 2008/909/JHA). In accordance with Article 611t § 1 CCP, the issuing authorities are the regional courts in whose region the judgment was rendered.
- With reference to decisions/measures covered by FD 2008/947/JHA, Article 611u § 1 CCP indicates “a court” as the issuing authority. As already mentioned, the court competent *ad casum* under this provision should be the court that rendered the judgment in the first instance (the district court or the regional court).
- With reference to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000, Poland in a declaration submitted pursuant to Article 24(1) of the Convention, upon notification under Article 27(2) of the Convention, indicated circuit prosecutors (*prokuratorów okręgowych*) having territorial jurisdiction as competent to cooperate pursuant to Article 5 of the Convention<sup>170</sup>. Regardless of this, there should be no doubts that the courts also have competence in this matter, considering the fact that, in accordance with Article 27(2) of Convention, the list of authorities listed by a Member State does not exclude the possibility of cooperation between the authorities listed in the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and in the Benelux Treaty. Such an assumption seems fully justified by Article 3(1) of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 in

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<sup>170</sup> Declarations of Poland – Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union, <https://www.ejn-crimjust.europa.eu/ejn/libshowdocument/EN/629/EN>, (last visited: 6 Mar. 2024), p. 2.

connection with Article 3(a) of the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 17 March 1978.

It is important to consider whether the division of competences to initiate European cooperation at the enforcement stage of the proceedings as provided in national law, does not hinder, weaken or limit effective and proportionate cooperation.

In particular, one shall consider whether the competence to issue an execution-EAW and to initiate the enforcement of a sentence of imprisonment in another MS pursuant to FD 2008/909/JHA is regulated correctly and provides for smooth and proportionate use of both instruments of cooperation. First of all, it should be emphasised that the interviewed practitioners did not report any difficulties with regard to this issue. It may be justified by the different scope of application of both measures. In practice, the EAW procedure is initiated to execute in Poland the penalty of imprisonment issued against Polish nationals, while, as a rule, the procedure of enforcement in another MS of the penalty of imprisonment does apply to convicts who are nationals of other MS.<sup>171</sup> Thus, already such a defined scope of application of both measures determines their different use and prevents situations of difficulties or gaps in their application.

As already mentioned, in accordance with the general rules, in proceedings concerning the enforcement of the judgment, the court that rendered the judgment in the first instance has jurisdiction. This means that the court competent to execute the judgment will often not have the direct competence to cooperate using the EAW or the instruments regulated in FD 2008/909/JHA. Pursuant to Article 607a § 1 CCP, if the judgment in the first instance was rendered by the district court, it is then possible for this court to apply to the regional court to issue an execution-EAW. On the other hand, if the penalty of imprisonment is to be executed in another Member State, the regional court shall act *ex officio* or upon the motion of the Minister of Justice, a convict or a court of another organ of the executing MS (Article 611t § 2 CCP).<sup>172</sup> Hence, the potential difficulties stemming from the division of competence of the issuing authorities may arise only in the following situations:

1) if a district court applies for the issuance of an execution-EAW, while the regional court is convinced that the procedure provided in FD 2008/909/JHA should be initiated. In such a situation, the regional court is not bound by the motion of the district court. It may decide not to issue the execution-EAW but to initiate *ex officio* the procedure provided in FD 2008/909/JHA.

2) if a district court reports to the regional court that the procedure under FD 2008/909/JHA should be initiated, such a motion is not binding on the regional court. As stated above, while using this measure the regional courts are allowed to act *ex officio* or upon a motion

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<sup>171</sup> Such conclusion stems from Article 611t § 1 CCP stating that enforcement of the penalty in another MS should enable the achievement of educational and preventive objectives of the penalty to a greater extent. Furthermore, Article 611t § 3 CCP provides that, as a rule, the enforcement of the sentence should take place in the MS of which the sentenced person is a citizen and in which he/she has a permanent or temporary place of stay. The enforcement of the sentence in another MS may take place upon consent of the competent court or another body of that state.

<sup>172</sup> See, section 1.3.2.(b).

of three entities (the Minister of Justice, the convict or the court or another organ of the executing MS). The district courts are not indicated as organs competent to file such a motion. The competence to act *ex officio* means that the competent regional court may ask the district court for the case file in order to examine the need to initiate the procedure of enforcement of the sentence in another MS or that such a regional court may act upon the information submitted by the district court.<sup>173</sup>

If a given district court is responsible for enforcement of the sentence of imprisonment and such an enforcement is possible only by using the measures of mutual recognition available in the EU, it is obliged to apply to the regional court for the issuance of an execution-EAW if previous attempts to apply the procedure provided in FD 2008/909/JHA proved unsuccessful.

Summarizing, if the district court files a motion to apply a given measure of cooperation, the regional court may refuse to issue it and then, *ex officio*, initiate proceedings aimed at applying an alternative measure. Therefore, in such circumstances it is up to the competent regional court to consider proportionality issues while taking a decision about which form of cooperation should be used in each case.

#### **(a) Person concerned is present in issuing MS**

#### **(ee) enforcement in another MS<sup>174</sup>**

##### **- FD 2008/909/JHA**

##### **Enforcement of a custodial sentence**

Poland implemented FD 2008/909/JHA in Chapter 66f of the CCP with reference to Polish regional courts acting as the issuing judicial authorities. Article 611t § 1 CCP enables the filing of a motion for enforcement in another MS – by the regional court in whose region the judgment was rendered – of the following judgments:

- Final and enforceable judgments imposing penalty of imprisonment; it could also be a penalty lasting less than 6 months; no judgments/decisions imposing isolating security measures (like psychiatric detention) may be subject to this instrument under the CCP. Although the FD 2008/909/JHA covers “the penalty” understood as not only a penalty resulting from a custodial sentence but also the deprivation of liberty resulting from another measure, the Polish legislator clearly limited the scope of the discussed

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<sup>173</sup> Cf. Steinborn, “Komentarz do art. 611t Kodeksu postępowania karnego” in Paprzycki (Ed.), *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego* (LEX, 2015), thesis no. 20-21.

<sup>174</sup> As the person concerned is present in the *issuing MS*, enforcement in the *issuing MS* does not require judicial cooperation.

measure to the penalty of imprisonment. It was justified by the fact that FD 2008/909/JHA allows refusal of the request for enforcement in another MS of a penalty connected with the application of psychiatric therapy or other therapy (Article 9(1)(k) FD 2008/909/JHA). Furthermore, this position is supported by the wording of Article 611tk § 1 (6) CCP, excluding the opportunity to enforce in Poland the penalty of imprisonment imposed in another MS and connected with the use of psychiatric therapy or other measures unknown to Polish law.<sup>175</sup> It is also argued that Article 1(b) FD 2008/909/JHA, unlike Article 1 (1) the FD EAW, does not mention “detention order” (German: *die freiheitsentziehende Maßregel der Sicherung*) as covered by the scope of application of this measure of mutual recognition. Thus, unlike the FD EAW, the procedure provided in FD 2008/909/JHA does not apply to security measures imposed as a separate measure, not connected with the execution of the penalty of imprisonment.<sup>176</sup> In the written reasons to the draft act implementing FD 2008/909/JHA, it was stated that the security measures are imposed for an undefined period of time and the certificate provided for in the Framework Decision is not suitable for the execution of such measures of an undefined time of their execution.<sup>177</sup>

- The final sentence of imprisonment issued as a conditionally suspended sentence and subsequently made enforceable by the court ordering its execution.<sup>178</sup> Until a conditionally suspended sentence is ordered, probation is enforceable<sup>179</sup>, not a penalty of imprisonment.

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<sup>175</sup> Cf. Steinborn, “Komentarz do art. 611t Kodeksu postępowania karnego” in Paprzycki (Ed.), *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego* (LEX, 2015), thesis no. 2; Katowice Court of Appeal, case no. II AKz 1016/19, decision of 5 November 2019, LEX no. 3200411.

<sup>176</sup> Cf. Steinborn, “Komentarz do art. 611t Kodeksu postępowania karnego” in Paprzycki (Ed.), *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego* (LEX, 2015), thesis no. 2; Nita-Świątłowska, “Komentarz do art. 611t Kodeksu postępowania karnego” in Skorupka (Ed.), *Kodeks postępowania karnego. Komentarz* (Legalis, 2023), thesis no. 1 (D); See, however, decision of the Supreme Court of 12 October 2021, IV KK 64/21, Lex no. 3342016. This case concerned enforcement of psychiatric detention in Germany. The cassation appeal of the Public Prosecutor relied on the general provisions of the CCP concerning transfer of sentenced persons (which do not apply to the MS of the EU) and on the provisions of the Additional Protocol to the Convention on the Transfer of Sentenced Persons of 1997. Despite this the Supreme Court in the written reasons of its decision mentioned that enforcement of psychiatric detention is possible under Article 611t CCP, however without providing any justification supporting this opinion.

<sup>177</sup> See, Reasoning for the draft act no. 4583 issued in 2011, available at: <https://orka.sejm.gov.pl/Druki6ka.nsf> (last visited: 31 Dec. 2024).

<sup>178</sup> Nita-Świątłowska, “Komentarz do art. 611t Kodeksu postępowania karnego” in Skorupka (Ed.), *Kodeks postępowania karnego. Komentarz* (Legalis, 2023), thesis no. 1 (D); Kuczyńska, “Komentarz do art. 611t Kodeksu postępowania karnego” in Szumiło-Kulczycka (Ed.), *Kodeks postępowania karnego. Komentarz do wybranych przepisów* (LEX, 2022), thesis no. 4. Cf. Supreme Court, case no. V KK 248/10, decision of 21 October 2010, LEX no. 621356.

<sup>179</sup> The transfer of probation measure is possible using the provisions implementing the FD 2008/947/JHA and regulated in Chapter 66h of the CCP.

- There are no obstacles to forwarding for recognition and execution in another Member State of an alternative penalty of imprisonment imposed instead of an unpaid fine (Article 46 of the CEC) or instead of a penalty of restriction of liberty which has not been executed (Article 65 of the CEC) after the decision ordering such a penalty becomes final, except the situations where the execution of the penalty has been suspended pursuant to Article 48a § 1 of the CEC or Article 65a § 1 of the CEC.

The discussed measure of mutual recognition may be used only if the judgment/decision is enforceable. This means that it cannot be applied in the case of suspension of the execution of penalty based on any grounds provided for in the CEC, as well as in the event of adjournment of the execution of the penalty or granting a break in its execution, until the expiry of the period of the adjournment or the break<sup>180</sup>.

The transfer of a penalty of imprisonment is permissible both in relations to a Polish citizen and a foreigner (Article 611t § 1 of the CCP), but, as stated above, in practice it is mainly used with reference to nationals of other MS or persons having permanent residence there. Pursuant to Article 611t § 3 (1-3) of the CCP, it is possible to address an appropriate request to the following states: the executing state of which the offender is a citizen and where he resides permanently or temporarily; the executing state of which the offender is a citizen and where he does not reside either permanently or temporarily, but to which he will be extradited on the basis of a final and binding judicial decision, after the execution of the penalty or release from a penal institution; another executing state, with the consent of a competent court or other authority of this state.

However, there are no grounds to request that a penalty of imprisonment be taken over and enforced by another state if the person sentenced to a custodial sentence that is to be enforced does not reside either in the territory of the Republic of Poland or in the Member State to which the request for recognition is addressed<sup>181</sup>.

As a rule, the consent of the convict is required to request that the sentence of imprisonment be executed in another MS. There are certain exceptions to this rule, which apply in a situation where the convict stays in the territory of Poland. The requirement of consent in the examined scope is waived when the judgment is forwarded to: the state of which the offender is a citizen and where he or she resides permanently or temporarily; the state to which the offender will be extradited after the execution of the penalty or release from a penal institution, on the basis of a final and binding judicial decision obliging the offender to return.

In this context, it is necessary to note the defective implementation of FD 2008/909/JHA with reference to the exception from the need to obtain consent, provided for in Article 611tk § 5 (1) of the CCP. According to this provision, a derogation from the need to obtain a consent

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<sup>180</sup> Cf. Sygrela, "Komentarz do art. 611t Kodeksu postępowania karnego" in Gerecka-Żołyńska (Ed.), *Kodeks karny wykonawczy. Komentarz* (Wolters Kluwer, 2023), p. 918.

<sup>181</sup> Kuczyńska, "Komentarz do art. 611t Kodeksu postępowania karnego" in Szumiło-Kulczycka (Ed.), *Kodeks postępowania karnego. Komentarz do wybranych przepisów* (LEX, 2023), thesis no. 8.

applies to a convict **who is the citizen of the executing state and who has permanent or temporary residence in the territory of that state**, while Article 4(1) in conjunction with Article 6 (2) (a) FD 2008/909/JHA refers to the concept “where he or she lives”. This means that the solution adopted in Article 611t § 5 (1) of the CCP is not fully consistent with this provided in the FD, since it allows a derogation from the obligation to obtain consent if the convicted person not only permanently resides, i.e. lives in a specific country, but also when he or she only resides there (has a temporary place of residence). It is clear from motive 17 of the FD, that the state where the convicted person lives means the place to which the person is attached, based on habitual residence and through elements such as family, social or professional ties. It seems that the *ratio* of such a solution adopted in the CCP was the desire to have greater possibilities of transferring penalties of imprisonment for execution outside Poland.<sup>182</sup>

Finally, it should be noted that pursuant to Article 611t § 1 CCP, when deciding on applying to another MS for enforcement of the sentence of imprisonment, the court should consider whether “handing over of the ruling for execution would enable the achievement of educational and preventive objectives of the penalty to a greater extent.”

### Practice

The available statistics concern all requests submitted by Polish Regional Court to the executing authorities of other Member States and are as follows (no information is provided whether these requests were successful):

- In 2018 – 205 requests were issued;
- In 2019 – 255 requests were issued;
- In 2020 – 251 requests were issued;
- In 2021 – 339 requests were issued;
- In 2022 – 333 requests were issued;
- In 2023 – 430 requests were issued;<sup>183</sup>

As transpires from the above statistics, the number of requests for enforcement of the penalty of imprisonment in another MS has increased over the last four years. The Interviewed practitioners do not report considerable difficulties with reference to the application of this instrument of cooperation.

### **- FD 2008/947/JHA**

### **Enforcement of an alternative sanction/a probation decision**

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<sup>182</sup> Steinborn, “Nowy model przekazywania skazanych między państwami Unii Europejskiej? Uwagi na tle zakresu *rationae personae* instytucji”, 15 Białostockie Studia Prawnicze (2014), 225-238, at 234-236.

<sup>183</sup> See, information provided by the Ministry of Justice, document BK-VII.082.307.2024 of 18 July 2024.



Pursuant to Article 611u § 1 CCP, the court may apply to the competent court or authority of another Member State for the enforcement of a judgment regarding:

- a conditionally suspended penalty of imprisonment,
- a penalty of restriction of liberty,
- an autonomous penal measure,
- a decision on conditional release or a decision on conditional discontinuation of proceedings if the decision imposes on a defendant duties specified in Article 34 § 1a (1) of the CC (obligation to perform socially useful, unpaid, supervised work), Article 39 (2-2d) of the CC (disqualification from holding specific offices, performing specific professions or carrying out specific business activities; disqualification from pursuing activities related to raising, treating and educating minors, or taking care of them; prohibition from holding an office or performing a profession or work in state or local government bodies or institutions, as well as in commercial companies and partnerships, in which the State Treasury or a local government unit holds, directly or indirectly through other entities, at least 10% of shares or interests; prohibition from associating with special social groups or appearing in specific locations, prohibition on contacting specific individuals or on leaving a specific place of residence without the court's permission; prohibition from entering a mass event; prohibition from entering gambling facilities and participating in gambling games), Article 46 § 1 or § 2 of the CC (redress of damage, compensation for harm, surcharge), Article 67 § 2 of the CC (supervision of a probation officer or a person of public trust, an association, or a social organization involved in educating offenders, preventing them from moral depravation, or providing assistance to them), Article 72 § 1 (1, 3-7a) and 8 of the CC (obligation to keep the court or the probation officer informed about the progress of the probation period; obligation to perform an imposed duty to provide support to another person; obligation to perform paid work, educational activity or vocational training; obligation to refrain from abusing alcohol or other intoxicants; obligation to undergo addiction treatment; obligation to undergo the therapy, in particular psychotherapy or psychoeducation; obligation to attend rehabilitation or educational programs; obligation to refrain from appearing in certain communities and locations; obligation to avoid contact with the victim or other persons in a specified manner or to approach the victim or other persons; obligation to engage in any other appropriate conduct during the probation period that may prevent a further offence) or Article 72 § 2 of the CC (monetary benefit or redress for all or part of the damage) or if a decision submits the offender to the supervision of probation officer or a public institution.

If the convicted person stays in Poland as the issuing state, within the meaning of Article 611u § 1 of the CCP, the discussed measure of mutual recognition applies in a situation where the convicted person has a lawful permanent residence in the executing state and declares the intention of return there. Additionally, the discussed measure may be applied if the person concerned is already staying in the executing state but only if he/she has permanent legal

residence there. Moreover, pursuant to Article 611u § 2 of the CCP, the request of the Polish court, as the competent issuing authority, may also be – at the motion of the convicted person – addressed to a Member State other than the country of permanent residence of the person. Cooperation within the limits of the analyzed measure may therefore be carried out both with respect to a foreigner and a Polish citizen<sup>184</sup>.

#### Practice – available statistics

The research conducted in this area in Poland shows that the use of the analysed cooperation instrument is negligible. Available information for the period from 2012 to March 2015 show that applications for the recognition and enforcement of probation decisions took place in only 14 cases, of which 13 concerned the forwarding of a prison sentence with conditional suspension of its execution<sup>185</sup>. Subsequent research results indicated a significant decrease in the use of this institution – 6 cases were reported for the period 2015-2017 (they concerned a prison sentence with conditional suspension of its execution).<sup>186</sup> The above numbers do not cover the whole practice since they were indicated on the basis of cases made available to researchers at the moment of conducting the research. However, also the statistics concerning subsequent years prove little use of this measure (24 cases in 2020; 15 cases in 2019; 10 cases in 2018; 14 cases in 2017).<sup>187</sup>

As far as the last three years are concerned, the statistics gathered in the framework of this project concern only requests directed to other MS by the Regional Courts (no statistics concerning district courts acting as issuing authorities were provided). In 2021 all Regional Courts in Poland issued altogether 4 new requests for enforcement of judgments under the FD 2008/947; 2 additional requests were made in 2020 but not examined in the latter year, so they were left for examination for 2021. Thus, finally 5 requests were issued within the whole 2021. In

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<sup>184</sup> Cf. Sakowicz, “Komentarz do art. 611u Kodeksu postępowania karnego” in Hofmański, Sadzik, Zgryzek (Ed.), *Kodeks postępowania karnego. Komentarz do artykułów 468-682*. Vol. 3, (Legalis, 2012), thesis no. 6; Cf. Staszczuk, „Zasada wzajemnego uznawania orzeczeń zagranicznych w sprawach karnych – teoria i praktyka”, 7-8 Przegląd Sądowy (2014), 145-159, at 153-154.

<sup>185</sup> Zielińska, Serzysko, *Wzajemne uznawanie orzeczeń probacyjnych*, <[https://iws.gov.pl/wp-content/uploads/2018/08/kolor\\_IWS\\_Zieli%C5%84ska-E.-Serzysko-A.\\_Wz.-uznawanie\\_orzecze%C5%84-probacyjnych-ost.pdf](https://iws.gov.pl/wp-content/uploads/2018/08/kolor_IWS_Zieli%C5%84ska-E.-Serzysko-A._Wz.-uznawanie_orzecze%C5%84-probacyjnych-ost.pdf)>, (last visited: 14 Apr. 2024), p. 33-34.

<sup>186</sup> Zielińska, Klimczak, *Wzajemne uznawanie orzeczeń probacyjnych – w praktyce. II etap badań*, <<https://iws.gov.pl/wp-content/uploads/2019/05/IWS-E.Zieli%C5%84ska-J.Klimczak-Wzajemne-uznawanie.pdf>>, (last visited: 14 Apr. 2024), p. 8, 11-12. It should be underlined that conditionally suspended sentence may be enforced abroad only if it is accompanied by at least one probatory measure whose execution requires supervision in another MS. Until 2015 the imposition of such a probatory measure was not mandatory. Therefore, the number of cases falling within the scope of application of the FD 2008/947/JHA was relatively low. See in this context: Kuczyńska, “Europejskie warunkowe skazanie” in Błachnio-Parzych, Jakubowska-Hara, Kosonoga, Kuczyńska (Eds.), *Problemy sprawiedliwości karnej. Księga Jubileuszowa Profesora Jana Skupińskiej* (Wolters Kluwer, 2013), 870-881, at 881.

<sup>187</sup> See, Buczma, Kierzyńska (ed.), Stefaniak-Dąbrowska, *Wzajemne uznawanie orzeczeń karnych w Unii Europejskiej. Poradnik dla praktyków* (Wydawnictwo Krajowej Szkoły Sądownictwa i Prokuratury, 2023), p. 160.

2022 all Regional Courts issued only 3 requests under this FD. The number of requests increased in 2023 to 12.<sup>188</sup>

#### Application in practice – opinions of interviewed practitioners

The interviewed practitioners reported a lack of experience in using this instrument. The few attempts made in this area, e.g. to transfer the penalty of imprisonment with conditional suspension, are often met with no action taken in another Member State. They argue that there are two reasons for the lack of cooperation: 1) the diversity of regulations in individual Member States regarding penalties and measures that may be the subject of transfer; 2) little practical need to use this measure - often there is a possibility of enforcing a judgment even if the sentenced person decides to leave Poland (e.g. in the case of a prison sentence with conditional suspension of its execution, the obligation of the convict to report to and keep in contact with the probation officer may be executed remotely).

The above opinions are endorsed by the conclusions of the Final report on the 9th round of mutual evaluations on Mutual recognition of legal instruments in the field of deprivation or restriction of liberty. As the main reasons for the rare use of this instrument the Report lists: the lack of awareness and knowledge among practitioners concerning this instrument; the complexity and the length of the procedure provided by FD 2008/947/JHA; the significant differences between the national legal systems of the Member States in terms of the nature and duration of the applicable probation, alternative and supervision measures<sup>189</sup>.

The opinion of practitioners on the little practical usefulness of this measure of cooperation must be seen in the following context.

Firstly, the procedure provided by FD 2008/947/JHA shall be used in cases in which the sentenced person lawfully and ordinarily resides in another MS, and moreover, the sentenced person has returned or wants to return to that State (Article 5 (1) FD 2008/947/JHA). For this reason, the Polish Code of Criminal Procedure in Article 611u § 1 clearly states that this measure may be applied with reference to sentenced persons who have a **legal permanent place of stay** in another MS, if they are staying in that MS or declare their intention to return there. As an exception to the rule, this measure may also be transferred for execution to another MS in which the person concerned does not have lawful and ordinary residence (Article 5 (2) FD 2008/947/JHA). Hence, **this measure of mutual recognition cannot be used with reference to Polish citizens who declare that they have a permanent place of residence in Poland but who at the same time travel abroad to work in another MS, even if this is not only seasonal work.**

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<sup>188</sup> See, information provided by the Ministry of Justice, document BK-VII.082.307.2024 of 18 July 2024.

<sup>189</sup> See: Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty, < <https://data.consilium.europa.eu/doc/document/ST-6741-2023-INIT/en/pdf>>, (last visited: 28 Aug. 2024), p. 8, 62-66.

Numerous Polish citizens work abroad, but they declare social and family ties with Poland.<sup>190</sup> It must be underlined that the aim of this measure is “to enhance the prospects of the sentenced person’s being reintegrated into society, by enabling that person to preserve family, linguistic, cultural and other ties, but also to improve the monitoring of compliance with probation measures and alternative sanctions, with a view to preventing recidivism, thus paying due regard to the protection of victims and the general public” (motive 8 of FD 2008/947/JHA). It follows from the above considerations that with reference to Polish citizens who temporarily stay and work in another MS but declare their permanent residence in Poland as well as social and family ties with Poland, the discussed measure cannot be used.

Secondly, in practice, some of the probatory obligations and duties mentioned above do not require “permanent” supervision and they may be executed in Poland also from abroad by a one-time action. In particular, all forms of redress for all or part of the damage may be executed in this way, without any involvement of the authorities of another MS.

Thirdly, as transpires from the statistics presented above, most frequently the procedure of FD 2008/947/JHA is used with reference to a conditionally suspended penalty of imprisonment. According to Article 70 of the CC, the probatory period runs from 1 to 3 years, exceptionally with reference to young adults who committed a violent crime against a person sharing the same residence, the probatory period lasts from 2 to 5 years. During this time, the sentenced person may be placed under the supervision of a probation officer or a public institution. As transpires from Article 611u § 1 CCP, a conditionally suspended sentence of imprisonment may be subject to the procedure of FD 2008/947/JHA if a sentenced person is placed under such supervision or if the probatory measures indicated in Article 72 § 1 (1, 3-7a) and 8 and Article 72 § 2 of the CC are imposed by the court. Also, in the case of the conditional discontinuation of criminal proceedings, the person concerned may be placed under the supervision of a probation officer or a public institution for a probatory period which cannot exceed 3 years (Article 67 CC). As mentioned above, some practitioners indicated the opportunity to keep in contact with the probation officer remotely. Thus, if the only duty imposed on the person concerned is to keep in contact with a probation officer, the measure provided in FD 2008/947/JHA is not applicable (in cases of Polish citizens staying only temporarily abroad while keeping family and social ties with Poland) or – even if applicable – it is not necessary for the following reasons. According to Polish law, the supervision of a probation officer should be executed in the place of permanent

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<sup>190</sup> According to available statistics, at the end of 2022 in all MS of the EU stayed about 867 000 Polish citizens who were classified as “temporary staying abroad for more than 12 months” but having permanent residence in Poland (they are registered in Poland as staying there permanently), so these who do not declare permanent stay abroad. The majority of them stayed in Germany, the Netherlands and Ireland. See, statistics published by the Statistics Poland available at: <https://stat.gov.pl/en/topics/population/international-migration/information-on-the-size-and-directions-of-emigration-for-temporary-stay-from-poland-in-2017-2022,8,1.html> (last visited: 31 Dec. 2024). One may assume that the number of migrants staying in other MS for less than 12 months (from 3 to 12 months) is comparable.

residence of a person placed under supervision (Article 169 § 4 of the CEC). Such a person cannot change the place of permanent residence without the consent of a competent court (Article 169 § 3 CEC). As a rule, all persons placed under the supervision of a probation officer are divided into three “groups of risk of reoffending”: A, B, and C, where “A” designates the group of “reduced risk”; “B” – “basic risk” and “C” – the group of “increased risk” (Article 169b CEC). The persons placed under the supervision of a probation officer are obliged to report to him/her within 7 days from the date on which they became aware of the imposition of this measure. Afterwards, they are obligated to keep in contact with a probation officer. Persons belonging to group “A”, are obliged to meet in person with a probation officer at least once every 2 months and to contact him/her by phone at least once a month (Article 169b § 8 CEC). Nevertheless, pursuant to Article 169b § 11 CEC, the judge or the director of a probation team may, in particularly justified cases, order different frequency and form of contacts of a probation officer with a person placed under his/her supervision.

As transpires from the interviews with practitioners of the Lublin region, the majority of persons having Polish citizenship and placed under the supervision of a probation officer have a permanent stay in Poland, but they frequently work in another MS. Such persons are obliged to inform the probation officer about their will to leave Poland and to work abroad. For this purpose, they fill in a special form containing, among others, the following information: the address of stay in another MS, their phone number and e-mail address, information that they are traveling abroad to work there in order to fulfill all obligations imposed in the course of the probation period, and information about the planned date of return to Poland. The form also contains declarations that: they will keep in contact with a probation officer by phone, e-mail or in person (if present in Poland) and inform him/her about their current situation not later than until the 25<sup>th</sup> of each month; they will execute the duties imposed on them; they will immediately inform a probation officer of any problems in executing the above mentioned obligations; they will report to a probation officer immediately upon arrival in Poland in order to establish the further forms of execution of the supervision. As was reported by the interviewed practitioners from the Lublin Region, the above-described form of contact (via phone conversations, e-mail) are applied with reference to Polish citizens placed under the supervision of a probation officer who have a permanent stay in Poland and travel for a certain period to another MS to work there. Nonetheless, those who declare a longer stay abroad and are not able to indicate the date of return to Poland, usually apply to the court for cancellation of the supervision of a probation officer (modification or cancellation of the supervision is possible upon the motion of a probation officer with reference to convicts sentenced to a suspended sentence of imprisonment (Article 74 § 2 CC); persons with reference to whom the criminal proceedings were conditionally discontinued for a probation period (Article 67 § 4 CC) and convicts who were conditionally released from the execution of a sentence of imprisonment (Article 163 § 2 CEC)).

Summarizing, the insignificant practical use of the procedure provided by FD 2008/947/JHA by Polish courts acting as the issuing authorities stems from its limited scope of application on the one hand, and from the specific character of Polish probation measures and sanctions alternative to imprisonment. In general, this measure cannot be used with reference to persons placed under the supervision of a probation officer who stay in other Member States temporarily and have family and social ties with Poland. On the other hand, with reference to those who decide to stay permanently in another MS, after the expiry of a certain probation period, the supervision of a probation officer may be lifted, and therefore there is no longer any need to use the mechanism provided by FD 2008/947/JHA.

Finally, it must be underlined that the total number of probation measures imposed yearly by Polish courts and accompanied by the supervision of a probation officer is not very high. The statistics for 2023 (with reference to two probation measures) are as follows<sup>191</sup>:

**All district courts in Poland** (data concerning offences excluding fiscal offences):

252 627 convictions, including 95 633 convictions to the penalty of imprisonment, including 39 651 convictions to the penalty of imprisonment with conditional suspension of its execution for probation period. Only in 12 413 cases out of 39 651 this measure was accompanied by placing a person concerned under the supervision of a probation officer.

In 25 763 cases the criminal proceedings were conditionally discontinued for a probation period, but the supervision of a probation officer was ordered only in 1957 cases.

**All regional courts in Poland:**

7631 convictions, including 6980 convictions to the penalty of imprisonment, including 2639 convictions to the penalty of imprisonment with conditional suspension of its execution for probation period. Only in 1005 cases out of 2639 this measure was accompanied by placing a person concerned under the supervision of a probation officer.

In 62 cases the criminal proceedings were conditionally discontinued for a probation period, but the supervision of a probation officer was ordered only in 11 cases.

As is stemming from the above statistics, the supervision of a probation officer is not applied in the majority of cases. It should be stressed that such supervision is, as a rule, not mandatory.

**- Convention on Transfer of Proceedings/European Convention on Mutual Assistance in Criminal Matters –**

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<sup>191</sup> See, data published in Ogólnopolskie sprawozdania sądów powszechnych, komorników i notariuszy za rok 2023, available at: <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-jednoroczne-w-tym-pliki-dostepne-cyfrowo/rok-2023/download,3858,3.html> (last visited: 31 Dec. 2024). This is a ZIP file. See information provided in files „MS-S6o 2023” and “MS – S6r 2023”.

**Is it possible under national law to transfer proceedings once the sentence is final and enforceable and the other MS refuses to recognise the sentence?**

As already mentioned, the Convention on Transfer of Proceedings is not applicable to Poland.

As already stated, it seems possible to use Article 21 of the European Convention on Mutual Assistance in Criminal Matters also at the enforcement stage of the proceedings. However, the provisions of the CCP (Articles 590-591) described in the Report and offering the legal basis for transfer of proceedings do not apply to the enforcement stage of the criminal process.

**– Is it possible under national law to ‘divide’ ‘composite sentences’ and to deal with the unconditional part under the national transposition of FD 2008/909/JHA and with the conditional part under the national transposition of FD 2008/947/JHA?**

According to Article 37b of the CC: “While sentencing for a misdemeanor subject to the penalty of deprivation of liberty, the court may impose jointly the penalty of deprivation of liberty not exceeding 3 months, and if the upper limit of the statutory penalty exceeds 10 years - 6 months, and the penalty of limitation of liberty for up to 2 years, notwithstanding the lowest statutory penalty provided for in a statute for a given crime. The provisions of Articles 69-75 do not apply. In such situation, the penalty of deprivation of liberty is served first, unless a statute provides otherwise.”

There are no obstacles in the national law to apply for enforcement in another MS of the two penalties imposed as the mixed sentence, by using two separate instruments of European cooperation. Moreover, this possibility is also mentioned in the doctrine<sup>192</sup>. The individual components of a mixed penalty (composite sentence) may be forwarded on other grounds, i.e. using the provisions set out in chapters 66f and 66h of the CCP respectively. It is possible to transfer them simultaneously. In such a situation, it is necessary to complete two separate forms. It should be noted that the recognition and enforcement of a penalty of restriction of liberty must include a reference to its close connection with the penalty of imprisonment, e.g. by specifying the order in which individual sanctions are to be executed.

However, the indication of the court competent for issuing the relevant decision may be problematic in this respect. It may happen that two courts of two levels are entitled to issue the decisions concerning the enforcement of the mixed sentence. As already stated, with reference to the penalty of limitation of liberty it may be a district court (as the first instance court) and for the penalty of imprisonment – the regional court. However, it is rightly emphasized that for functional reasons, the regional court should have jurisdiction in the analyzed case<sup>193</sup>.

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<sup>192</sup> Buczma, Kierzyńska (ed.), Stefaniak-Dąbrowska, *Wzajemne uznawanie orzeczeń karnych w Unii Europejskiej. Poradnik dla praktyków* (Wydawnictwo Krajowej Szkoły Sądownictwa i Prokuratury, 2023), p. 155.

<sup>193</sup> Ibidem.

### Application in practice

The majority of the interviewed judges reported that they accept the above-mentioned interpretation concerning the competence of the regional court to issue decisions on the enforcement of a mixed sentence in another MS. Moreover, one of them even reported the application of such a solution in practice. This judge argued that it would be surprising for the executing authority in another MS if it obtains two separate requests for the enforcement of a mixed sentence, sent by two different courts.

However, the approach occurred to be divergent as to which court would then be competent, i.e. whether jurisdiction should be separated in terms of forwarding the individual components of a mixed penalty (the separate transfer of a penalty of imprisonment by a regional court and a penalty of limitation of liberty by a district court or a joint motion for recognition of the judgment and the enforcement of a mixed penalty in another Member State by a regional court). The regional court judges pointed out that they accept the interpretation that the regional courts have the competence to decide on the transfer of the whole mixed sentence to another MS (in this context, they rely on the example of such a *modus operandi* in cases of transferring a penalty of imprisonment and a fine imposed in one judgment for execution in another Member State, where essentially the possibility of applying for enforcement and recognition in another Member State of the judgment with reference to a fine was within the jurisdiction of the district court). Nevertheless, the district court judges stated that in such a situation the regional court would only have competence to forward a mixed sentence in terms of imprisonment, while the district court would have jurisdiction to transfer a separate part of the sentence as to the restriction of liberty.

Since the mixed penalty is not frequently imposed, there are no data enabling analysis of the practice on this issue in a more detailed manner.<sup>194</sup>

### **(b ) Person is present in another MS**

#### **(ee) enforcement in another MS**

#### **- FD 2008/909/JHA**

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<sup>194</sup> The institution of mixed penalty was introduced into the CC on July 1, 2015. In this context, attention should be paid to its relatively limited use in practice. In 2015, it was imposed on only 370 people, which constituted only 0,14% of all judgments in criminal cases – Statystyka sądowa. Prawomocne skazania osób dorosłych 2012-2016, <<https://isws.ms.gov.pl/pl/baza-statystyczna/publikacje/download,3502,23.html>>, p. 14 (last visited: 14 Apr. 2024). In turn, in subsequent years, the number of penalties pursuant to art. 37b of the CC increased and gained the value (per person): 3544 – in 2016; 3424 – in 2017; 3212 – in 2018. In the years 2016-2018, the number of people who were sentenced to a mixed penalty constituted the following percentages of total convictions: 2016 – 1,22%; 2017 – 1,42%; 2018 – 1,16%. See: Statystyka sądowa. Prawomocne osądzienia osób dorosłych 2014-2018, <<https://isws.ms.gov.pl/pl/baza-statystyczna/publikacje/download,2779,12.html>>, p. 14 (last visited: 14 Apr. 2024).



### Enforcement of a custodial sentence

See, in particular, the comments on this issue contained in (a).

The fact that the person concerned is present in another MS has certain influence on the catalogue of exceptions to the general requirement to obtain the convict's consent to transfer the sentence for enforcement in another MS. Apart from the above-mentioned derogations indicated in Article 611t § 5 (1-2) of the CCP, consideration should be given to Article 611t § 5 (3) of the CCP. It follows that the consent is not necessary when the judgment will be forwarded for execution to the state, to which the offender has fled for fear of criminal proceedings pending in the Republic of Poland or obligation to serve the penalty imposed.

### - FD 2008/947/JHA

#### Enforcement of an alternative sanction/a probation decision

See comments in this respect in (a).

Under Article 611u §§ 1 and 2 CCP, the request for enforcement of the penalty/measure covered by this FD may be submitted to the MS in which the perpetrator has a legal permanent place of stay, provided that the perpetrator is staying in that state or declares their intention to return there. Moreover, it may be directed, upon motion of the perpetrator, also to a MS other than the state in which he has the permanent place of residence, provided that the consent of a competent court or another authority of that state is obtained.

### - European Convention on Mutual Assistance in Criminal Matters – Is it possible under national law to transfer proceedings once the sentence is final and enforceable and the other MS refuses to surrender the person concerned and refuses to recognise the sentence?

See the comments on this topic provided in (a).

### – Is it possible under national law to 'divide' 'composite sentences' and to deal with the unconditional part under the national transposition of FD 2008/909/JHA and with the conditional part under the national transposition of FD 2008/947/JHA?

See the above comments on this topic contained in (a).

### (ff) enforcement in issuing MS

#### - FD 2002/584/JHA

Article 607b (2) of the CCP provides that it is inadmissible to issue an EAW for the purpose of executing a penalty of imprisonment of up to four months or any other measure involving the deprivation of liberty not exceeding four months. Pursuant to Article 37 of the Criminal Code, the penalty of imprisonment lasts no less than a month and no more than 30 years; it should be

imposed in months and years. Thus, as a rule, the minimum penalty of imprisonment which may be a cause for issuing the execution-EAW lasts at least 5 months.<sup>195</sup> However, the execution-EAW may only be issued if “the interest of justice” so require. This means that the regional courts while issuing the EAWs shall apply the principle of proportionality. The fact that the penalty to be executed thanks to the EAW exceeds 4 months is not enough to use this measure<sup>196</sup>. The EAW should be issued only in the most serious cases and only if other measures to reach the procedural goal have been exhausted<sup>197</sup>.

Article 607b CCP does not mention issuing the execution-EAW with reference to “security measures” (i.e. a psychiatric detention). However, despite the lack of reference to security measures in this provision or in any other provision regulating EAW, it is accepted in the literature that the execution-EAW may be issued for the purpose of execution of security measures resulting in deprivation of liberty, particularly a measure of placing a person in the psychiatric detention.<sup>198</sup>

The opposite view is expressed with reference the possibility to issue the EAW aimed at execution of an alternative penalty of imprisonment (i.e. the penalty of imprisonment imposed on a person in case of failure to pay a fine).<sup>199</sup> Such penalty may only be sent for execution to another MS by using provisions of the CCP implementing the FD 2008/909/JHA.

#### Application in practice – proportionality on using the measures discussed.

The Polish law concerning enforcement of the sentence of imprisonment was changed in 2023. As from 1 October 2023<sup>200</sup>, new wording of Article 79 § 1 CEC was introduced. According to this provision, “with reference to the person sentenced to the penalty of imprisonment, the court should order his arrest and bring him to the penitentiary facility”. Prior to this date, this provision stated that the court should first summon the convict to report to the penitentiary unit voluntarily, on the exact day. Only in the case of failure to appear at the penitentiary unit, the

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<sup>195</sup> There are, however, certain exceptions, for instance relating to the penalty of imprisonment imposed instead of non-executed penalty of limitation of liberty. In accordance with Article 65 CEC, two days of limitation of liberty should be equal to one day of imprisonment. Thus, at least in theory, it is possible to issue the EAW for the purpose of execution of the penalty of imprisonment replacing the penalty of limitation of liberty and amounting to 4 months and a few days.

<sup>196</sup> Regional Court in Gdańsk, case no. XIV Kop 71/20, decision of 29 July 2020, not published.

<sup>197</sup> In this context see more: Smarzewski, *Periodic Country Report: Poland*, <[https://stream-eaw.eu/wp-content/uploads/2023/07/STREAM\\_Country-Report\\_Poland3.pdf](https://stream-eaw.eu/wp-content/uploads/2023/07/STREAM_Country-Report_Poland3.pdf)>, (last visited: 25 Aug. 2024), p. 7-9; Smarzewski, *Research Brief. Poland*, <[https://stream-eaw.eu/wp-content/uploads/2023/06/Poland-STREAM\\_Country\\_Research\\_Brief.pdf](https://stream-eaw.eu/wp-content/uploads/2023/06/Poland-STREAM_Country_Research_Brief.pdf)>, (last visited: 25 Aug. 2024), p. 4-5; On the application of the principle of proportionality in issuing the EAWs in Poland - see also: Wąsek-Wiaderek, Zbiciak, “The Practice of Poland on the European Arrest Warrant” in Barbosa, Glerum, Kijlstra, Klip, Peristeridou, Wąsek-Wiaderek, Zbiciak, *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, 23 Maastricht Law Series (2022), p. 256-262.

<sup>198</sup> Steinborn, „Komentarz do art. 607b Kodeksu postępowania karnego” in Paprzycki (Ed.), *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego* (LEX, 2015), para. 5.

<sup>199</sup> Cf. Augustyniak, “Komentarz do art. 607b Kodeksu postępowania karnego” in Świecki (Ed.), *Kodeks postępowania karnego. Tom II. Komentarz aktualizowany* (LEX, 2024), thesis no. 8-9.

<sup>200</sup> Journal of Laws 2022, Item 1855.

court decided on the arrest of such a person. The current wording of Article 79 § 1 CEC is problematic since in fact the court is not allowed to use less intrusive measures to secure the appearance of the convict in the penitentiary facility. As an exception to this general rule, Article 79 § 1a CEC allows the court to summon the convict to appear in the detention center on a specified date, but only “in justified cases” and at the convict’s request. This exceptional procedure is additionally permissible only if the convict’s previous attitude and behavior justify the assumption that he will appear when summoned.

The interviewed judges criticized the new regulations. Moreover, they reported that if they have an address of the convict in another MS, they still make attempts to apply old rules or the exception provided in the current rules and send a summons to the convict to appear at the penitentiary facility.

For this reason, Article 5 (1) of the EU Convention on Mutual Assistance in Criminal Matters still plays an important role. This solution (sending the correspondence directly by post) is reflected in the regulations of the CCP, presented above (see, Article 138 of the CCP and Article 139(1) of the CCP, applicable to enforcement proceedings pursuant to Article 1 § 2 of the CEC)<sup>201</sup>, according to which a defendant staying abroad should indicate the address for service in the country or in another EU Member State.

This may prove important if the court responsible for the enforcement of the sentence has information provided by the convict about his place of stay in the territory of another Member State. The requirement to send correspondence directly to him would result in an obligation in this matter also at the stage of the enforcement proceedings. This would endorse the principle of proportionality.

Nonetheless, it must be highlighted once again that currently, due to the new wording of Article 79 § 1 CEC, the courts are not obliged to use summoning first as a way of ensuring appearance of the convict at the penitentiary facility.

The fact that a person sentenced in Poland has a place of residence indicated by him in another Member State is also important in the context of sending him correspondence directly to the address provided by him in another Member State in the course of proceedings in which he was sentenced to imprisonment with conditional suspension of its execution, a penalty of restriction of liberty, an autonomously imposed penal measure, or if a conditional release or conditional discontinuation of criminal proceedings were applied to him. This allows the convict to request enforcement of the judgment in another Member State, and thus avoid, for example, ordering the execution of a conditionally suspended sentence, imposing a substitute sentence of imprisonment for a penalty of restriction of liberty or the risk of a resumption of conditionally discontinued proceedings.

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<sup>201</sup> Cf. Lachowski, “Komentarz do art. 1 Kodeksu karnego wykonawczego” in Lachowski (Ed.), *Kodeks karny wykonawczy. Komentarz*, (Legalis, C.H. Beck, 2023), thesis no. IV (18). Cf. Zagrodnik (Ed.), *Kodeks postępowania karnego. Komentarz praktyczny do nowelizacji 2019*, (Wolters Kluwer, 2020), p. 72-73.

In this respect, Article 5(2) of the EU Convention on Mutual Assistance in Criminal Matters also seems important, as it constitutes the basis for possible service – in the context of enforcement proceedings – of procedural documents through the authorities of the requested Member State, where the address of the person concerned is unknown or uncertain, or where it was not possible to serve the document to him by post or there are reasonable grounds to believe that the postal route will be ineffective in a particular case.

#### CHAPTER 4. Anticipating the application of instruments: sentencing

At least two issues are of interest here:<sup>202</sup>

- *Conditional sentences and probation decisions*<sup>203</sup> and *alternative sanctions*.<sup>204</sup> Is the fact that the accused person resides in another Member State a factor in determining whether to impose a specific sanction, especially if a person residing in the issuing Member State would receive a similar sanction for comparable offences?
- *composite sentences* (see the introduction to Chapter 3). Does the fact that such sentences are governed by two different judicial cooperation regimes – and, consequently, that enforcing such sentences in another Member State may cause difficulties – play a role in deciding whether or not to impose such a sentence?

Currently the Criminal Code provides for very detailed directives concerning aspects which the court should consider while imposing a sentence. Article 53 CC reads as follows:

*“§ 1. The court imposes the punishment according to its own discretion, within the limits prescribed by a statute, observing that its severity does not exceed the degree of fault, taking into*

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<sup>202</sup> We invite the NARs to identify and include other issues.

<sup>203</sup> See the definition of both in Article 2(3) and (5) of FD 2008/947/JHA.

<sup>204</sup> See the definition in Article 2(4) of FD 2008/947/JHA.

*account the degree of social harmfulness of the act and taking into consideration preventive and educational aims it is to achieve with regard to the sentenced person, as well as the need to develop legal awareness of the society.*

*§ 2. While imposing a penalty, the court takes into account especially the perpetrator's motivation and manner of conduct, particularly in case of the commission of a crime against a person who is helpless due to age or health condition, commission of the crime in complicity with a minor, the type and degree of the violation of the perpetrator's duties, the type and the extent of negative consequences of the crime, the characteristics and personal conditions of the perpetrator, the perpetrator's way of life prior to the commission of the crime and his behavior after the commission of the crime, especially his efforts to redress the damage or to satisfy public sense of justice in any other form, as well as the harmed party's conduct.*

*[...]*

*§ 3. While imposing a penalty, the court also takes into consideration the positive results of the mediation between the victim and the perpetrator or the settlement they have reached during the proceedings held before a court or a public prosecutor.”*

In 2023 the new §§ 2a-2e were introduced into Article 53 CC, providing for several additional detailed directives of sentencing. However, none of them relate to the situation of the convict residing abroad or having the citizenship of another country.

It is clear from the quoted provisions that in the process of sentencing such aspects as prospect of execution of the sentence abroad are not taken into account.

#### Application in practice

As declared by a few practitioners, the fact that the accused resides outside the territory of Poland rarely but sometimes is, to certain extent, taken into account when choosing the type of penalty, which, of course, is not supported by the wording of the provisions providing for sentencing directives, and is only the result of pure calculation related to the prospect of potential difficulties in enforcing the sentence abroad. However, the majority of interviewed practitioners declared that they do not take such circumstances into account.

However, this usually seems to work to the accused's advantage. This is most visible in the abandonment of imposing a penalty of restriction of liberty consisting of the obligation to perform unpaid, supervised work for social purposes ranging from 20 to 40 hours per month (for a maximum period of two years) and imposing a fine instead, i.e. a penalty that is generally milder and at the same time easier to enforce (it is enough for the accused to make a one-off payment of the fine imposed on him). Sometimes another form of the penalty of restriction of liberty is chosen, which, instead of the obligation to work, involves deducting from 10 to 25% of the monthly remuneration for work for social purposes. This form of the penalty of limitation (restriction) of liberty is easier to execute if the accused is abroad. In similar facts and circumstances, the accused living in Poland would most likely be sentenced to restriction of liberty involving obligation to work for social purposes. At the same time, in conversations with

practitioners, there was no mention of "giving up" punishment without conditional suspension of its execution in favor of a punishment combined with such benefit.

## Chapter 5 Miscellaneous: whereabouts unknown and *in absentia*

### 5.1 Introduction

This Chapter is also an odd one out. It concerns stages in which cooperation is not sought or in which it is not necessary yet. When making decisions about going to trial and informing the suspect of the date and place the whereabouts of the accused may be unknown. When the whereabouts are known and he is abroad, whatever a Member State does may have consequences for asking for cooperation now or at a later stage. At the sentencing stage decisions will be made that subsequently will lead to a need for cooperation, either automatically or on the basis of a specific decision. As in the previous Chapter, the focus of this last one is on stages of criminal proceedings in which there is no need for judicial cooperation yet and, therefore, no need for the application of instruments yet: the stage of preparations for the trial and the sentencing stage (the determination by a court of the sentence to be imposed on an accused person who has been found guilty of the offence he was charged with).

### 5.2 Whereabouts unknown

The object of this chapter is to establish what decisions authorities take in seeking the whereabouts of the accused. Not knowing the whereabouts of the suspect is a problem, because it means that the authorities do not know what measures are possible and with whom cooperation must be sought. Do they ask for information from other states, do they introduce a Schengen-alert, do they issue an EAW or do they simply wait? There is very little known at this early stage and especially not on whether and if so, what instruments of cooperation are used.

As transpires from the interviews conducted for the purpose of this project, after establishing that a suspected person is not present in Poland the public prosecutors first try to establish his/her whereabouts with the assistance of the consulate (with reference to Polish citizens) or introduce the SIS - alert.

On the other hand, the following practice is described in the evaluation report on the use of the EIO:

*“Regarding the relationship between the EIO and EAW, the Polish authorities noted that establishing the whereabouts of a person is not in itself an investigative measure and does not serve the purpose of taking evidence. Consequently, Poland would not issue an EIO in such cases. The whereabouts of a person are established by police channels or by means of other international cooperation instruments (for example with a SIS alert). In practice, it is possible to send an EIO in order to establish the whereabouts of a person and subsequently carry out measures with their participation. Individual cases have been noted in which an EIO has been issued in order to establish the whereabouts of a person in another Member State with a view to sending a*

*subsequent request. Similarly, occasional cases have been noted in which the effect of an EIO was intended to check whether a certain person was staying in Poland at the address indicated.”*<sup>205</sup>

### 5.3 *In absentia*

Depending on national criminal procedure, a Member State may or may not have the possibility to conduct trials in the absence of the accused. It would be relevant to know to what extent judges consider the pros and cons of asking for cooperation when taking a decision on the summons of the accused as well as on whether or not to proceed to trial without the accused present.

At least two issues are of interest here:<sup>206</sup>

The summons to an accused abroad may be sent directly by mail without any assistance from the Member State in which the accused resides. It may also be sent with the assistance of its authorities. The former may be faster, the latter may give more certainty about whether the accused received the summons and wishes to be present at the trial. Is this a matter that is considered by courts? To what extent does the choice for one or the other relate to the (im)possibility the national system may have to conduct proceedings in the absence of the accused? Is it considered that if the accused is in the other Member State, whether a transfer of proceedings might be more appropriate in this case?

As a rule, since 2015 participation of the accused in the hearing held at the trial stage of the criminal proceedings is not mandatory. Exceptions to this rule were explained in the previous sections of this Report. However, this does not mean that proper summoning to the hearing is of no relevance for the judicial authorities. To the contrary. In principle, pursuant to Article 117 CCP the hearing should not be conducted *in absentia*, if the accused was not duly summoned to this hearing. The Code of Criminal Procedure provides for higher requirements with reference to the summoning to the first hearing than with reference to other procedural activities. As a rule, the summons shall be received by the accused in person. There is also the opportunity to declare that the accused was duly summoned to the first hearing if the summons was sent twice at the address indicated by the accused. As was already explained in the previous chapters of this Report (see section 2.3.), the latter requirement (of having the evidence of repeated summoning) generates some difficulties with reference to the summons sent to another Member State. The interviewed judges explained that they first try to inform the accused of the date of the hearing by sending the summons directly to the address indicated by the accused within the territory of the EU. With

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<sup>205</sup> *Evaluation Report on the 10th Round of Mutual Evaluations on the implementation of the European Investigation Order (EIO). Report on Poland*, Document 13516/1/24 REV 1, issued on 2 October 2024, p. 21, available at: <https://www.consilium.europa.eu/en/documents/public-register/public-register-search/?AllLanguagesSearch=false&OnlyPublicDocuments=false&DocumentNumber=13516%2F24&DocumentLanguage=EN> (last visited: 30 April 2025).

<sup>206</sup> We invite the NARs to identify and include other issues.



reference to Polish citizens residing abroad, the consular path is also explored<sup>207</sup>. However, if there is no opportunity to obtain the proof of double summoning (due to regulation of the post serviced abroad), interviewed judges declared that they use simplified letters rogatory based on Article 5 (2) of the 2000 Convention on mutual assistance.

As far as the transfer of proceedings is concerned, the available statistics were presented in previous sections of this Report. Poland is not a party to the Convention on Transfer of Proceedings. Thus, all cases of transfer of proceedings are examined on the basis of bilateral agreements, the provisions of the CCP or on the basis of Article 21 of the European Convention on Mutual Assistance in Criminal Matters. However, the latter does not provide for real transfer of proceedings, as was explained in previous sections of this Report.

There is a follow-up question to that. When taking the decision to allow *in absentia* proceedings to be held, does the judge consider that the *in absentia* character of the proceedings may have consequences when later international cooperation is needed? For example: FD 2002/584/JHA applies other, more severe, conditions to such judgements than to other judgments.

Since the presence of the accused at the trial is mandatory only in the most serious cases, conducting the judicial proceedings *in absentia* in other cases is not an exception. Therefore, it seems justified to argue that judges do not consider whether the *in absentia* character of the proceedings may have consequences later, at the enforcement stage of the proceedings.

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<sup>207</sup> Article 26 of the consular law provides that upon the motion of the court, the consul delivers procedural letters and other documents to Polish citizens, if the addressee accepts such document voluntarily. The consul shall apply the Polish law relevant in the case.

## Memorandum

### I. What should be done at EU level

#### 1. Application of an EIO for complex procedural activities aimed at investigation and prosecution.

The EIO should be assessed as a very effective and useful tool of cooperation<sup>208</sup>. However, the scope of purposes for which the EIO may be issued is still somehow vague. The most problematic question is whether the EIO may be used for complex procedural (investigative) activities comprising service of documents (for example a decision on bringing charges against a suspect) and interrogation of a suspected person as a suspect. It should be underlined that Polish practitioners frequently use the EIO for the procedural activity which encompasses both: bringing charges (i.e. directing prosecution against a person) and taking evidence in the form of interrogation of the suspect. On the other hand, they reject the option of using the temporary transfer under the EIO path to bring charges against the suspect arguing that this measure should be used for evidence purposes, not for prosecution. The problem of the scope of the EIO and the admissibility of using it partly for prosecution purposes (in particular for serving an indictment on the suspect) was examined by the Court of Justice of the EU in the recent *Delda* case (C-583/23). As a rule, the Court of Justice followed the opinion of the Advocate General Collins delivered in this case<sup>209</sup> and stated that: “Articles 1 and 3 of Directive 2014/41/EU [...] must be interpreted as meaning that:

an order by which a judicial authority of one Member State requests a judicial authority of another Member State to serve on a person an indictment relating to him or her does not, as such, constitute a European Investigation Order within the meaning of that directive;

an order by which a judicial authority of a Member State requests a judicial authority of another Member State to remand a person in custody pending trial for purposes other than those referred to in Articles 22 and 23 of that directive, or to require him or her to make a bail payment, does not constitute a European Investigation Order within the meaning of that directive;

an order by which a judicial authority of a Member State requests a judicial authority of another Member State to allow a person to make observations on the matters set

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<sup>208</sup> Since 2018 until the end of 2022 the Polish procedural organs issued altogether 30530 EIOs. Only 98 of them were refused by the executing organs of other MS. See, *Evaluation Report on the 10th Round of Mutual Evaluations on the implementation of the European Investigation Order (EIO). Report on Poland*, Document 13516/1/24 REV 1, issued on 2 October 2024, p. 71; available at: <https://www.consilium.europa.eu/en/documents/public-register/public-register-search/?AllLanguagesSearch=false&OnlyPublicDocuments=false&DocumentNumber=13516%2F24&DocumentLanguage=EN> (last visited: 30 April 2025).

<sup>209</sup> Opinion of 4 October 2024, ECLI:EU:C:2024:863.

out in the indictment relating to him or her constitutes a European Investigation Order within the meaning of Directive 2014/41, in so far as that request for a hearing is intended to gather evidence.”

However, as transpires from paras. 42-44 of the judgment, CJEU is ready to accept using an EIO for the purpose of bringing charges or serving an indictment to a suspect if, according to the national law of the issuing Member State, such an activity is the necessary precondition for interrogation of a suspect aimed at gathering of evidence. The CJUE supported its opinion by referring to Article 9(2) of Directive 2014/41 providing that the executing authority is, in principle, required to comply with the formalities and procedures expressly indicated by the issuing authority.

The above presented interpretation of Directive 2014/41 is more than welcomed. It is my view that it allows to use the EIO mechanism for bringing charges against a suspect. As transpires from the research conducted within the framework of this project, currently the EIO mechanism of cooperation (as used by Polish practitioners at the pre-trial stage of the proceedings) is fully complementary to the use of the prosecution-EAW. As already stated, the EIO measure is frequently used for bringing charges against a suspect and his/her interrogation. It is very reasonable that the CJEU did not follow the option presented by AG Colling, that service of documents connected with the interrogation of a suspect should be done on the basis of Article 5 of the Convention of 29 May 2000. This proposal was dysfunctional. Moreover, it was difficult to find the reasons behind such an opinion based on the need to protect the rights of suspects.

To sum up, the CJEU ruling in *Delda* case allows for using the EIO for the purpose of bringing charges against a suspect whose purpose is also (but not solely) to enable a suspect to make observations on the charges laid against him or her (see, *a contrario*, para. 42 of the judgment). However, this conclusion does not undermine the need for searching for a new solution, maybe the new legal instrument, allowing for mutual recognition of measures aimed solely at prosecution purposes, if issuing an execution-EAW is not necessary or disproportionate in the given case.

## 2. Admissibility of using EIO for ensuring participation of a defendant in the trial

Another important question is whether the EIO may be issued only for the purpose of investigation or maybe also for the participation of a suspect/accused in procedural activities (the trial). Currently the answer to this question seems to be a negative one while the coherent model of cooperation should provide for easily accessible option of using videoconference not only for hearing witnesses, expert witnesses and suspects (which is now possible under the EIO but in practice dependent on the internal regulation of the MS), but for conducting the whole hearing (trial) by videoconferencing. As a first step such a model of conducting the proceedings could be applied to persons deprived of liberty and in cases of mandatory participation of the accused in the hearing. There are not obstacles based on human rights grounds for providing the accused

person detained in one MS with the opportunity to participate in the hearing conducted before the court of another MS. Participation of the accused in the hearing by videoconferencing is accepted under certain conditions in the case-law of the European Court of Human Rights<sup>210</sup>. In particular, such obstacles could not be voiced if participation in the hearing via videoconferencing would be granted upon motion or after obtaining the consent of the accused. To reach this goal, the EIO Directive could be amended, or a new instrument adopted at the EU level. Certain option would also be the reinterpretation of the provisions of the EIO Directive, in particular the notion of “investigative” measure which would allow to cover not only interrogation of the accused person during the hearing but also his/her participation in evidentiary proceedings. However, considering the judgment in the above-mentioned *Delda* case, the CJEU seems to be rather reluctant to apply extensive interpretation of Directive 2014/41. The Court ruled that the concept of “investigative measures” must be given an autonomous interpretation in EU law. It was defined as covering “any investigative act intended to establish a criminal offence, the circumstances in which it was committed and the identity of the perpetrator” (para. 28 of the judgment).

### 3. Proposals for amendments to the FD EAW

It seems that Article 6 of the Regulation 2023/2844 will bring positive changes with reference to this issue and will “force” many MS, including Poland, to regulate the hearing of a suspect by videoconferencing. Once the Regulation 2023/2844 and the Directive (EU) 2023/2843 will be implemented in the EU Member States, hearing of a requested person upon the motion of the issuing state in the framework of the EAW proceedings will be possible also by videoconference<sup>211</sup>. One may assume that after such a hearing in certain cases the EAW could be withdrawn.

Moreover, it seems reasonable to allow not only hearing of such a person via videoconference prior to issuing a decision on the execution of the EAW but also later on, if the surrender was postponed (i.e. in the circumstances described in Article 24 FD EAW). Currently Article 24 FD EAW provides only for the temporary transfer of the requested person if surrender is postponed in the executing MS. Hence, the above presented opportunity would require amendments of Article 24 FD EAW. Thus, if a requested person subject to the prosecution-EAW is deprived of liberty in the executing state (detained in another case, or simply executing the penalty) and his surrender is adjourned due to this fact, the use of videoconferencing at this stage

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<sup>210</sup> See, KEY THEME. Article 6 (criminal limb) Hearings via video link, available at: <https://ks.echr.coe.int/documents/d/echr-ks/hearings-via-video-link> (last visited: 10 Oct. 2024).

<sup>211</sup> Article 18 (1) FD EAW as amended by the Directive 2023/2843 provides that “Where the European arrest warrant has been issued for the purpose of conducting a criminal prosecution, the executing judicial authority must: (a) either agree that the requested person should be heard in accordance with Article 19 of this Framework Decision or via videoconferencing in accordance with Article 6 of Regulation (EU) 2023/2844; (b) or agree to the temporary transfer of the requested person.”

could replace his personal appearance before the court in the issuing MS and – in certain cases - could also result in withdrawal of the prosecution-EAW. One may assume that this may decrease the total number of surrenders.

I believe that the use of videoconferencing at the large scale in criminal proceedings could result in noticeable decrease of EAWs issued for prosecution purposes. Thus, the next step would be to offer the opportunity to participate in the hearing by videoconferencing also to those defendants, whose presence is mandatory but who are at liberty in another MS. Again, as an alternative to issue the prosecution-EAW for the purpose of forcing them to appear before the court, the court should conduct the hearing by videoconferencing. However, for that purpose a new measure is necessary which would allow to face such defendants with the option: either they appear before the procedural organ in another MS to take part in the hearing remotely, or they will be subject to the prosecution-EAW.

#### 4. Other instruments of cooperation

An effective mechanism for transfer of proceedings is needed at the European level. It is to be hoped that the recently adopted Regulation of the European Parliament and of the Council on the transfer of proceedings in criminal matters will provide the adequate legal basis for effective cooperation in this area.

It seems justified to postulate introduction of standardized rules for summoning defendants from another MS prior to the use of more intrusive measures of cooperation. I am not sure whether such initiative could find legal basis in Article 82 (1) or (2) TFEU but it would be useful and would fully implement the principle of proportionality.

## II. What should be done at the national level

**General reservation:** Currently in Poland attempts are made to resolve the most urgent legal problems which has emerged during the last 8 years. The most important is removing unconstitutional changes introduced into our legal system. The Criminal Law Codification Commission has prepared already the draft Act removing the most bothersome changes introduced into the CC, CCP and CEC over the last few years. The draft Act should be adopted in a few months, of course, if there will still be a political will to do so. For this reason, the national law as it stands and as it is presented in the Report, may be changed in 2025. Moreover, a comprehensive reform of the CCP is planned in the nearest future (2 years perspective).

1. Poland should change Article 258 § 1 CCC. *De lege lata* this provision allows for applying detention on remand if “the accused has no permanent residence in the country” (i.e. in Poland). As argued by some Authors, this provision is discriminatory and increases the risk of applying the most severe preventive measure with reference to foreigners<sup>212</sup>.

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<sup>212</sup> Wolny (in cooperation with Szuleka and Kalisz), *Wzajemne uznawanie orzeczeń probacyjnych – w praktyce. II etap badań, Ryzyko ucieczki i ukrycia się podejrzanego jako podstawa stosowania tymczasowego aresztowania. Raport z*

2. The opportunity to hear a suspect at the pre-trial stage of the proceedings by videoconferencing should be introduced into Polish law. All reservations to provisions of the CoE Convention and 2000 Convention excluding hearing a suspect/a defendant by videoconference (see, Section 1.2. of the Report) should be withdrawn. Due to the lack of appropriate regulations, Polish authorities are allowed (under certain conditions) to execute the EIO requesting interrogation of a suspect by videoconference but at the same time are not allowed to issue the EIO requesting interrogation of a suspect by means of videoconference in other MS.
3. The Polish legislator should introduce clear legal basis for interrogating the accused at the trial stage of the proceedings using videoconference. *De lege lata* Article 377 § 4 *in fine* CCP provides the legal basis for such way of interrogation only in specific, narrowly defined circumstances and, as such, may be applied in a very limited number of cases.
4. The full opportunity to conduct the trial by videoconferencing with the participation of the accused should be introduced into the CCP. The current scope of application of Article 374 § 4 CCP is too narrow. It should not be conceived as an optional form of participation in the hearing to be chosen by a defendant (i.e. I do not propose to regulate this as “a right of the accused to participate in the hearing remotely”) but as an option for the court to secure presence of the defendant in the hearing remotely. Thus, it should still be conceived as an exception to the principle of direct participation in the trial.
5. The Polish legislator should regulate *expressis verbis* the opportunity of the Polish court issuing the prosecution-EAW to ask the executing authorities to hear the requested person, also by videoconferencing (Articles 18 and 19 of the FD EAW).
6. The Polish legislator should regulate *expressis verbis* the opportunity of the Polish courts issuing the prosecution-EAW to ask the executing authorities for temporary transfer of the requested person prior to deciding on the execution of the EAW (Article 18 FD EAW) – see, Section 2.2.2. of the Report.
7. The Polish legislator should consider amending the CCP (the regulations concerning the execution of the EAW) by providing legal basis for temporary transfer of the requested person to the issuing MS prior to deciding on the execution of the EAW (Article 18 FD EAW). The current provision of Article 607o § 2 CCP regulates temporary transfer of the requested person only in case of postponed surrender, i.e. it implements Article 24 FD EAW – see, Section 2.2.2. of the Report.
8. The Polish legislator should consider unifying the competence of courts acting as issuing authorities for the purpose of FD 2008/909/JHA and FD 2008/947/JHA (see, Section 2.3. of the Report).

9. The Polish legislator should restore the previous wording of Article 79 § 1 CEC (see, Section 3.2. of the Report).

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