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Research Project
“InAbsentiEAW”

Country Report on the European Arrest Warrant
The Republic of Poland

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I. Introduction

Since the implementation of Framework Decision 2002/584/JHA by the Republic of Poland in 2004, the European Arrest Warrant (EAW) has generated considerable interest in terms of its widespread use by the Polish judicial authorities. What is more, the transposition of Framework Decision 2002/584/JHA led to the first amendment of the Constitution of the Republic of Poland. Consequently, the EAW has received much attention in the doctrine and political discussion.¹ Furthermore, in the literature concerning the topic it is widely considered that the EAW is the most representative example of the judicial cooperation in criminal matters in the European Union.² Currently, in Polish academia and politics, the recent developments in the *Celmer* case³ regarding concerns about judicial independence in the Republic of Poland have led to a fierce debate concerning the EAW.⁴

The aim of this report, prepared for the purposes of the research project “InAbsentEAW,” is to consider the state of affairs of the EAW in the Republic of Poland. At first, this report will analyse the issue of implementation of Framework Decisions 2002/584/JHA and 2009/299/JHA into the Polish legal order. The legislative process of transposition of Framework Decision 2002/584/JHA in light of the constitutional prohibition on extradition of Polish citizens will be juxtaposed with the judgement of the Constitutional Tribunal of the Republic of Poland on that matter. Consequently, the report will discuss several studies concerning the constitutionality of the surrender of a Polish national to another Member State of the European Union on the basis of a EAW.

As for the analysis of issuing European arrest warrants to other Member States of the European Union by Polish judicial authorities, the key findings will concern the current form of the procedural aspects such as, the authority competent to issue EAWs, the principles of legality and proportionality, and the conditions applicable for issuing EAWs. What is more, the report will examine the procedure of sending a EAW to other Member State of the European Union, depending on whether the location of the person wanted is known to the Polish competent authorities or not. Finally, a remarkable feature of the Polish practice of issuing EAWs, meaning a comparatively high number of the

¹ Jakubiec 2015, p. 182.

² Bieńkowska 2012, p. 541.

³ C-216/18 PPU, *Minister for Justice and Equality v LM*, [2018].

⁴ Dori 06-06-2018.

EAWs issued by the Polish judicial authorities, will be extensively analysed. The report will present several potential reasons for the considerable number of EAWs issued by the Republic of Poland.

Subsequently, the focus of the report will be on the procedure of executing European Arrest Warrants issued by other Member States of the European Union by Poland. The central focus of that section will be on the issues such as, the competent authority to execute EAWs, the conditions applicable to the procedure of executing EAWs, and the facultative and mandatory grounds for denial to execute EAWs. With regard to the facultative grounds for denial to execute a EAW, the key findings will regard the implementation of Art. 4a of the Framework Decision 2002/584 into the Code of Criminal Procedure of the Republic of Poland. The scope of that section was limited to that particular ground because the focus of the research project “InAbsentiaEAW” is on *in absentia* proceedings. The subsequent section will examine the issue of service as regulated by the Code of Criminal Procedure of the Republic of Poland. Next, it will be followed by evaluation of the various manners of service as applicable to summons and notifications. Furthermore, particular steps of the procedure of service and certain shortcomings related to them will be discussed.

The final section will elaborate on the *in absentia* proceedings and under which conditions proceedings without the accused being present may be conducted pursuant to the Code of Criminal Procedure of the Republic of Poland. *In absentia* proceedings will be analysed from a broader perspective taking into account legislative amendments to the provisions in the Code of Criminal Procedure of the Republic of Poland which regulate the matter of the presence of the accused at the main trial. Furthermore, the report will consider the opinions of experts, judges, and practitioners with regard to the current state of affairs in that matter. Furthermore, the report will discuss the issue of the consequences of the absence of the accused at the main trial to the enforceability of the decision resulting from it. The conclusions from this analysis will again focus on empirical data gathered during the research phase. Lastly, the report will elaborate on the procedure of reopening of proceedings at request of the accused if the judgment was passed in his absence. That section will discuss the implementation of Art. 4a of Framework Decision 2002/584 into the Polish legal order.

The findings in the report are based on various primary and secondary sources. With regard to the first group the focus will be on the Constitution of the Republic of Poland, the Code of Criminal Procedure of the Republic of Poland and case law. Moreover, parliamentary proceedings, including parliamentary debates, draft bills, and

parliamentary reports are discussed. In reference to the secondary sources, the emphasis is on the most recent versions of legal commentaries, journal articles, and experts' opinions concerning the subject-matter of the report. Furthermore, the report involves empirical data such as information gathered by the report's author through interviews with professors and practitioners in the field of Polish criminal law, Polish criminal procedure, and transnational criminal law. Lastly, the statistics on European Arrest Warrants issued and executed by Poland will be provided in Annex I, Annex II, and Annex III.

The report will discuss the main arguments presented during the conference entitled "Human rights and mutual recognition of judicial decisions in the European Union – reflections on the basis of *Celmer* case" as organised by the Helsinki Foundation for Human Rights. The above-mentioned conference gathered together various actors specialised in matters of European Arrest Warrant such as, judges, lawyers, prosecutors, academics, and representatives of NGOs. During the conference the panellists discussed various matters concerning European Arrest Warrant, *inter alia*, the principle of proportionality in the practice of Polish judicial authorities, the potential implications of the *Celmer* case,⁵ and cooperation with judicial authorities of other Member States of the EU with regard to the EAW.

The report does not discuss in details the relation, if any, between the decentralised structure of the procedures of issuing and executing European arrest warrants and collecting data concerning EAWs. Furthermore, the analysis did not identify existence of any state initiatives with regard to *in absentia* European arrest warrants (both EAWs issued by other Member States of the European Union to Poland, and EAWs issued by Poland to other Member States). Taken as a whole, the results of the report do not devote a lot attention to the preliminary rulings referred to the Court of Justice in EAW cases by the Polish courts. Regarding the above-described issues, the report does not discuss them extensively because over the course of writing this report barely any sources containing information regarding these matters were found. In addition, the consulted sources did not elaborate on the influence of the case law of the Court of Justice of the European Union concerning the EAW on the Polish practice. Therefore, no significant correlation was identified between the case law of the Court of Justice of the European Union and the practice concerning service and *in absentia* EAWs in Republic of Poland.

⁵ C-216/18 PPU, *Minister for Justice and Equality v LM*, [2018].

II. Implementation of Framework Decisions 2002/584/JHA and 2009/299/JHA into Polish legal order

The main focus of this section is to demonstrate how the Framework Decisions 2002/584/JHA and 2009/299/JHA were transposed into the Polish legal order and the challenges related to that process. At first the implementation of the Framework Decision 2002/584/JHA will be discussed, which will be followed by the examination of the constitutional issues which arose with regard to the transposition of that legal act.

A. Framework Decision 2002/584/JHA

To begin with, the deadline for the transposition of the Framework Decision 2002/584/JHA (hereinafter referred to as “FD 2002/584/JHA”) into national legal orders of the Member States (MS) of the European Union (EU) was the 31st December, 2003. At that time, the Republic of Poland (hereinafter referred to as “Poland”) was not yet a Member State of the EU, but a candidate Member State. Poland was about to access the European Union during the 2004 enlargement. During the process of the 2004 enlargement of the European Union, FD 2002/584/JHA formed a part of the *acquis communautaire* falling under the chapter concerning Cooperation in the field of Justice and Home Affairs (JHA). Poland, while negotiating the terms of its accession to the EU, did not put forward a motion for either transitional periods or derogations in the JHA Pillar.⁶ Furthermore, Poland while negotiating its position with regard to the above-mentioned chapter, obliged itself to accept all legal acts forming the new *acquis communautaire*.

For the new Member States, such as Poland, the obligation to transpose the FD 2002/584/JHA arose with the moment of the accession (i.e. 1 May 2004). Consequently, in order to fulfil its obligations as a Member State of the EU, the Polish legislator undertook appropriate legislative actions in advance in order to secure entrance into force of the provisions, which implement the FD 2002/584/JHA, by the 1st May, 2004. In September 2003, the government submitted a bill⁷ to the *Sejm*, which is the lower

⁶ Łazowski 2005, p. 572.

⁷ *Projekt ustawy – o zmianie ustawy – Kodeks Karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks wykroczeń wraz z projektem podstawowego aktu wykonawczego* [Draft Bill

chamber of the Polish parliament. The bill was introduced to amend, *inter alia*, the Code of Criminal Procedure of the Republic of Poland of 6th June, 1997 (hereinafter referred to as “the Code of Criminal Procedure” (CPC)). The aim of the proposed legislation was to implement the FD 2002/584/JHA into the Polish legal order.

The legislative process looked as follows, the *Rada Ministrów* (hereinafter referred to as “the Council of Ministers”)⁸ took the legislative initiative. While preparing the draft of the legislative act the Council of Ministers asked for the opinion of *Rada Legislacyjna* (hereinafter referred to as “the Legislative Council”)⁹ concerning the conformity of surrender of Polish nationals to the Member States of the EU on the basis of EAW with the Constitution of the Republic of Poland of 2nd April, 1997 (hereinafter referred to as “the Constitution”).¹⁰ At that time the Constitution explicitly prohibited the extradition of Polish citizens (Art. 55 (1) of the Constitution). At that stage a debate started in political and judicial circles whether the implementation of the FD 2002/584/JHA should be preceded by an amendment to the Constitution. The aim of such a potential amendment would have been to bring the Constitution in line with the FD 2002/584/JHA.

B. Legislative Council’s opinion concerning constitutionality of implementation of the Framework Decision 2002/584/JHA

The Legislative Council in its opinion¹¹ discussed the issue of constitutionality of implementation of the FD 2002/584/JHA. The members of the Legislative Council took two strongly dissenting views. According to one position,¹² Art. 55 (1) of the Constitution entailed a fundamental constitutional principle. Moreover, Art. 55(1) of the Constitution was unconditional and did not allow for any exceptions. Consequently, any narrowing interpretation of Art. 55 (1) of the Constitution (i.e. limiting the prohibition of the extradition of Polish citizens only to the third countries, which are not Member

amending the Criminal Code, Criminal Procedure Code and Minor Offences Code with the Draft Executive Regulation] Doc. No. 2031 of 19 Sept. 2003.

⁸ *Rada Ministrów* (The Council of Ministers) is the collective executive decision-making body of the Polish government. The cabinet consists of the Prime Minister, the Deputy Prime Minister, who acts as a vice-president of the Council of Ministers, and all other ministers.

⁹ *Rada Legislacyjna* (The Legislative Council) is an advisory and consultative body of the Prime Minister and the Council of Ministers existing since 1972. The members of the Legislative Council are top legal scholars in Poland.

¹⁰ Sobczak 2008, p. 31.

¹¹ *Rada Legislacyjna* [The Legislative Council] 2004, p. 147.

¹² *Projekt ustawy – o zmianie ustawy – Kodeks Karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks wykroczeń wraz z projektem podstawowego aktu wykonawczego* [Draft Bill amending the Criminal Code, Criminal Procedure Code and Minor Offences Code with the Draft Executive Regulation] Doc. No. 2031 of 19 Sept. 2003, p. 39.

States of the EU) would be an interpretation *per analogiam* to the detriment of the requested person. Commentators adhering to that position argued that departure from that unconditional prohibition of surrendering of a Polish citizen would require an appropriate amendment to the Constitution.¹³ As argued, neither international treaties nor acts of international law have precedence over the Constitution, which is the supreme law of Poland (Art. 8 (1) of the Constitution). Constitutional provisions apply directly, unless the Constitution provides otherwise (Art. 8 (2) of the Constitution). The supporters of that position, pointed out that in Art. 55 (1) of the Constitution there was no indication that the provision does not apply directly.

In order to support the former view, it was argued that the new procedure under the EAW is a form of direct cooperation of judicial authorities of the Member States of the EU. According to that position, “surrendering” of a citizen (including Polish nationals) on the basis of a EAW was a distinct institution from “extradition” as understood by Art. 55 (1) of the Constitution. Consequently, the implementation of the FD 2002/584/JHA should be performed in such a manner to make in the CPC a clear distinction between the “extradition” as provided in Art. 55 (1) of the Constitution (including introducing to the CPC the constitutional term “extradition”) and the “surrendering” on the basis of a EAW.

On the other hand, some commentators argued that the “surrendering” of a citizen on the basis of a EAW was a distinct institution from the concept of “extradition” under international law, which was laid down in Art. 55 (1) of the Constitution.¹⁴ As claimed, the FD 2002/584/JHA introduced to EU law new institution of the “surrendering” of a citizen against whom a EAW was issued by the competent authorities of the Member States of the EU. Therefore, according to that view, the remaining question was whether the new procedure introduced by the FD 2002/584/JHA (i.e. surrender of a prosecuted person between the Member States of the EU on the basis of a EAW) was in the legal sense an institution completely distinct from the institution of “extradition” or a type of that procedure.¹⁵ In order to support that position, the

¹³ *Projekt ustawy – o zmianie ustawy – Kodeks Karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks wykroczeń wraz z projektem podstawowego aktu wykonawczego* [Draft Bill amending the Criminal Code, Criminal Procedure Code and Minor Offences Code with the Draft Executive Regulation] Doc. No. 2031 of 19 Sept. 2003, p. 40.

¹⁴ *Projekt ustawy – o zmianie ustawy – Kodeks Karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks wykroczeń wraz z projektem podstawowego aktu wykonawczego* [Draft Bill amending the Criminal Code, Criminal Procedure Code and Minor Offences Code with the Draft Executive Regulation] Doc. No. 2031 of 19 Sept. 2003, p. 40.

¹⁵ *Projekt ustawy – o zmianie ustawy – Kodeks Karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks wykroczeń wraz z projektem podstawowego aktu wykonawczego* [Draft Bill

proponents invoked point 5 of the FD 2002/584/JHA. Moreover, the Legislative Council argued that there are several features which distinguish the “surrender” on the basis of a EAW such as, the lack of double criminality requirement for certain offences, the exclusive involvement of judicial authorities, and the principle of mutual trust.¹⁶

Biuro Studiów i Ekspertyz (Bureau of Research of the Chancellery of the Sejm)¹⁷ issued a number of expert opinions. Legal scholars such as Professor Paweł Sarnecki¹⁸ and Professor Michał Płachta¹⁹ in their opinions, argued that the proposed provisions were not compatible with Art. 55 (1) and (2) of the Constitution.²⁰ Moreover, Płachta in the expert opinion argued that the legislator disregarded Art. 55(2) of the Constitution which at that time stated as follows: “The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden.”²¹ Płachta described the distinction, made by the Legislative Council, between the “extradition” and “surrendering” on the basis of a EAW as invalid.²² Płachta argued that that division followed from a misunderstanding of the concept of “extradition” and called the above-mentioned arguments provided by the legislator not only unconvincing but also misleading.²³ It is crucial to note that the opinion of Płachta was not followed by the legislator while implementing the FD 2002/584/JHA into Polish legal order.

As demonstrated above, the position of the Legislative Council was not unanimous. However, in the end the Legislative Council decided that the institution

amending the Criminal Code, Criminal Procedure Code and Minor Offences Code with the Draft Executive Regulation] Doc. No. 2031 of 19 Sept. 2003, p. 41.

¹⁶ *Projekt ustawy – o zmianie ustawy – Kodeks Karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks wykroczeń wraz z projektem podstawowego aktu wykonawczego* [Draft Bill amending the Criminal Code, Criminal Procedure Code and Minor Offences Code with the Draft Executive Regulation] Doc. No. 2031 of 19 Sept. 2003, p. 43.

¹⁷ *Biuro Studiów i Ekspertyz* (Bureau of Research of the Chancellery of the Sejm) – the Bureau renders services to fulfil needs of deputies and organs of the *Sejm* ranging from provision of concise basic information and legal consultations to preparation of written experts' opinions and reports requiring complex and time-consuming studies. The Bureau gives opinions on draft legislation being under the Sejm consideration with special regard to their expected legal, social, economic and ecological consequences as well as burden they may impose on the State Budget. Information available at the Bureau's website <http://biurose.sejm.gov.pl/eng/index.htm> last visited on 29 April, 2018.

¹⁸ Professor Paweł Sarnecki (1939-2016) – Professor at the Faculty of Law at the Jagiellonian University, expert in the field of constitutional law.

¹⁹ Professor Michał Płachta – Professor at the Faculty of Law at the University of Gdańsk, expert in the field of criminal law.

²⁰ Płachta 2004, p. 10-11.

Sarnecki 2004, p. 3.

²¹ Płachta 2004, p. 13.

²² Płachta 2004, p. 10-11.

²³ Płachta 2004, p. 13.

created by the FD 2002/584/JHA was acceptable in the light of the Polish constitutional order. Consequently, that conclusion was followed by the Council of Ministers. Therefore, despite significant doubts, regarding constitutionality of the proposed legal act implementing the FD 2002/584/JHA, the Polish legislator decided to transpose the FD 2002/584/JHA by means of an amendment only to the CPC, without any accompanying alternation of the Constitution.²⁴

The result of the legislative process was passing by the Parliament of *Ustawa z dnia 18 marca 2004 r. o zmianie ustawy — Kodeks karny, ustawy — Kodeks postępowania karnego oraz ustawy — Kodeks wykroczeń*,²⁵ which entered into force on the 1st of May, 2004. With regard to the implementation of the FD 2002/584/JHA, the act amended the CPC by adding two chapters to it – Chapter 65a (Articles 607a-607j) and Chapter 65b (Articles 607k-607zc). The former one regulates the situations in which the EAW is issued by the Polish authorities. While the latter chapter regulates the execution of the EAW originating from other Member States. Finally, the legislator introduced a terminological distinction between “extradition” (*ekstradycja*) and the “surrendering” (*przekazanie*) of a person on the basis of a EAW. According to amended Art. 602 of the CPC included in Chapter 65 (entitled “Surrender and transport of prosecuted or convicted persons, or the delivery of objects upon the request of foreign states”), “extradition” was understood as a term applying exclusively under international law and was defined in such a manner that it excluded the surrendering of a person on the basis of the EAW.

C. Constitutionality of the amended provisions of the CPC – Judgment of the Polish Constitutional Tribunal concerning European Arrest Warrant (release of 27th April 2005)

Having demonstrated how the implementation of the Framework Decision 2002/584/JHA proceeded, now it is necessary to discuss the implications following from the alleged unconstitutionality of Art. 607t § 1 of the CPC. The aforementioned provision allows the surrendering of a Polish citizen to another Member State of the European Union on the basis of the EAW and reads as follows:

²⁴ Nußberger 2008, p. 163.

²⁵ *Ustawa z dnia 18 marca 2004 r. o zmianie ustawy — Kodeks karny, ustawy — Kodeks postępowania karnego oraz ustawy — Kodeks wykroczeń* [Bill of 18 March 2004 on Amendments to the Criminal Code, the Criminal Procedure Code and the Petty Offences Code]. Dziennik Ustaw [Journal of Laws], (2004), Doc. No. 69, item. 626.

Where a European arrest warrant has been issued for the purposes of prosecuting a person holding Polish citizenship or enjoying the right of asylum in the Republic of Poland, the surrender of such a person may only take place upon the conditions that such person will be returned to the territory of the Republic of Poland following the valid finalization of proceedings in the State where the warrant was issued.

a. Proceedings before the Sąd Okręgowy w Gdańsku IV Wydział Karny

In January 2005, the *Sąd Okręgowy w Gdańsku IV Wydział Karny*²⁶ (Gdańsk Circuit Court (IV Criminal Division) (hereinafter referred to as the “Gdańsk Circuit Court”)) was adjudicating a case regarding a EAW issued by the Netherlands requesting the surrender of a Polish citizen for the purpose of conducting a criminal prosecution in the Netherlands. Before executing the EAW at hand, the Gdańsk Circuit Court sought clarification whether the surrender of Polish citizens pursuant to Art. 607t § 1 of the CPC was acceptable in the light Art. 55 (1) of the Constitution. The Gdańsk Circuit Court referred a question of law to the Constitutional Tribunal concerning the constitutionality of Art. 607t § 1 of the CPC. The basis of review was Art. 55 (1) of the Constitution pursuant to which ‘the extradition of a Polish citizen shall be forbidden.’

b. Judgement of the Polish Constitutional Tribunal concerning European Arrest Warrant (release of 27th April 2005)

As observed in the literature, the judgement of the Polish Constitutional Tribunal concerning European Arrest Warrant of 27th April 2005 (hereinafter referred to as “the judgement of Constitutional Tribunal”)²⁷ can be divided into two parts.²⁸ The first one provides a detailed analysis of the constitutionality of Article 607t § 1 of the CPC. The second part concerns both material and procedural consequences of the judgement and sets a transition period of 18 months for its entry into force.

²⁶ In the three-tier system of the ordinary courts, the Circuit Courts are courts of the second instance, however, in certain cases they adjudicate also at the first instance.

²⁷ Wyrok Trybunału Konstytucyjnego z dnia 27 kwietnia 2005r., [Judgement of the Constitutional Tribunal of the 27th April 2005] P 1/05 *Stosowanie Europejskiego Nakazu Aresztowania do obywateli polskich* [Executing European Arrest Warrant against Polish nationals], OTK ZU [Jurisdiction of the Constitutional Tribunal. Official Collection] No 4/A/2005, item 42, part III 3.4.

²⁸ Nußberger 2008, p. 164.

The main focus of the Constitutional Tribunal's analysis was whether there was a difference between extradition as meant in Art. 55 (1) of the Constitution and surrendering on the basis of a EAW. The Constitutional Tribunal rejected the arguments presented by the Legislative Council in the above-discussed opinion.²⁹ The Legislative Council was of the opinion³⁰ that a clarification of the differences between the two procedures in the CPC is enough to exclude surrender from the scope of Art. 55 (1) of the Constitution. In that regard, the Constitutional Tribunal held that constitutional norms have an autonomous nature in relation to binding acts of lower rank.³¹ Therefore, statutory terms may neither bind nor define the interpretation of constitutional notions.

Subsequently, the Constitutional Tribunal examined differences between extradition and the surrender procedure on the basis of a EAW. Traditionally in the Polish legal doctrine, the terms "extradition" and "surrendering" were used interchangeably.³² On the basis of the linguistic interpretation, a broad reading of the constitutional term "extradition" is justified.³³ With reference to that point, the Constitutional Tribunal denied the distinction between the terms in Polish legal terminology.³⁴ With regard to the procedures themselves, the Constitutional Tribunal listed several factors distinguishing "surrendering" from "extradition" such as, the lack of double criminality requirement for certain offences, the exclusive involvement of judicial authorities, and the *quasi* abolition of two main barriers to extradition (no extradition of Polish citizens and extradition for offences of political character).³⁵

On the basis of these factors, the Constitutional Tribunal concluded that indeed the surrender procedure differs formally and substantially from extradition.³⁶ However, even if vital discrepancies exist between surrendering on the basis of the EAW and extradition on the basis of the CPC, they do not preclude the possibility that the former procedure does not constitute extradition within the autonomous constitutional sense provided in Art. 55 (1) of the Constitution. As the Constitutional Tribunal underlined,

²⁹ Rada Legislacyjna [The Legislative Council] 2004, p. 147.

³⁰ As indicated above, the Legislative Council was not unanimous while issuing the opinion at hand.

³¹ Wyrok Trybunału Konstytucyjnego z dnia 27 kwietnia 2005r., [Judgement of the Constitutional Tribunal of the 27th April 2005] P 1/05 *Stosowanie Europejskiego Nakazu Aresztowania do obywateli polskich* [Executing European Arrest Warrant against Polish nationals], OTK ZU [Jurisdiction of the Constitutional Tribunal. Official Collection] No 4/A/2005, item 42, para. III-3.3.

³² Nußberger 2008, p. 164.

³³ Nußberger 2008, p. 164.

³⁴ Nußberger 2008, p. 164.

³⁵ Nußberger 2008, p. 165.

³⁶ Nußberger 2008, p. 165.

the Constitution itself does not regulate those aspects which would determine the difference between these two procedures. Consequently, it would only be possible to regard the surrendering on the basis of a EAW as an institution separate from extradition, as meant in Art. 55 (1) of the Constitution, if the core of these two institutions was distinct.

In the judgement the Constitutional Tribunal argued that the essence of extradition lies in “the transfer of a prosecuted, or sentenced, persons for the purpose of conducting a criminal prosecution against them or executing a penalty previously imposed upon them.”³⁷ As the Constitutional Tribunal continued, the surrendering of a person prosecuted on the basis of a EAW has the same core. Therefore, it was not deemed to be a separate legal institution, but a particular form of extradition, which falls under the scope of Art. 55(1) of the Constitution. Furthermore, in the opinion of the Constitutional Tribunal, from the point of view of the prosecuted person, the surrender on the basis of the EAW is a more burdensome institution (executing of a EAW is possible within a shorter period of time and under certain circumstances it excludes the principle of double criminality) than extradition, as provided in the CPC. The Constitutional Tribunal invoked the *a minori ad maius* principle and noted that the constitutional ban on extradition is “all the more applicable to surrendering a person on the basis of a EAW, which is realised with the same objective and is subject to a more burdensome legal regime.”³⁸

The Constitutional Tribunal emphasised that the Constitution endows Polish citizens with certain rights and obligations. The prohibition on extradition provided in Art. 55 (1) of the Constitution is an expression of a right of Polish citizens to be held criminally accountable before a Polish court. While surrendering a Polish citizen to another Member State of the EU on the basis of a EAW would entirely preclude enjoyment of that right. What is more, in fact it would amount to an infringement of the essence of this right, which is inadmissible pursuant to Art. 31 (3) of the Constitution.³⁹ Therefore, the way in which Art. 55 (1) of the Constitution is formulated indicated that

³⁷ Wyrok Trybunału Konstytucyjnego z dnia 27 kwietnia 2005r., [Judgement of the Constitutional Tribunal of the 27th April 2005] P 1/05 *Stosowanie Europejskiego Nakazu Aresztowania do obywateli polskich* [Executing European Arrest Warrant against Polish nationals], OTK ZU [Jurisdiction of the Constitutional Tribunal. Official Collection] No 4/A/2005, item 42, para. III.

³⁸ Nußberger 2008, p. 165.

³⁹ Art. 31(3) of the Constitution: Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

the prohibition is absolute in nature. Consequently, the personal rights of Polish citizens following from it may not be subject to any limitations. Finally, the above analysis was concluded with the ruling that Art. 607t § 1 of the CPC, insofar as it permits the surrendering of a Polish citizen to another Member State of the EU on the basis of the EAW, is not compatible with Art. 55 (1) of the Constitution.

c. Delay of the loss of force

The second part of the judgement concerned the delay of the date of the loss of binding force of Art. 607t § 1 of the CPC. In principle, when the Constitutional Tribunal declares the challenged provision unconstitutional, that provision loses its binding force from the moment of the judgement's publication in the *Dziennik Ustaw*⁴⁰ (Journal of Laws of the Republic of Poland). However, in this case the Constitutional Tribunal decided to postpone the date on which Article 607t § 1 of the CPC was annulled for 18 months (running from the 4th of May, 2005).⁴¹ Before deciding to delay the annulment of Art. 607t § 1 of the CPC, the Constitutional Tribunal took into account several factors, among others, the protection of individual's rights, obligations to respect international law, and the complexity and potential duration of the constitutional revision procedure.⁴² It is important to note that before the judgement's entry into force, hence, during the period of delay, Art. 607t § 1 of the CPC was fully applicable. Therefore, Polish legislation fulfilled the obligation to comply with the Framework Decision 2002/584/JHA.

d. Consequences of the judgement

Following the judgement, the Polish legislator amended Art. 55 of the Constitution by *Ustawa z dnia 8 września 2006 r. o zmianie Konstytucji Rzeczypospolitej Polskiej*⁴³ (Act of 8 September 2006 on the Amendment to the Constitution of the Republic of Poland). The consequence is that the extradition of Polish citizens is still prohibited, however, the prohibition is not absolute anymore. According to Art. 55(1) of the Constitution, 'The

⁴⁰ *Dziennik Ustaw* (Journal of Laws of the Republic of Poland) – *Dziennik Ustaw* or *Dziennik Ustaw Rzeczypospolitej Polskiej* is the only official source of law for promulgation of Polish laws. The publication of this journal is solely the responsibility of the Prime Minister of the Republic of Poland.

⁴¹ The period of 18 months is the maximum period of delay pursuant to Art. 190(3) of the Constitution.

⁴² Łazowski 2005, p. 578.

⁴³ *Ustawa z dnia 8 września 2006 r. o zmianie Konstytucji Rzeczypospolitej Polskiej* [Bill of 8 September 2006 on the Amendment to the Constitution of the Republic of Poland] *Dziennik Ustaw* [Journal of Laws], (2006), Doc. No. 200, item. 1471.

extradition of a Polish citizen shall be prohibited, except in cases specified in paras 2 and 3.’ Under Art. 55 (2) of the Constitution:

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

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

It is significant to highlight that the first part of Art. 55 (2) of the Constitution is in accordance with the FD 2002/584/JHA. The amendment of the aforementioned provision brought in line the Constitution with the FD 2002/584/JHA.⁴⁴ However, subparagraphs (1) and (2) might raise problems, which was widely criticised in the literature.⁴⁵ According to Art. 55 (2)(1) of the Constitution, extradition (including one on the basis of a EAW) of a Polish national is only allowed if the act covered by the request for extradition was committed outside Polish territory. Therefore, the Polish legislator introduced a new mandatory ground for non-execution of the EAW.⁴⁶ While pursuant to Art. 4 (7) of the FD 2002/584/JHA, which is implement in Art. 607r § 1 (5) of the CPC, the territorial principle is an optional ground for non-execution of the EAW. As it follows, the condition imposed by Art. 55 (2)(1) of the Constitution is not in line with the FD 2002/584/JHA.⁴⁷ Furthermore, this solution may lead to unjustified differentiation between a situation of a Polish citizen and a person without Polish citizenship, from the perspective of applicable grounds for non-executing a EAW (Art. 55(2)(1) of the Constitution applies only in the situation of Polish nationals).⁴⁸

⁴⁴ Wawrzyńczak-Mistygacz 2016, p.

⁴⁵ Wawrzyńczak-Mistygacz 2016, p.

Górski & Sakowicz 2006, p. C2.

Malinowska-Krutul 2007, p. 112.

Nita 2007, p. 67.

⁴⁶ Malinowska-Krutul 2007, p. 112.

⁴⁷ Malinowska-Krutul 2007, p. 112.

⁴⁸ Hołub 2009, p.135.

What is more, Art. 55 (2)(2) of the Constitution upholds the principle of double criminality with regard to Polish citizens while executing a EAW issued by judicial authorities of other Member States of the EU. Therefore, surrendering of a Polish citizen on the basis of a EAW to other Member States of the EU is possible if the committed act constitutes a criminal offence under Polish criminal law at the moment it was committed and at the moment of issuing the EAW. Under Art. 55 (3) of the Constitution, exceptions are only envisaged in cases involving “a crime of genocide, crime against humanity, war crime or a crime of aggression.” The above-mentioned restrictions were not contained in the first draft of the law amending the Constitution⁴⁹ and were only added during the legislative process.

Furthermore, the legislator did not decide to amend Art. 55 (4) of the Constitution pursuant to which:

The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens.

As it follows from Art. 55 (4) of the Constitution and Art. 607p § 1 (6) of the CPC, extradition, including surrendering on the basis of a EAW, is prohibited with respect to a person suspected of the commission of a crime for political reasons but without the use of force. According to Art. 55 (4) of the Constitution and Art. 607p § 1(5)⁵⁰ of the CPC, extradition, which if allowed would violate rights and freedoms of persons and citizens, is not allowed either. Finally, as argued by Hołub, these conditions breach international obligations of Poland and undermine the principle of mutual trust.⁵¹

D. Framework Decision 2009/299/JHA

Poland transposed the Framework Decision 2009/299/JHA (hereinafter referred to as “FD 2009/299/JHA”) by means of a legislative amendment to the CPC⁵² and 5

⁴⁹ *Projekt ustawy o zmianie Konstytucji Rzeczypospolitej Polskiej z dnia 12 Maja 2006r.* [Draft Bill on the Amendment of the Constitution of the Republic of Poland], Doc. No. 580 of 12 May 2006.

⁵⁰ This provision was introduced to the CPC by *Ustawa z dnia 27 października 2006 r. o zmianie ustawy – Kodeks postępowania karnego* (Bill of 27 October 2006 Amending the Code of Criminal Procedure).

⁵¹ Hołub 2009, p. 136.

⁵² *Ustawa z dnia 29 lipca 2011r. o zmianie ustawy - Kodeks karny, ustawy - Kodeks postępowania karnego oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary* [Bill of 29 July 2011 Amending the Criminal Code, the Code of Criminal Procedure and Corporate Criminal Liability Act], *Dziennik Ustaw* [Journal of Laws], (2011), Doc. No. 191, item. 1135.

regulations of the Minister of Justice (*rozporządzenie Ministra Sprawiedliwości*).⁵³ Art. 4a of the FD 2009/299/JHA was transposed into the CPC.⁵⁴ Importantly, for the purposes of this report only the regulation of the Minister of Justice transposing Art. 2 (3) of the FD 2009/299/JHA is of relevance.⁵⁵ The regulation⁵⁶ was passed on the 24th of February 2012, therefore, the Polish legislator did not comply with the time limit for the implementation of the FD 2009/299/JHA (Art. 8 (1) of the FD 2009/299/JHA). The aforementioned regulation concerns the part D of the EAW form. The transposed part D of the EAW form was compared with the original version prescribed in Art. 2 (3) of the FD 2009/299/JHA. That comparison did not reveal any differences in the forms.

It is crucial to note that that in regard to delivering official information of the scheduled date and place of the trial which resulted in the judicial decision, the FD 2009/299/JHA prefers summoning in person or another form ensuring that the accused will directly obtain information about the time and place of the hearing. However, while implementing the FD 2009/299/JHA, the Polish legislator did not introduce a legislative amendment changing the provisions concerning summoning of the accused to the trial.⁵⁷

III. The procedure of issuing a EAW

Having demonstrated how the Framework Decisions 2002/584/JHA and 2009/299/JHA have been implemented into Polish law, now it is necessary to examine the procedure of issuing a EAW. In the Polish legal order, the procedure of issuing a EAW is regulated by Chapter 65a of the CPC (Articles 607a-607j).

A. Chapter 65a of the CPC “Motion to a European Union Member State for the Surrender of a Requested Person Pursuant to a European Arrest Warrant”

⁵³ Information obtained via Eur-lex <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32009F0299>

⁵⁴ *Ustawa z dnia 29 lipca 2011r. o zmianie ustawy - Kodeks karny, ustawy - Kodeks postępowania karnego oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary* [Bill of 29 July 2011 Amending the Criminal Code, the Code of Criminal Procedure and Corporate Criminal Liability Act], *Dziennik Ustaw* [Journal of Laws], (2011), Doc. No. 191, item. 1135.

⁵⁵ *Rozporządzenie Ministra Sprawiedliwości z dnia 24 lutego 2012 r. w sprawie określenie wzoru europejskiego nakazu aresztowania* [The Regulation of the Minister of Justice of 24 February 2012 concerning the form of the European arrest warrant]. *Dziennik Ustaw* [Journal of Laws], (2012), item 266.

⁵⁶ *Rozporządzenie Ministra Sprawiedliwości z dnia 24 lutego 2012 r. w sprawie określenie wzoru europejskiego nakazu aresztowania* [The Regulation of the Minister of Justice of 24 February 2012 concerning the form of the European arrest warrant]. *Dziennik Ustaw* [Journal of Laws], (2012), item 266.

⁵⁷ *Kodeks Postępowania Karnego* [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 540b.

Art. 607a of the CPC implements Art. 6 (1) of the FD 2002/584/JHA, and goes as follows:

Art. 607a. European arrest warrant.

If it is suspected that a person prosecuted for an offence falling under the jurisdiction of Polish criminal courts may be staying in the territory of a Member State of the European Union, a local circuit court, on a motion of the public prosecutor, or *ex officio* or on a motion of a competent district court in court and enforcement proceedings, *may*⁵⁸ issue a European arrest warrant, referred to in this Chapter as a „warrant”.

According to Art. 607a of the CPC, a local circuit court may issue a EAW in case of a suspicion that the prosecuted person for a commission of a criminal offence, which is within jurisdiction of Polish criminal courts, may be in the territory of a Member State of the EU. Therefore, under Art. 607a of the CPC there are two cumulative conditions of issuing a EAW:

- i. prosecuting an offence under the jurisdiction of Polish criminal courts; and
- ii. there is a suspicion that the prosecuted person may be staying on the territory of a Member State of the European Union.

With regard to the first condition, the offence must be within jurisdiction of Polish criminal courts.⁵⁹ As argued by Gardocka, such recognition is significantly wider than the original version of Art. 607a of the CPC, which prescribed issuing the EAW only in cases when the offence was committed in the territory of Poland.⁶⁰ This initial limitation included in Art. 607a of the CPC was criticised in the literature and commentaries⁶¹ concerning the topic. Following that critique, the legislator introduced an amendment to Art. 607a of the CPC⁶² and broadened the possibility of issuing a

⁵⁸ emphasis added by the author.

⁵⁹ Gardocka & Jagiełło 2014, p. 58.

⁶⁰ Gardocka & Jagiełło 2014, p. 58.

⁶¹ Gardocka & Jagiełło 2014, p. 58.

⁶² *Ustawa z dnia 5 listopada 2009 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks karny wykonawczy, ustawy – Kodeks karny skarbowy oraz niektórych innych ustaw* [Bill of 5 November 2009 Amending the Criminal Code, the Code

EAW. Consequently, currently the focus is not only on offences committed in the territory of Poland but each jurisdiction link justifying Polish jurisdiction is significant.⁶³ The jurisdiction of Polish courts is prescribed in Arts. 109-113 of the *Kodeks Karny*⁶⁴ (Criminal Code of the Republic of Poland (hereinafter referred to as “CC”)) in conjunction with Art. 5 of the CC.⁶⁵

With regard to the second condition, EAWs addressed by Poland to other Member States of the EU apply both to Polish citizens and foreigners.⁶⁶ Therefore, issuing a EAW is not limited neither to Polish citizens nor to EU citizens.⁶⁷ Furthermore, the term ‘prosecuted person’ is interpreted widely as to include:

- 1) suspects
- 2) accused
- 3) convict for the purposes of executing a custodial sentence or detention order
- 4) persons against whom a detention order was issued.⁶⁸

According to the wording of Art. 607a of the CPC, issuing a EAW is admissible at every stage of proceedings. However, pursuant to the version of Art. 607a of the CPC before the legislative amendment from 2009,⁶⁹ it was not that straight-forward. The previous wording of the aforementioned provision could be read as implying incorrectly that the EAW can only be issued at the stage of preparatory proceedings. Moreover, according to the original wording of Art. 607a of the CPC, the EAW was issued only at the motion of the prosecutor. Finally, the word “may” does not imply arbitrariness in the application of Art. 607a of the CPC. In the context of Art. 607a of the CPC, the word

of Criminal Procedure, Executive Criminal Code, Tax Penal Code and some other legislative acts]. *Dziennik Ustaw* [Journal of Laws], (2009), Doc. No. 206, item. 1589.

⁶³ Gardocka & Jagiełło 2014, p. 58.

Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Światłowska), Art. 607a.

⁶⁴ *Kodeks Karny* (‘The Criminal Code’) z dnia 6 czerwca 1997 r. (Dz.U. tłum. gb Nr 88, poz. 553)

⁶⁵ *Kodeks Postępowania Karnego* [The Code of Criminal Procedure] [Commentary], 2016, Buczman, Art. 607a.

⁶⁶ *Kodeks Postępowania Karnego* [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Światłowska), Art. 607a.

⁶⁷ *Kodeks Postępowania Karnego* [The Code of Criminal Procedure] [Commentary], 2012, Hofmański, Art. 607a.

⁶⁸ *Kodeks Postępowania Karnego* [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Światłowska), Art. 607a.

⁶⁹ *Ustawa z dnia 5 listopada 2009 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks karny wykonawczy, ustawy – Kodeks karny skarbowy oraz niektórych innych ustaw* [Bill of 5 November 2009 Amending the Criminal Code, the Code of Criminal Procedure, Executive Criminal Code, Tax Penal Code and some other legislative acts]. *Dziennik Ustaw* [Journal of Laws], (2009), Doc. No. 206, item. 1589.

“may” grants the local circuit court the competence to issue a EAW. The further sections will discuss the matter of issuing a EAW at different stage of proceedings.

a. Issuing a EAW at the stage of the preparatory proceedings

At the stage of the preparatory proceedings the EAW is issued only at the motion of the prosecutor. In the CPC there is no restriction on the level of the prosecutor, who can submit a motion for issuance of the EAW to the local circuit court. This matter is clarified in § 292 of *Regulamin wewnętrznego urzędowania powszechnych jednostek organizacyjnych prokuratury* (Regulations of internal functioning of common organizational units of the prosecutor's office, hereinafter referred to as “RegProk”),⁷⁰ according to which the request for issuing a EAW is directed to the local circuit court by the Director of the *Departament do Spraw Przestępczości Zorganizowanej i Korupcji Prokuratury Krajowej* (Department of Organized Crime and Corruption of the National Prosecutor's Office), head of *Wydział Spraw Wewnętrznych Prokuratury Krajowej* (the Internal Affairs Department of the National Public Prosecutor's Office), the head of the *właściwy miejscowo wydział zamiejscowy* (the local branch of the National Public Prosecutor's Office), circuit prosecutor or district prosecutor.

The prosecutor is obliged to fulfil all the formal requirements while submitting the motion for issuing a EAW. Consequently, the prosecutor has to prove that there is need to issue a EAW – the person prosecuted committed an offence, which lies with the jurisdiction of the Polish criminal courts, and following that act the prosecuted person left the territory of Poland and is staying in the territory of a Member State of the EU.⁷¹ Furthermore, the local circuit court, when examining the motion for issuing a EAW, is obliged to demonstrate that the conditions for the issuance of the EAW have been fulfilled. Finally, it is also the local circuit court's duty to examine whether the legal qualification indicated by the prosecutor is correct from the factual perspective.

b. The court and enforcement proceedings

⁷⁰ *Rozporządzenie Ministra Sprawiedliwości – Regulamin wewnętrznego urzędowania powszechnych jednostek organizacyjnych prokuratury z dnia 7 kwietnia 2016 r.* [Regulations of internal functioning of common organizational units of the prosecutor's office]. *Dziennik Ustaw* [Journal of Laws], (2016), item. 508 with the amendments of 18 May 2017 *Dziennik Ustaw* [Journal of Laws], (2017), item. 1206.

⁷¹ *Kodeks Postępowania Karnego* [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski), Art. 607a.

A EAW may be issued *ex officio* at the stage of judicial and enforcement proceedings (if the case is pending in the circuit court), or at the request of the district court (if the case is pending in the district court). Issuing a EAW *ex officio* is admissible if such a need arises during the pending proceedings before the circuit court, which is at the same time the ‘local circuit court’ competent to issue a EAW in the case at hand. If the need of issuing a EAW arises during the pending proceedings before the district court, the EAW is still issued by the local circuit court. However, then the circuit court does not issue a EAW *ex officio* but on the motion of the competent district court, meaning the court before which the proceeding, in which the need for issuing a EAW arose, are pending.

It is significant to point out that neither at the stage of court proceedings nor enforcement proceedings the prosecutor can submit a motion for issuing a EAW. The prosecutor may only submit to the court a non-binding suggestion to consider filing a motion for issuing a EAW (if the proceedings are currently pending before a district court), or to suggest the issuing of a EAW (this refers to proceedings pending before a circuit court).

B. The authority competent to issue a EAW

It is necessary to discuss which judicial authority in Poland has the competence to issue or refuse to issue a EAW. Significantly, in the doctrine and case law there is a long-standing debate concerning the interpretation the passage of Art. 607a of the CPC, which concerns that issue. In 2017, *Prokuratura Krajowa* (hereinafter referred to as “National Public Prosecutor’s Office”) acknowledged in the press release that in judicial and prosecutorial practice, doubts arose regarding the interpretation of Art. 607a of the CPC, insofar as it concerns the court’s jurisdiction to issue a EAW.⁷² According to Art. 607a of the CPC a local circuit court is competent to issue a EAW. The literal translation of that passage of the Polish version of the aforementioned provision would be “an appropriate” or “competent” circuit court. The local circuit court is the authority competent to issue a EAW, therefore, the unclarity with regard to which circuit court is the ‘local’ one caused a fierce debate.⁷³

a. Preparatory proceedings

In the literature, there is a divergence of opinions as to which rules should determine the jurisdiction of the court in the event that the need to issue a EAW appears at the stage of preparatory proceedings. Some authors and M. Pasioneck, the Deputy Prosecutor

⁷² Prokuratura Krajowa [National Public Prosecutor’s Office] 22-12-2017.

⁷³ Prokuratura Krajowa [National Public Prosecutor’s Office] 22-12-2017.

General, claim that this is a circuit court in which the preparatory proceedings take place.⁷⁴ The Appellate Court in Katowice⁷⁵ and the Appellate Court in Łódź⁷⁶ also adhered to that view. Pasionek, in a letter addressed to all prosecutors,⁷⁷ argued that Art. 607a of the CPC should not be interpreted from the view of Art. 31 of the CPC, which prescribes the general rule of the territorial jurisdiction of the circuit court. He pointed out that the local circuit court referred to in Art. 607a of the CPC, is not the court competent to hear the case for an offence which the EAW concerns. As the argument continues, since the legislator did not make the jurisdiction to issue a EAW dependent on the jurisdiction to examine the case in the first place, it can be assumed that the legislator did not make it dependent on the place where the offence was committed.

Furthermore, Pasionek invoked the aims underlying the FD 2002/584/JHA such as, simplification and acceleration of the transfer of suspected offenders or convicted persons. In his view, in line with these aims is instructing the prosecutors to submit the application for the issuance of the EAW to the circuit court, in whose judicial circuit the preparatory proceedings are conducted. Such a solution has a practical value such as, a more efficient circulation of procedural documents. Finally, Pasionek argued that the term ‘local court’ is not uniformly understood in the CPC, therefore, there is no reason to associate that term only with Arts. 31 and 32 of the CPC.

A different view was expressed by Steinborn, who considered that the rules for determining which circuit court is the ‘local’ one are prescribed in Arts. 31 and 32 of the CPC,⁷⁸ meaning that a EAW is issued by a circuit court which has territorial jurisdiction,

⁷⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2012, Hofmański, Art. 607a.

Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2008, Grzegorzczuk, Art. 607a.

Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2014, Boratyńska, (Górski & Sakowicz), Art. 607a.

⁷⁵ Postanowienie Sądu Apelacyjnego w Katowice z dnia 27 maja 2009 r. [Decision of the Appellate Court in Katowice of the 27th of May 2009], II AKz 343/09.

⁷⁶ Postanowienie Sądu Apelacyjnego w Łodzi - II Wydział Karny z dnia 20 lipca 2011 r. [Decision of the Appellate Court in Łódź – II Criminal Division of the 20th of July 2011], II AKz 380/11.

⁷⁷ Prokuratura Krajowa [National Public Prosecutor's Office] 22-12-2017.

⁷⁸ Art. 31. Territorial jurisdiction. § 1. Jurisdiction over a case belongs to that court in whose judicial circuit the offence was committed.

§ 2. If an offence was committed on a Polish vessel or aircraft and § 1 cannot be applied, jurisdiction over a case belongs to that court in whose judicial circuit the vessel or aircraft's home port is located.

§ 3. If the offence was committed in a judicial circuit of more than one court, jurisdiction over the case belongs to that court in whose judicial circuit preparatory proceedings were first instituted.

Art. 32. Auxiliary criteria.

meaning that jurisdiction over a case belongs to a court in whose judicial circuit the offence was committed.⁷⁹ As a consequence, the 'local' circuit court is the circuit court competent to hear the case of the prosecuted person charged with the offence at hand or the circuit court in whose judicial circuit there is a district court competent to hear that case.⁸⁰

As argued by Nita-Światłowska, this position seems to be right. Nita-Światłowska agrees with Steinborn, who pointed out that pursuant to Art. 329 § 1 of the CPC to procedures in preparatory proceedings provided for by law are conducted in a hearing by the court competent to hear the case in the first instance.⁸¹ The Appellate Court in Warsaw also opted for such an interpretation of the phrase "local circuit court" used in the commented provision. The Appellate Court in Warsaw stated that the phrase should be interpreted in a manner that takes into account the content of Art. 31 § 1 of the CPC, which states that "the jurisdiction in which the offence was committed is locally competent to hear the case".⁸² Furthermore, as argued by Buczma, as a result of the evolution of the case law, the primacy gained the view that the jurisdiction of the court to issue a EAW in preparatory proceedings is determined on the basis of Arts. 31 and 32 of the CPC, and not according to the place of conducting the preparatory proceedings.⁸³ Finally, from the literature it follows that in practice the prevailing position is the one of the Appellate Court of Warsaw. Moreover, some of the courts such as the Appellate Court of Katowice, which adhered to the opposite view, changed its position and

§ 1. If the location where the offence was committed cannot be established, jurisdiction over the case is vested in the court in whose judicial circuit:

- 1) the offence was revealed,
- 2) the accused was apprehended,
- 3) the accused resided permanently or temporally, before committing the offence - depending on where preparatory proceedings were first instituted.

§ 2. The provisions of § 1 apply accordingly to offences committed abroad.

§ 3. If the location cannot be established according to the preceding provisions, jurisdiction is vested in the court for the district of Śródmieście of the capital city of Warsaw.

⁷⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2013, Grajewski (Steinborn), Art. 607a.

⁸⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2013, Grajewski (Steinborn), Art. 607a.

Postanowienie Sądu Apelacyjnego w Krakowie z dnia 7 kwietnia 2009 r. [Decision of the Appellate Court in Kraków of the 7th of April 2009], II AKo 31/09.

⁸¹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Światłowska), Art. 607a.

⁸² Postanowienie Sądu Apelacyjnego w Warszawie z dnia 4 marca 2010 r. [Decision of the Appellate Court in Warsaw of the 4th of March 2010], II AKz 138/10.

⁸³ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2016, Buczma, Art. 607a.

followed the reasoning of the Appellate Court of Warsaw.⁸⁴ Therefore, the above-mentioned press release of the Deputy Prosecutor General, which supports the opposing view, is not in line with the predominant view accepted in the jurisprudence on that issue.

b. The court and enforcement proceedings

With regard to the court proceedings in the literature, it is assumed that the ‘local circuit court’ is the circuit court before which the proceedings are conducted or the circuit court which is superior in relation to the district court before which the proceedings are pending, for which the need arises to issue a EAW. While at the stage of the enforcement proceedings, the ‘local circuit court’ is the circuit court, in whose judicial circuit the judgement to be enforced has been passed. It is significant to note that that matter is not contentious in the doctrine.

C. Hearing at which a EAW is issued

The court adjudicates in a hearing as prescribed by Art. 95 § 1 of the CPC.⁸⁵ At the hearing the panel composed of one judge, unless the case is of a particular complexity or importance, then it is heard in the panel of three judges (Art. 30 § 1 of the CPC). As it follows from the literature,⁸⁶ the presence of the parties at the hearing is determined pursuant to Art. 96 § 2 of the CPC. Therefore, parties have a right to participate in the hearing if they attend.

In the doctrine there is a divergence of opinions whether of the notification of parties about the date of the hearing is required or not (Art. 96 § 1 and 2 of the CPC). As argued by Nita, if it is important for the protection of their interests, parties and persons who are not parties have a right to participate in the hearing if they attend, unless the law states otherwise. Moreover, Nita indicates that the court should notify the above-mentioned actors about the date of the hearing.⁸⁷ On the other hand, Sakowicz maintains that if the provision concerning the specific type of a hearing (for instance, the hearing at

⁸⁴ Postanowienie Sądu Apelacyjnego w Katowicach - II Wydział Karny z dnia 5 lutego 2014 r. [Decision of the Appellate Court in Katowice – II Criminal Division of the 5th of February 2014], II AKz 60/14.

⁸⁵ **Art. 95. Trial and hearing.** § 1. In cases provided for by law, the court adjudicates in a trial, while in other cases at a hearing. Judgments issued at a hearing may also be issued in a trial.

⁸⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2016, Buczman, Art. 607a.

⁸⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita), Art. 607a.

which the EAW is issued) does not discuss the issue of participation of the parties and persons who are not parties, then these actors can participate if they attend. However, Sakowicz argues that in these cases no one is notified of this hearing.⁸⁸

Furthermore, Gardocka is of the same opinion of Sakowicz, meaning that the notification of parties and persons who are not parties of the date of the hearing is not required.⁸⁹ As explained by Gardocka,⁹⁰ a person against whom a EAW is to be issued has a right to participate in the hearing at which the local circuit court will be adjudicating the case. Therefore, there is an obligation to notify the person against whom the EAW is to be issued if the address of that person is known to judicial authorities. On the other hand, if the judicial authorities only suppose that the wanted person is somewhere at the territory of the EU, but do not know the exact whereabouts of that person, then due to factual obstacles the wanted person is not notified about the hearing.⁹¹

D. The conditions applicable to issuing a EAW

Art. 607b of the CPC, which implements Art. 2 (1) of the FD 2002/584/JHA, provides two negative conditions for issuing a EAW. However, before these will be discussed, it is necessary to examine the amendment to that provision from 2013, which entered into force on the 1st July, 2015.⁹² The aforementioned amendment supplemented Art. 607b of the CPC with a condition it is not permissible to issue a EAW, if it is not in the interest of the administration of justice. Therefore, the amendment introduced to Art. 607b of the CPC sets a higher bar to cases in which issuing of a EAW is admissible. Before the general clause of ‘the interest of the administration of justice’ will be discussed in details, a historical context will be provided.

Following the implementation of the FD 2002/584/JHA into the Polish legal order, the EAW became a common instrument being applied at each stage of proceedings.⁹³ In the years following the transposition of the FD 2002/584/JHA, the number of EAWs sent from Poland stood out significantly from the number of EAWs sent by other

⁸⁸ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Sakowicz), Art. 96.

⁸⁹ Gardocka & Jagiełło 2014, p. 58.

⁹⁰ Gardocka 04-06-2018.

⁹¹ Gardocka 04-06-2018.

⁹² *Ustawa o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw z dnia 27 września 2013r.* [Bill Amending the Code of Criminal Procedure and other legislative acts of 27 September 2013] Dziennik Ustaw [Journal of Laws], (2013), item. 1247.

⁹³ Gardocka & Jagiełło 2014, p. 65.

Member States of the EU.⁹⁴ That situation exposed Poland to the high costs of execution of EAWs and was harming Poland's reputation abroad. Furthermore, judicial authorities in other Member States of the EU, on the basis of the description provided in the EAWs issued by Polish judicial authorities, concluded that issuing a EAW was a way to prosecute perpetrators of minor offences, predominantly at the stage of enforcing the penalty.⁹⁵

Consequently, there was a wide-spread impression among the Member States of the EU that Poland abused the institution of EAW, which was meant to be used for the fight against serious crimes, and not for "prosecution of petty thieves, drink-driving or individuals not paying alimonies for their children."⁹⁶ What is more, it is crucial to underline that Polish courts, which decided to issue EAWs in cases of minor importance to reinforcing the fight against serious crime, did not commit substantive mistakes under the CPC. On the contrary, because of the initial wording in which Art. 2 (1) of the FD 2002/584/JHA was introduced to the CPC, courts and investigative authorities were obliged to recourse to the EAW in cases in which it was admissible.⁹⁷

Interestingly, already in 2004, the Circuit Court in Tarnów in its judgement,⁹⁸ emphasized the need for a restrained use of the EAW. The Court pointed out that since the issuance of the EAW is optional, it is appropriate to consider the purposefulness of involving foreign authorities, and therefore considering the gravity of the crime and the prescribed punishment for it. However, as followed from the statistics, various opinions raised in the literature at national and European level, Polish judicial authorities had tendency to issue EAWs precipitately in cases concerning minor offences and automatically if the formal conditions were fulfilled. In order to understand that phenomenon, it is necessary to discuss the potential reasons behind it.

a. Principle of legality

As one of the advanced explanations for the comparatively high number of EAWs issued by Poland is the fact that Polish criminal procedural law system adheres to the principle of legality (Art. 10 of the CPC). Pursuant to Art. 10 of the CPC, with respect to an offence prosecuted *ex officio*, the authority responsible for the prosecution of offences is

⁹⁴ Gardocka & Jagiełło 2014, p. 70.

⁹⁵ Gardocka & Jagiełło 2014, p. 70.

⁹⁶ Gardocka & Jagiełło 2014, p. 70.

⁹⁷ Gardocka 2011, p. 38.

⁹⁸ Postanowienie Sądu Okręgowego w Tarnowie z dnia 26 stycznia 2004 r. [Decision of the Circuit Court in Tarnów of the 26th of January 2004], II Kop 17/04.

obliged to institute and conduct preparatory proceedings, and the public prosecutor is moreover obliged to bring and support charges. It is clear that the authorities responsible for the prosecution of offences and public prosecutor's offices are bound by the principle of legality. However, in the doctrine the issue whether the principle of legality binds courts is a bone of contention. As argued by Sakowicz, the principle of legality is directed solely towards authorities responsible for the prosecution of offences (meaning public prosecutors and law enforcement agencies).⁹⁹ Therefore, Sakowicz is of the opinion that the courts are not bound by the principle of legality.¹⁰⁰ With regard to the exceptionally high number of EAWs issued by Poland, Sakowicz provides several reasons which will be discussed in the report.

The proponent of the view that the principle of legality does not bound the courts is also Podhalańska. Podhalańska understands the aforementioned provision as a provision directed towards law enforcement agencies and the prosecution of offences at the stage of the preparatory proceedings, not the administration of justice *sensu stricto*.¹⁰¹ Furthermore, according to Podhalańska, Art. 10 of the CPC imposes specific procedural obligations in the area of prosecuting crimes on the law enforcement agencies such as, prosecutors and various police agencies. Finally, with regard to the theoretical discussion concerning the principle of legality and whether it bounds courts or not, Podhalańska indicated that it is *straight-forward* that Art. 10 of the CPC concerns the matter of prosecuting criminal offences and instituting criminal investigations, while the court is the recipient of the indictment prepared by the competent body.¹⁰²

On the other hand, the majority of the opinions in the doctrine is that the courts are bound by the principle of legality. As argued by Gardocka, Art. 10 of the CPC *certainly* bounds the courts.¹⁰³ Gardocka claimed that Art. 10 of the CPC *indisputably* should be interpreted in such a way that it encompasses the authorities responsible for the prosecution of the offences *sensu largo*. Gardocka pointed out that courts fall under the scope of the broadly understood system of the authorities responsible for the prosecution of the offences mentioned in Art. 10 § 1 of the CPC.¹⁰⁴ Importantly, in the view of Gardocka, the courts may only discontinue the criminal proceedings if one of the alternative conditions pursuant to Art. 17 of the CPC is fulfilled. Finally, Gardocka

⁹⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Sakowicz & Górski), Art. 607b.

¹⁰⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Sakowicz & Górski), Art. 607b.

¹⁰¹ Podhalańska 07-06-2018.

¹⁰² Podhalańska 07-06-2018.

¹⁰³ Gardocka 04-06-2018.

¹⁰⁴ Gardocka 04-06-2018.

described the Polish principle of legality as a *strict* version of that principle, meaning that criminal proceedings are not instituted, or if instituted, are discontinued only in strictly limited circumstances.¹⁰⁵

In the opinion of Gajewska-Kraczkowska, the principle of legality bounds the courts.¹⁰⁶ However, Gajewska-Kraczkowska grounds that claim in Art. 10 § 2 of the CPC, pursuant to which except for the cases mentioned in the law or in international law, no one can be discharged from liability for an offence committed. It is significant to note that Gajewska-Kraczkowska indicated that the same principle is a *curse* of the Polish administration of justice.¹⁰⁷ As the interviewee continued, in the CPC indeed there are certain institutions which adhere to the opportunity principle. However, they are certainly insufficient to mitigate the effect of the principle of legality.¹⁰⁸

Proponents of the view that the courts are bound by the principle of legality, claim that before adding the condition of ‘the interest of the administration of justice’ to Art. 607b of the CPC, the courts in Poland regarded that EAWs had to be issued without limitations if all conditions for the application were satisfied.¹⁰⁹ During the discussion concerning proportionality while issuing EAWs by judicial authorities of the Member States of the EU, Poland was put in the spotlight as a Member State which issued a significantly high number of EAWs, also in trivial cases.¹¹⁰ Furthermore, in 2014 experts in the field of Polish criminal procedure conducted a study concerning the Polish practice of sending EAWs to other Member States of the EU.¹¹¹ Authors juxtaposed the fact that Poland is a Member State of the EU issuing the largest number of EAWs while it also has the highest percentage of refusals to surrender persons prosecuted by Poland under this procedure.¹¹² What is more, the experts suggested to consider the purposefulness of limiting issuing EAWs to particularly serious cases, in which the prosecution of offenders would be worth engaging law enforcement authorities of the Member States of the EU. That would allow directing resources, both personal and financial ones, at prosecuting the most serious crimes.¹¹³ The authors pointed out that there were several cases in which courts issued EAWs despite the fact that no ‘wanted’

¹⁰⁵ Gardocka 04-06-2018.

¹⁰⁶ Gajewska-Kraczkowska 05-06-2018.

¹⁰⁷ Gajewska-Kraczkowska 05-06-2018.

¹⁰⁸ Gajewska-Kraczkowska 05-06-2018.

¹⁰⁹ Gardocka & Jagiełło 2014, p. 66.

¹¹⁰ Gardocka & Jagiełło 2014, p. 66.

¹¹¹ Gardocka & Jagiełło 2014, p. 68.

¹¹² Gardocka & Jagiełło 2014, p. 68.

¹¹³ Gardocka & Jagiełło 2014, p. 70.

warrant (Art. 279 of the CPC) had been issued before.¹¹⁴ In that regard Gajewska-Kraczkowska explained that since in the EU there are open borders, there is a presumption that the wanted person left the territory of Poland. In order to be effective, the courts issue EAWs, not ‘wanted’ warrants pursuant to Art. 279 of the CPC.¹¹⁵

The conclusion in light of the above-described situation was that there existed necessity to establish a certain proportionality level to issuing EAWs in Poland.¹¹⁶ The authors of the 2014 study analysed justifications provided in judgements containing refusals to issue EAWs due to lack of proportionality. The outcome of the analysis was that judges struggled between feeling the need to act appropriately (i.e. refusing to issue a EAW because of lack of proportionality) to the cases at hand (cases concerned petty offences while issuing a EAW results in high costs and involvement of authorities) and finding legal grounds for refusals. During the conference “Human rights and mutual recognition of judicial decisions in the European Union – reflections on the basis of *Celmer* case”, a judge from the Circuit Court in Słupsk¹¹⁷ recalled that during the first years following the implementation of the FD 2002/584/JHA, the legislation in force did not provide simple arguments in such cases. Therefore, the judge from the Circuit Court in Słupsk in order to avoid issuing EAWs in trivial cases sought legal grounds for the refusal to issue a EAW even in the Constitution.¹¹⁸ Interestingly, other participant¹¹⁹ of the above-mentioned conference confirmed that the Circuit Court in Słupsk was indeed one of the few circuit courts in Poland which was not issuing EAWs in clearly disproportional cases.

In addition, Gardocka and Jagiełło argued that there was a need to provide a legal mechanism in the legislation which allows the grounds to justify a refusal to issue a EAW, which is legally admissible but essentially unjustified.¹²⁰ Finally, the authors claimed that a solution could be supplementing Art. 607a of the CPC with a phrase referring to the interest of the administration of justice. Such a phrase because of its adequately wide meaning, could enable consideration of various arguments by the courts before issuing a EAW. In the opinion of the authors, the phrase at hand would provide a

¹¹⁴ Gardocka & Jagiełło 2014, p. 73.

¹¹⁵ Gajewska-Kraczkowska 05-06-2018.

¹¹⁶ Gardocka & Jagiełło 2014, p. 73.

¹¹⁷ The judge’s statements are anonymised.

¹¹⁸ The judge’s statements are anonymised.

¹¹⁹ Zbigniew Krüger – attorney at law, partner at Krüger & Partnerzy Law Firm, specializes in criminal defence and litigation. Information available at <https://krugerlegal.com/en/team/zbigniew-kruger/>

¹²⁰ Gardocka & Jagiełło 2014, p. 74.

satisfactory justification of a perspective that the principle of legality is not absolutely binding in the case of EAW.¹²¹

b. The interest of the administration of justice

In order to reverse the above-described tendency, the legislator decided to supplement Art. 607b of the CPC with the general clause of ‘the interest of the administration of justice.’¹²² The amendment introducing the general clause of ‘the interest of the administration of justice’ to Art. 607b of the CPC entered into force on the 1st of July 2015. Podhalańska interprets the general clause of ‘the interest of the administration of justice’ as that it gives a ground for the court to refuse to issue a EAW in certain cases.¹²³ These circumstances regard situations where the formal conditions for issuing a EAW are fulfilled, however, the court decides that launching such an expensive, and time-consuming procedure, involving many foreign entities, and so much interfering in the life of an individual, is not in the interest of the administration of justice, meaning it is disproportional.¹²⁴ The general clause of the interest of the administration of justice was already known in the CPC in the request to take over the prosecution (Arts. 591-592 of the CPC) and solving jurisdictional disputes in the EU (Arts. 592c-592d of the CPC). Importantly, courts while applying Art. 607b of the CPC, can make use of the standards developed in case law concerning Arts. 591-592 and Arts. 592c-592d of the CPC.

The assessment whether the interest of the administration of justice demands issuing a EAW applies at first to the authority filing a motion for issuing a EAW (i.e. the public prosecutor at the stage of the preparatory proceedings) or *ex officio* to the circuit court or to a competent district court (at the stage of judicial and enforcement proceedings).¹²⁵ However, the final responsibility for the assessment rests with the authority competent to issue the EAW, that is, the local circuit court.¹²⁶ The local circuit court has to determine whether the issuance of the EAW in the case at stake will serve as the interest of the administration of justice. Furthermore, the evaluation whether the interest of the administration of justice is fulfilled must be concluded both for the EAWs issued for the

¹²¹ Gardocka & Jagiełło 2014, p. 74.

¹²² *Ustawa o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw z dnia 27 września 2013r.* [Bill Amending the Code of Criminal Procedure and other legislative acts of 27 September 2013] Dziennik Ustaw [Journal of Laws], (2013), item. 1247.

¹²³ Podhalańska 07-06-2018.

¹²⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2016, Buczma, Art. 607b.

¹²⁵ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2016, Buczma, Art. 607b.

¹²⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2016, Buczma, Art. 607b.

purpose of prosecution and for the execution of a penalty or any other measure involving the deprivation of liberty. For the issuance of the EAW, it is not sufficient to identify the existence of the interest in the administration of justice. The local circuit court rather has to assess whether the scale of the interest of the administration of justice in a given case "requires" such a procedural decision.¹²⁷

The interest of the administration of justice is intertwined with the objectives of the criminal proceedings. In order to assess the scale of the interest of the administration of justice system one should therefore take into account whether the issuance of the EAW will be realistically conducive to achieving the aims set out in Art. 2 § 1 of the CPC. The issuance of the EAW should be preceded by the joint assessment of these objectives in terms of the suitability of the EAW in a given case to achieve them. It seems that the interest of the administration of justice system will oppose (and in any case will not require) the issuance of the EAW, when the chances of substantive completion of the proceedings are minimal (especially for reasons of evidence or due to the statutory limitations).¹²⁸ Moreover, issuing a EAW cannot be considered correct in a situation where the costs of proceedings for the execution of an EAW, including transport costs of the surrendered person, will be grossly disproportionate to the amount of damage caused by a prohibited act. The same applies if there is no individual interest of the victim in continuing the proceedings in Poland.¹²⁹

In addition, the assessment of compliance with the requirement of the interest of the administration of justice must be conducted in the light of the specific nature of the EAW, in particular its transnational dimension.¹³⁰ Therefore, the interest of the administration of justice encompasses the effects of the issuance of the EAW not only for Polish authorities, but also to take into account the burdens for foreign authorities involved in the proceedings (the executing State or the state of transit).¹³¹ Finally, while evaluating the interest of the administration of justice in a case at hand, the consideration should be given to the protection of human and civil rights. The local circuit courts issuing EAWs should avoid the grossly disproportionate accumulation of burdens for the prosecuted person himself and, in special cases, also for his relatives.

¹²⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2016, Buczma, Art. 607b.

¹²⁸ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2016, Buczma, Art. 607b.

¹²⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2016, Buczma, Art. 607b.

¹³⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607b.

¹³¹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607b.

Lastly, the local circuit courts before issuing a EAW should check whether alternative mechanisms to the EAW could be successfully used. These alternative instruments might be:

- using videoconference,
- considering filing a motion to a Member State of the EU for the enforcement of preventive measures (Chapter 65c of the CPC),
- considering filing a motion to a Member State of the EU for the enforcement of a judgement imposing a conditionally suspended penalty (Chapter 66h of the CPC), or
- considering filing a motion to a Member State of the EU for the enforcement of a judgement imposing a fine (Chapter 66a of the CPC).¹³²

As it follows from statistical data collected by the Ministry of Justice, since 2009 the number of EAWs issued by Poland was systematically decreasing.¹³³ Therefore, presumably the above-listed alternative instruments might have impacted the practice of issuing EAWs by the Polish judicial authorities. However, as it follows from the analysis of the Annex I to the Report, supplementing Art. 607b of the CPC with the general clause of ‘the interest of the administration of justice’ had not resulted in significant drop in the number of EAWs issued by Poland. To illustrate this point, in the years following the amendment of Art. 607b of the CPC indeed the number of EAWs issued by Poland has decreased (from 2681 in 2014 to 2428 in 2015 and 2177 in 2016).¹³⁴ However, in 2017 there was a slight increase in the number of EAWs issued by Poland.¹³⁵ As concluded in the report issued by the Helsinki Foundation for Human Rights, the effect, if any, of the general clause of ‘the interest of the administration of justice’ on the Polish practice of issuing EAWs is not yet fully determinable.¹³⁶

c. Negative conditions to issuing a EAW pursuant to Art. 607b of the CPC

Next to the above-described condition regarding the interest of the administration of justice, the legislator in Art. 607b of the CPC prescribed two negative conditions to

¹³² Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2016, Buczma, Art. 607b.

¹³³ Annex I to the Report.

¹³⁴ Annex I to the Report.

¹³⁵ Annex I to the Report.

¹³⁶ Praktyka stosowania europejskiego nakazu aresztowania w Polsce jako państwie wydającym [Practice of using the European arrest warrant in Poland as the issuing state] 2018.

issuing a EAW. Art. 607b of the CPC transposes into the Polish legal order Art. 2 (1) of the FD 2002/584/JHA and it goes as follows:

Art. 607b. Inadmissibility of issue.

It is not permissible to issue a warrant, if it is not required by the interest of the administration of justice. Moreover, it is not permissible to issue a warrant:

- 1) in connection with criminal proceedings conducted against the requested person for an offence carrying a penalty of imprisonment of up to a year,
- 2) 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.

As decided in case law,¹³⁷ Art. 607b point 1 of the CPC applies to cases at the stage of preparatory and judicial proceedings. Pursuant to Art. 607b point 1 of the CPC, a EAW may concern a person who is charged (presented with a charge or against whom the bill of indictment has been brought) with committing an offence for which the law prescribes imposing a custodial sentence of up to a year. It should be noted that according to Art. 2 (1) of the FD 2002/584/JHA, a EAW may be issued with respect to crimes punished by custodial sentence or a detention order of 'at least twelve months'. This incompatibility results in a slight contradiction of Art. 607b of the CPC with the FD 2002/584/JHA, which - as it is emphasized in the literature - is admissible. Although, it poses a restriction on the issuing of EAWs by Poland.¹³⁸ Importantly, that remark equally applies to Art. 607b point 2 of the CPC.

Moreover, if the EAW is to be issued during the enforcement proceedings, the imposed penalty up to four months or any other measure involving the deprivation of liberty not exceeding four months (Art. 607b point 2 of the CPC). By this solution the Polish legislator prevents the issuance of a EAW for the purpose of serving a sentence of imprisonment of up to 4 months or another measure involving deprivation of liberty not exceeding four months. On the other hand, the European legislator prevents issuing a EAW against a person deprived of liberty - in any in the form – of 'at least 4 months'

¹³⁷ Postanowienie Sądu Apelacyjnego w Warszawie z dnia 6 sierpnia 2004 r. II AKz 391/04 [Decision of the Appellate Court of Warsaw of the 6th of August 2004, II AKz 391/04].

¹³⁸ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2013, Grajewski (Steinborn), Art. 607b.

(Art. 2 (1) of the FD 2002/584/JHA).¹³⁹ Furthermore, in light of Art. 607b point 1 of the CPC, it is undisputed that - according to the principle *a maiori ad minus* - the issuing of a EAW is also inadmissible when the offence is punishable by a non-custodial sentence, for example a community sentence or a fine.¹⁴⁰ In line with that reasoning, the Supreme Court decided that it is inadmissible to issue a EAW when the offence for which criminal proceedings are conducted is punished by a non-custodial punishment.¹⁴¹ What is more, it is not admissible to issue a EAW if the custodial sentence was adjudicated together with conditional suspension of its execution.¹⁴² Finally, the court issuing a EAW must indicate that conditions prescribed in Art. 607b of the CPC have been fulfilled.¹⁴³

d. Potential reasons for the comparatively high number of EAWs issued by Poland

In order to fully comprehend the phenomenon of the comparatively high number of EAWs issued by Poland it is necessary to go beyond the above-discussed principle of legality. Firstly, as explained by Gajewska-Kraczkowska, another potential reason for the number of EAWs issued by the Polish judicial authorities is the problem of over-criminalization in Polish legislation in general.¹⁴⁴ Gajewska-Kraczkowska argued that in Poland a legislative act without provisions imposing criminal liability is considered to be *lex imperfecta*.¹⁴⁵ Consequently, the number of criminal offences is so vast that in combination with the principle of legality the outcome is the enormous number of issued EAWs by Poland. Finally, Gajewska-Kraczkowska stressed that in her view the over-

¹³⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607b.

¹⁴⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2012, Hofmański, Art. 607b.

Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2014, Boratyńska (Górski & Sakowicz), Art. 607b.

¹⁴¹ Wyrok Sądu Najwyższego z dnia 24 czerwca 2008 r. [Judgement of the Supreme Court of the 24th of June 2008], III KK 49/08.

¹⁴² Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2013, Grajewski (Steinborn), Art. 607b.

Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2014, Boratyńska (Górski & Sakowicz), Art. 607b.

¹⁴³ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607b.

¹⁴⁴ Gajewska-Kraczkowska 05-06-2018.

¹⁴⁵ Gajewska-Kraczkowska 05-06-2018.

criminalization is the original source of the problem and the legality principle its *amplifier*.¹⁴⁶

Secondly, from the experience of Podhalańska, who often represents clients against whom a EAW was issued, follows that EAWs issued by the Polish judicial authorities were very commonly *absolutely disproportional*.¹⁴⁷ Podhalańska in that regard noted that the authorities responsible for the prosecution of offences did not make attempts to use mechanism of judicial assistance and service of documents in criminal matters by foreign States (Art. 585 of the CPC) towards a person who is residing abroad.¹⁴⁸ Podhalańska mentioned that the authorities responsible for the prosecution of offences did not seek launching the procedure pursuant to Art. 585 of the CPC, even if the address of the wanted person was known to the authorities and that person was not evading justice.¹⁴⁹ Likewise, Sakowicz argues that the competent authorities issued EAWs in cases where it was possible to use other milder means, issuing EAWs, when the punishment left to be served did not justify the use of EAW, and issuing EAWs when the entire procedure was too expensive in relation to the damage done by the criminal offence.¹⁵⁰

Furthermore, in cases when the suspect or the accused (il-)legally left the country (legally in the sense that by presenting valid documents, illegally in the sense that the suspect or the accused did not inform the court that was leaving the territory of Poland, in the meantime the sentence was issued *in absentia*, and the convicted person did not appear to serve the punishment), the authorities responsible for the prosecution of offences do not make use of the available systems of exchange of information with other Member States of the EU.¹⁵¹ What is more, despite availability of tools such as the service of documents on persons residing abroad (Art. 585 (1) of the CPC) or ordering the examination of persons in the capacity of the accused, witnesses, or experts (Art. 585 (2) of the CPC), these authorities do not use them.¹⁵² In her career Podhalańska encountered only one case in which the prosecutor decided not to immediately issue a motion of a EAW but requested the judicial assistance pursuant to Art. 585 of the CPC from competent British authorities. In that respect Podhalańska pointed out that indeed

¹⁴⁶ Gajewska-Kraczkowska 05-06-2018.

¹⁴⁷ Podhalańska 07-06-2018.

¹⁴⁸ Podhalańska 07-06-2018.

¹⁴⁹ Podhalańska 07-06-2018.

¹⁵⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607b.

¹⁵¹ Podhalańska 07-06-2018.

¹⁵² Podhalańska 07-06-2018.

the procedure pursuant to judicial assistance took a considerable time, however, it was completed successfully.¹⁵³

Thirdly, as argued by Gardocka and a judge from the Circuit Court in Słupsk,¹⁵⁴ who participated in the conference,¹⁵⁵ the judges after the implementation of FD 2002/584/JHA into the Polish legal order were *left on their own* with a new and unknown legal institution, which the EAW was for them. The judge from the Circuit Court in Słupsk argued that for years judges were not provided with adequate training concerning using the EAW. Moreover, the same judge was of the opinion that the initial wording of Art. 607a of the CPC did not leave any discretion to judges.¹⁵⁶ Furthermore, Gardocka stressed that currently the training should focus on the principle of proportionality and the interpretation of the general clause of the interest of the administration of justice. As Gardocka continued, the judges adhere too strongly to the principle of legality.

Consequently, in the view of Gardocka, the general clause of the interest of the administration of justice did not bring the envisaged results. However, Gardocka stated that an additional amendment to the CPC would not solve the problem. According to her, the problem lies with the attitude of the judges who tend to treat the EAW as something to be used automatically. On the other hand, Gajewska-Kraczkowska maintained that judges issuing EAWs are judges from circuit courts, therefore, generally they are highly experienced.¹⁵⁷ What is more, as mentioned by Podhalańska, the number of EAWs issued by Poland to other Member States is systematically decreasing and the Polish courts are not using EAWs as automatically as they used to do.¹⁵⁸

Subsequently, Ostropolski indicates that the social and economic reasons for a considerable number of EAWs issued by Polish judges have to be discussed in more detail. The author pointed out that in years 2005-2009, the number of EAWs issued by Poland was constantly growing. Then the number decreased by around 20% until 2011. Ostropolski is of the opinion that there might have been several reasons for that decrease, *inter alia*, the critique from European partners, trainings organised by the Ministry of Justice, providing wider availability of the manuals concerning EAWs to the

¹⁵³ Podhalańska 07-06-2018.

¹⁵⁴ The judge's statements are anonymised.

¹⁵⁵ meaning the conference "Human rights and mutual recognition of judicial decisions in the European Union – reflections on the basis of *Celmer* case" (13 June 2018, Warsaw).

¹⁵⁶ The judge's statements are anonymised.

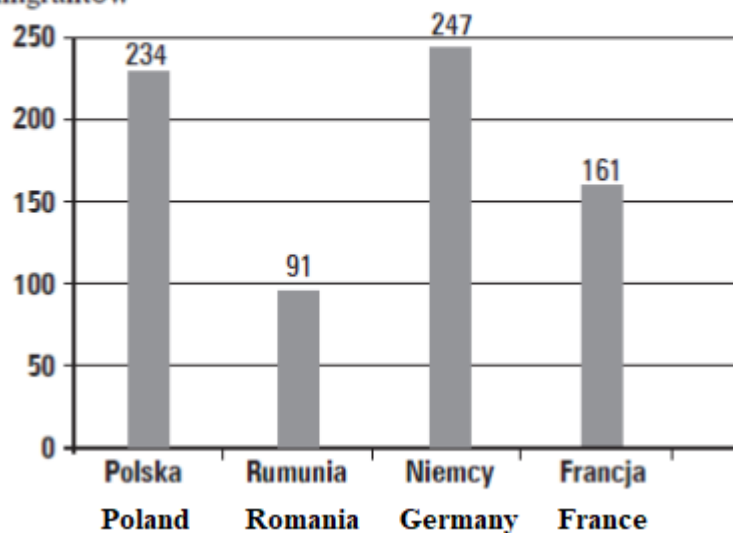
¹⁵⁷ Gajewska-Kraczkowska 05-06-2018.

¹⁵⁸ Podhalańska 07-06-2018.

courts.¹⁵⁹ The author claims that the number of EAWs issued is influenced by the dynamics of emigration of Polish nationals to other Member States of the EU. To illustrate that point, Ostropolski juxtaposed the number of EAWs issued by 4 Member States of the EU (including Poland) per every 100,000 of emigrants (who are nationals of these Member States of the EU).¹⁶⁰ Ostropolski argues that from the below-included graph depicts the proportionality in using EAWs by different Member States in a more precise manner than graphs including solely numbers of EAWs issued or EAWs issued per population of the Member State.

Chart 2. The number of EAWs in 2010 per 100,000 emigrants

Wykres 2. Ilość wydawanych ENA w 2010 r. na 100 tys. emigrantów



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As it follows, if the number of EAWs issued by Poland is compared with the number of emigrants, the number Polish EAWs is not that considerably higher than in other Member States of the EU. In that regard, Ostropolski maintains that the legislative amendments should partially focus on the *orthodox* version of the principle of legality and partially on a broader context of the system of criminal procedure in Poland.¹⁶² In the view of Ostropolski, such an approach is the only way to avoid artificial solutions.

Finally, when discussing the “popularity” of the EAW among Polish judicial authorities, the recent changes in the Polish judiciary system should be taken into account. Gardocka strongly agreed with that argument, explaining that judges in light of

¹⁵⁹ Ostropolski 2013, p. 22.

¹⁶⁰ Ostropolski 2013, p. 22.

¹⁶¹ Ostropolski 2013, p. 22.

¹⁶² Ostropolski 2013, p. 24.

the decreasing impartiality and independence of judiciary in Poland are afraid of disciplinary proceedings.¹⁶³ In the view of Gardocka, such proceedings could be initiated because of not complying with procedural requirements such as adhering to the principle of legality.¹⁶⁴ Therefore, a judge, who did not issue a EAW because in his opinion it was not in the interest of the administration of justice, could be faced with having to explain himself in course of disciplinary proceedings.¹⁶⁵ Furthermore, that argument was intensely discussed during the conference “Human rights and mutual recognition of judicial decisions in the European Union – reflections on the basis of *Celmer* case.” According to the panellists, the controversial reform of the judiciary will influence the practice of issuing EAWs by the Polish judicial authorities. As argued by one of the panellists, Prof. Dr. Marcin Matczak, toughening of the criminal policy by the Ministry of Justice cannot be overlooked.¹⁶⁶ Importantly, this argument goes in line with the opinion of Gajewska-Kraczkowska, who identified the over-criminalisation as one of the factors responsible for the high number of EAWs issued by Poland.¹⁶⁷ Furthermore, the participants of the conference argued that in light of the increasing competences of the Minister of Justice, who is a proponent of a strict criminal policy,¹⁶⁸ that tendency will continue. Importantly, in April 2018, the Minister of Justice announced that the Ministry of Justice is preparing a legislative reform, which main aim is toughening of the criminal policy in Poland.¹⁶⁹

E. Sending a EAW to the executing State

a. The location of the requested person is unknown

According to Art. 607d § 1 of the CPC, which implements Art. 10 of the FD 2002/584/JHA, if it is suspected that the requested person may be staying in the territory of a Member State of the European Union but his location is unknown, the public prosecutor and the circuit court that issued the EAW (in the court and enforcement proceedings), sends a copy thereof to the central Police unit co-operating with Interpol with a request to initiate an international search. Until now, due to delays related to the implementation of the Schengen Information System (SIS) by Poland, it is not possible

¹⁶³ Gardocka 04-06-2018.

¹⁶⁴ Gardocka 04-06-2018.

¹⁶⁵ Gardocka 04-06-2018.

¹⁶⁶ Matczak 13-05-2018.

¹⁶⁷ Gajewska-Kraczkowska 05-06-2018.

¹⁶⁸ Matczak 13-05-2018.

¹⁶⁹ Matczak 13-05-2018.

to issue an alert for the requested person in the SIS, as envisaged in Art. 9 (3) of the FD 2002/584/JHA.¹⁷⁰ It results in the necessity to use Interpol's services, which is clearly provided in Art. 607d § 1 of the CPC. If it is not possible to call on the services of the SIS, as it is in case of Poland, the issuing judicial authority may call on Interpol to transmit a EAW (Art. 10 (3) of the FD 2002/584/JHA).¹⁷¹

The initiation of the international search of the requested person takes place by sending a copy of the EAW to the central Police unit co-operating with Interpol.¹⁷² The authority competent to send a request to initiate an international search differs depending on at which stage of judicial proceedings, with regard the EAW was issued, the case is. As follows from Art. 607d § 1 of the CPC:

- 1) the authority competent at the stage of preparatory proceedings is the public prosecutor

The cooperation of the public prosecutor with the central Police unit co-operating with Interpol with regard to the international search under the EAW is regulated by § 292 (3) of the RegProk. According to this provision, if the place of stay of the requested person is unknown, and there is a suspicion that the requested person may stay in the territory of a participating country in the SIS, a copy of the EAW (in PDF format) and its English translation (in DOC, TXT, or RTF format) are sent in the form of an electronic document together with the request to initiate the international search (in PDF format). The above-mentioned documents are sent directly to the SIRENE Bureau's email address, and immediately after that the data of the requested person is entered into the SIS. The enumerated documents are sent in a manner that ensures the confidentiality and integrity of the transferred data.

- 2) the authority competent at the stage of court and enforcement proceedings is the circuit court that issued the EAW

The cooperation of the circuit court with the central Police unit co-operating with Interpol follows the same sequence as the above-described procedure in cases where the authority competent to send a request to initiate an international search is the public prosecutor. The procedure in cases where the authority competent is the circuit court that issued the EAW is regulated by § 333 (1) of the *Rozporządzenie Ministra*

¹⁷⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607d.

¹⁷¹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607d.

¹⁷² Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607d.

Sprawiedliwości z dnia 23 grudnia 2015 r., Regulamin urzędowania sądów powszechnych z dnia 23 grudnia 2015 r. (hereinafter referred to as “RegUSądR”).¹⁷³

Finally, when the location of the requested person on the basis of a EAW is determined, the circuit court that issued the EAW passes it to the competent judicial authority of the executing State.

b. The location of the requested person is known

According to Art. 607d § 2 of the CPC, which implements Art. 9 of the FD 2002/584/JHA, if the location of the requested person is known or was established as a result of the search referred to in Art. 607d § 1 of the CPC, the public prosecutor and, in the court and enforcement proceedings, the circuit court that issued the EAW, sends it directly to the judicial authority of the executing State (i.e. a Member State on which territory the requested person probably is). Therefore, if the judicial proceedings with regard to which the EAW was issued are at the stage of preparatory proceedings, the public prosecutor sends the EAW directly to the judicial authority of the executing Member State. Consequently, at the stage of preparatory proceedings, sending a EAW to the executing Member State does not require involvement of the circuit court, which issued the EAW.¹⁷⁴ The passage ‘the location of the requested person is known’ refers to a concrete location of the requested person in the territory of a Member State of the EU.¹⁷⁵

Furthermore, pursuant to Art. 607d § 2 of the CPC, a copy of the EAW will be sent to the Minister of Justice. The circuit court which issued the EAW has to send it to the Minister of Justice within 14 days from issuing the EAW. The circuit court has to include a copy of the decision to issue the EAW and information to which Member State of the EU the EAW was sent to be executed (§ 333 (2) and (3) of RegUSądR).¹⁷⁶ The *ratio legis* of sending copies of EAWs to the Minister of Justice was to harmonise the practice of sending EAWs by the circuit courts and to ensure centralisation of data

¹⁷³ *Rozporządzenie Ministra Sprawiedliwości z dnia 23 grudnia 2015 r., Regulamin urzędowania sądów powszechnych z dnia 23 grudnia 2015 r.* [The Regulation of the Minister of Justice of 23 December 2015, Regulations of functioning of the common courts]. Dziennik Ustaw [Journal of Laws], (2015), item. 2316.

¹⁷⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607d.

¹⁷⁵ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607d.

¹⁷⁶ *Rozporządzenie Ministra Sprawiedliwości z dnia 23 grudnia 2015 r., Regulamin urzędowania sądów powszechnych z dnia 23 grudnia 2015 r.* [The Regulation of the Minister of Justice of 23 December 2015, Regulations of functioning of the common courts]. Dziennik Ustaw [Journal of Laws], (2015), item. 2316.

concerning EAWs issued by Poland.¹⁷⁷ That requirement is permissible pursuant to Art. 7 of the FD 2002/584/JHA.

Finally, according to Art. 607d § 3 of the CPC, the provision of Art. 607d § 2 of the CPC applies accordingly in the event that the State executing the warrant requests additional information or documents. As it follows, if the judicial proceedings with regard to which the EAW was issued are at the stage of preparatory proceedings, then the additional information or documents are sent directly by the public prosecutor to the executing state. However, if the judicial proceedings with regard to which the EAW was issued are at the stage of court or judicial proceedings, then the circuit court has an obligation to promptly collect the requested information or documents and to send it to the executing Member State.¹⁷⁸

c. Other forms of sending the EAW

Finally, Art. 607d § 4 of the CPC implements Art. 10 (4) of the FD 2002/584/JHA. Pursuant to the aforementioned provision, the EAW and all information and documents connected thereto may also be sent by any means of electronic data transmission in the manner allowing their authenticity to be established. Therefore, it is admissible to send the EAW and all information and documents connected by e-mail or fax. However, the files should be sent in such a format (for instance PDF or JPG) that it is possible to establish the authenticity of official seals and signatures.

F. An appeal against issuing a EAW

To begin with, in the light of the regulation of the institution of the EAW in Chapter 65a of the CPC, it was not self-evident whether the decision of the circuit court regarding issuing the EAW is subject to *zażalenie* (Art. 459 of the CPC) (hereinafter referred to as “interlocutory appeal”).¹⁷⁹ What is more, that situation was causing serious discrepancies in the case law. Some circuit courts deemed that the decision is appealable by means of the interlocutory appeal and the complaint was being transferred to the appellate court. Consequently, the appellate courts were either considering the interlocutory appeal, leaving it without adjudication, or formulating doubts in that subject-matter. While in other circuit courts the interlocutory appeals with regard to issuing a EAW were refused

¹⁷⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607d.

¹⁷⁸ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607d.

¹⁷⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607a.

as inadmissible under the law. These discrepancies were occurring despite the firm view expressed by the experts in the field of the Polish criminal procedural law that the decision on issuing the EAW is not subject to an interlocutory appeal.¹⁸⁰

In 2004, the Sąd Apelacyjny w Lublinie (hereinafter referred to as the “Appellate Court in Lublin”) referred a question of law to the Supreme Court (Criminal Division) asking the Supreme Court whether an interlocutory appeal is admissible with regard to a decision of a circuit court in the subject-matter of issuing a EAW.¹⁸¹

While answering the question of law the Supreme Court emphasized that it is clear that the provisions of Chapter 65a of the CPC do not contain norms that would be the basis for challenging a decision issued on the basis of Art. 607a of the CPC.¹⁸² The Supreme Court stated that the determination whether lodging an interlocutory appeal on the decision issued on the basis of Art. 607a of the CPC is admissible on the basis of a provision contained in another chapter of the CPC depends on determination of the nature of the aforementioned decision. Therefore, while examining the case the decisive factor was whether that decision falls under the scope of one of the categories of decision which are appealable under general provisions of the CPC.

Consequently, the Supreme Court invoked Art. 459 § 1 and § 2 of the CPC pursuant to which an interlocutory appeal is admissible in cases of:

§ 1. The decision of the court precluding the possibility of delivering a judgment is subject to interlocutory appeal, unless the law provides otherwise.

§ 2. An interlocutory appeal may also be filed against a decision pertaining to a preventive measure and other decisions in cases indicated by the law.

As it follows from the judgement,¹⁸³ the circuit court’s decision with regard to (non-)issuing of a EAW neither falls under the scope of Art. 459 § 1 (the decision of the court precluding the possibility of delivering a judgement) nor § 2 (insofar as with regard other decisions as indicated by the law) of the CPC. That is why only the recognition that the decision on the subject of the EAW is a decision pertaining to a

¹⁸⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607a.

¹⁸¹ *Uchwała Sądu Najwyższego z dnia 20 stycznia 2005 r.* [Resolution of the Supreme Court of the 20th of January 2005], I KZP 29/04.

¹⁸² *Uchwała Sądu Najwyższego z dnia 20 stycznia 2005 r.* [Resolution of the Supreme Court of the 20th of January 2005], I KZP 29/04.

¹⁸³ *Uchwała Sądu Najwyższego z dnia 20 stycznia 2005 r.* [Resolution of the Supreme Court of 20th of January 2005], I KZP 29/04.

Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Boratyńska), Art. 459.

preventive measure (Article 459 § 2 in fine) would constitute a condition for challenging it on the basis of Art. 252 § 1 CPC (*zażalenie na postanowienie w przedmiocie środka zapobiegawczego* (hereinafter referred to as “an interlocutory appeal against the decision concerning preventive measures”)). However, the Supreme Court excluded that possibility on the basis of several arguments. First, the Supreme Court analysed Art. 1 of the FD 2002/584/JHA. Consequently, the Supreme Court pointed out on the basis of Art. 1 of the FD 2002/584/JHA, the EAW is described as a *decyzja sądowa* (a judicial decision) and *wniosek* (an application). Furthermore, in Chapter 65a of the CPC, there is no provision on a basis of which EAW may be equated with the application (or refusal of application) of a preventive measure in the form of pre-trial detention, meaning “a decision concerning preventive measure”. Finally, the provisions of the FD 2002/584/JHA do not provide for a possibility of appealing against a decision on issuing or refusal to issue a EAW. In conclusion, the Supreme Court held that the interlocutory appeal is not admissible to a decision of a circuit court on issuing or refusal to issue a EAW (Art. 607a of the CPC). That judgement contributed significantly to the Polish courts’ practice while issuing EAWs and put to an end the discrepancies occurring in the case law concerning the issue of admissibility of an appeal to issuing a EAW.¹⁸⁴

G. Decentralised procedure

In Poland the procedure of issuing the EAW by judicial authorities is decentralised. As argued above,¹⁸⁵ pursuant to Art. 607a of the CPC, the local circuit court is competent to issue a EAW. In Poland there are 45 circuit courts, which are listed at the website of the Ministry of Justice.¹⁸⁶ Furthermore, the Department of Enforcement of Decisions and Probation of the Ministry of Justice is responsible for recording EAWs.¹⁸⁷ The data concerning issuing EAWs by Poland to other Member States of the EU is accessible online via a governmental website containing data important for the development of innovation in the state and the information society.¹⁸⁸ The data regarding issuing EAWs by Poland to other Member States of the EU is updated twice a year, with the last update made on the 16th of June, 2018.

¹⁸⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607a.

¹⁸⁵ In the section concerning the authority competent to issue a EAW

¹⁸⁶ Ministerstwo Sprawiedliwości [The Ministry of Justice’s website] Information available via <https://bip.ms.gov.pl/pl/rejestry-i-ewidencje/lista-sadow-powszechnych/> , last visited on 9 June 2018.

¹⁸⁷ Gardocka & Jagiełło 2014, p. 59.

¹⁸⁸ Statistics on the EAW are available via <https://danepubliczne.gov.pl/dataset/ena-stosowanie-europejskiego-nakazu-aresztowania-w-latach-2004-i-p-2016> , last visited on 28 June 2018.

Annex I to this report contains data on the number of EAWs issued by Poland to other Member States of the EU with the division made on the basis whether the location of the requested person is (un-)known in the territory of a Member State of the EU.¹⁸⁹ Annex II to this report contains data on the number of EAWs issued by Poland to other Member States of the EU with the division made on the basis of to which Member State of the EU, the EAW was issued.¹⁹⁰

IV. The procedure of executing a EAW

The procedure of executing a EAW is governed by Chapter 65b of the CPC. According to Art. 607k § 1 of the CPC, the surrender of a person requested pursuant to a EAW, from the territory of Poland is carried out for the purpose of conducting criminal proceedings or executing penalty of imprisonment or other measure involving the deprivation of liberty against such a person within the territory of another Member State of the European Union. As specified in case law,¹⁹¹ the basic, preliminary, and necessary condition for the prosecution of a specific person staying in Poland is the issuance by another Member State of the EU a EAW, which must be presented in the original. If no original version of the EAW is presented to the Polish competent authorities, it is not possible to determine whether the EAW at hand is valid. As a consequence, instituting proceedings for the purposes of surrender of the requested person is inadmissible under Art. 17 § point 11 of the CPC. However, if the lack of the original version of the EAW at hand is mitigated by sending the original version of the EAW, then the procedure of executing the EAW is admissible.¹⁹²

A. Authority competent to execute a EAW

The Polish legislator decided to make a distinction between the authority which receives the EAW issued by other Member States of the EU and the authority adjudicating the case. At first, the authority authorised to receive EAWs issued by other Member States of the EU is the (locally competent) public prosecutor (§ 293 RegUProkR and Art. 607k

¹⁸⁹ Statistics on the EAW are available via <https://danepubliczne.gov.pl/dataset/ena-stosowanie-europejskiego-nakazu-aresztowania-w-latach-2004-i-p-2016/resource/a2116c94-bbe7-4116-9d33-5ed3506c6f37>, last visited on 28 June 2018.

¹⁹⁰ Statistics on the EAW are available via <https://danepubliczne.gov.pl/dataset/ena-stosowanie-europejskiego-nakazu-aresztowania-w-latach-2004-i-p-2016/resource/5b87d2c7-bb91-4cb6-8e3b-d06bacca7201>, last visited on 20 June 2018.

¹⁹¹ Postanowienie Sądu Apelacyjnego w Katowicach z dnia 3 czerwca 2009 r. [Decision of the Appellate Court in Katowice of the 3rd of June 2009] II AKz 335/09.

¹⁹² Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607k.

§ 2 of the CPC). What is more, if a EAW issued by other Member State of the EU was delivered directly to the court, that court has an obligation to send the EAW back to the relevant public prosecutor's office.¹⁹³

The public prosecutor, upon receiving a EAW, interrogates the person against whom the EAW was issued, informing him of the EAW's contents (Art. 607k § 2 of the CPC). It is significant to indicate that Art. 607k § 2 of the CPC does not prescribe the same standard of protection as Art. 14 of the FD 2002/584/JHA. According to Art. 14 of the FD 2002/584/JHA, where the arrested person does not consent to his or her surrender as referred to in Article 13 [of the FD 2002/584/JHA], he or she shall be entitled to be heard by *the executing judicial authority* [emphasis added], in accordance with the law of the executing Member State. Art. 14 of the FD 2002/584/JHA guarantees that the requested person is entitled to be heard by the executing judicial authority, while Art. 607k § 2 of the CPC prescribes that the requested person is heard not by judicial authority, but by the public prosecutor. As argued by Nita-Światłowska, the standard imposed in Art. 14 of the FD 2002/584/JHA is not upheld in Art. 607k § 2 of the CPC.¹⁹⁴

Furthermore, the public prosecutor informs the person against whom the EAW was issued of the possibility of giving consent to the surrender or consent to waive Art. 607e § 1 of the CPC, in which the rule of speciality is laid down (Art. 607k § 2 of the CPC). While interrogating the person against whom the EAW was issued, the public prosecutor should focus on the information which allow to second the surrender on the basis of the EAW or to conclude for the refusal to execute the EAW.¹⁹⁵ That is why the public prosecutor should concentrate on the circumstances which may indicate the existence (or absence) of mandatory or facultative grounds for refusing to execute the EAW.¹⁹⁶ Significantly, the person, whom the EAW concerns, can decide to solely consent to the surrender or to waive Art. 607e § 1 of the CPC, or for both.

Thereafter, the public prosecutor files the case with a local circuit court (Art. 607k § 2 of the CPC). The public prosecutor takes a stand on the issue of executing the EAW and presents it to the court. Regardless of information indicating the existence of grounds for denial of execution of the EAW, the motion of the public prosecutor should

¹⁹³ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Światłowska), Art. 607k.

¹⁹⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Światłowska), Art. 607k.

¹⁹⁵ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607k.

¹⁹⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Światłowska), Art. 607k.

discuss the notions of the postponement of the surrender (Art. 607o of the CPC), the conditional surrender (Art. 607t of the CPC), and the applications included in the EAW itself concerning the seizure and surrender of evidence (Art. 607wa of the CPC).¹⁹⁷ Finally, the procedure of executing EAWs is decentralised with the main criterion that the public prosecutor or the court are 'locally competent' to deal with the case at hand. The judicial authority executing EAWs is the local circuit court, which is competent because of the place of residence or place of permanent stay of the prosecuted person (Art. 32 § 2 in jo. § 1 (3) or (2) of the CPC).¹⁹⁸

B. Conditions applicable to executing a EAW

a. The beginning of the procedure of executing a EAW

Upon receiving a EAW, the public prosecutor interrogates the person against whom the EAW was issued (Art. 607k § 2 of the CPC). Before the interrogation, the public prosecutor has to inform the requested person on the basis of a EAW about:

- 1) The EAW's contents; and
- 2) The possibility of giving consent to the surrender; and
- 3) The possibility of giving consent to waive Art. 607e § of the CPC.¹⁹⁹

If the requested person on the basis of a EAW does not appear before the public prosecutor for the purposes of interrogation, it is admissible to order coercive measures. For instance, the requested person can be arrested and brought to the interrogation by the Police or other competent law enforcement agency. Importantly, the duration of the arrest cannot exceed the time limits specified in Art. 248 § 1 of the CPC.²⁰⁰ However, the public prosecutor may decide not to order the preventive measures nor coercive measures. As indicated in the literature,²⁰¹ such a decision strongly depends on the circumstances of a particular case. After conducting the interrogation, the public prosecutor files the case with a local circuit court. Finally, during the procedure of

¹⁹⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607k.

¹⁹⁸ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607k.

¹⁹⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2016, Buczman, Art. 607k.

²⁰⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607k.

²⁰¹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607k.

executing the EAW, the requested person has a status close to the one of an accused and has the right to defence. Because of the right to defence the requested person is not obliged to provide explanations.²⁰²

b. Arrest of the requested person on a basis of a EAW

To begin with, the arrest of a person requested pursuant to a EAW may also take place on the basis of a record in Schengen Information System or in the database of International Criminal Police Organisation. Articles 244-246 and 248 apply accordingly (Art.607k § 2a of the CPC). Hence, the record in Schengen Information System is equal with issuing a EAW. This is in line with Art. 9 (3) 2nd sentence of the FD 2002/584/JHA.²⁰³

According to Art. 607k § 3 of the CPC, on the motion of the public prosecutor, the circuit court may impose detention on remand, defining its period for the time necessary to surrender the requested person. Crucially, Art. 607k § 3 of the CPC refers to both the surrender for the purposes of the prosecution and for serving the punishment by the requested person. Moreover, the circuit court is not competent to order detention on remand *ex officio*, however, that limitation applies only when the procedure of executing the EAW is at the stage which precedes the judicial phase. What is more, the total period of detention on remand may not exceed 100 days. The court, while ordering detention on remand, should take into account the time limits prescribed by Art. 607m of the CPC. In addition, the court while deciding whether there is need to order detention on remand should consider that detention on remand is not ordered if a different preventive measure is sufficient (detention on remand as *ultima ratio* as provided in Art. 257 § 1 of the CPC).

On the one hand, as specified in case law,²⁰⁴ the court should take into account the objective of preventing the requested person on the basis of the EAW from absconding from surrender. On the other hand, it is accepted in case law that Art. 607k § 3 of the CPC does not impose an obligation to order detention on remand in course of the procedure of executing the EAW.²⁰⁵ Finally, the final and binding sentence, or

²⁰² Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607k.

²⁰³ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607k.

²⁰⁴ Postanowienie Sądu Apelacyjnego w Katowicach z dnia 3 lutego 2010 r. [Decision of the Appellate Court in Katowice of the 3rd of February 2010], II AKz 38/10.

²⁰⁵ Postanowienie Sądu Apelacyjnego w Katowicach z dnia 8 czerwca 2010 r. [Decision of the Appellate Court in Katowice of the 8th of June 2010], II AKz 502/10.

another decision constituting grounds for deprivation of liberty, rendered against the requested person in another Member State of the European Union constitutes separate autonomous grounds from imposing detention on remand (Art. 607k § 3 of the CPC).

Before receiving a EAW, the court may apply detention on remand for a period not exceeding seven days with respect to the requested person, if the competent judicial authority which issued the EAW so requested by entering a record into Schengen Information System or into the database of International Criminal Police Organisation guarantying that the final and binding sentence, or another decision constituting grounds for deprivation of liberty, is rendered against the requested person (Art. 607k § 3a of the CPC). If the EAW does not arrive in the period not exceeding 7 days, the person in custody has to be released.²⁰⁶

If, simultaneously to the issue of a EAW, a Member State of the EU demands that the requested person be questioned, such a person should be questioned before the examination of the EAW. The hearing is conducted with the attendance of the person indicated in the EAW (Art. 607k § 5 of the CPC). In such cases, Art. 588 § 4 of the CPC applies accordingly, meaning that trial procedures carried out on the request of the court or public prosecutor of a foreign State are governed by Polish law. However, the request of the above authorities to apply a particular mode or form to the procedure should be honoured, if this is not contrary to the legal order of Poland. Finally, Nita-Światłowska claims that Art. 607k § 5 of the CPC has a broader scope than Arts. 18-19 of the FD 2002/584/JHA.²⁰⁷ Art. 18 (1) of the FD 2002/584/JHA, concerns EAWs issued for the purpose of conducting a criminal prosecution, while Art. 607k § 5 of the CPC is not limited to that type of EAWs.²⁰⁸

C. Adjudication with respect to surrender and detention on remand

The circuit court adjudicates with respect to the surrender and detention on remand in a hearing, in which the public prosecutor and the defence counsel may participate (Art. 607l § 1 of the CPC). Importantly, not mentioning the requested person in the wording of Art. 607l § 1 of the CPC does not signify that the requested person does not have the right to participate in the hearing. In cases where the court adjudicates with respect to detention on remand of the requested person in a hearing, the participation of the

Postanowienie Sądu Apelacyjnego w Łodzi z dnia 15 lipca 2009 r. [Decision of the Appellate Court in Łódź of the 15th July 2009], II AKz 470/09.

²⁰⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Światłowska), Art. 607k.

²⁰⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Światłowska), Art. 607k.

²⁰⁸ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Światłowska), Art. 607k.

requested person in that hearing is indispensable.²⁰⁹ The court has to interrogate the requested person before ordering a preventive measure, including detention on remand (Art. 249 § 3 of the CPC applies accordingly). Furthermore, in light of Art. 42 (2) of the Polish Constitution,²¹⁰ the requested person has to be guaranteed a right to participate in a hearing concerning solely the surrender.²¹¹ Therefore, the requested person has to be notified about such a hearing. Moreover, the requested person in custody is entitled to file a motion to be brought to a hearing (Art. 451 of the CPC).²¹² Finally, the circuit court adjudicating the execution of a EAW, can settle both issues (the surrender and detention on remand) at a single hearing. However, as argued in the literature, if the decision on the surrender would be too precipitate at that stage, the court has to schedule an additional hearing with regard to ordering detention on remand.²¹³

When notifying the prosecuted person of the hearing referred to in Art. 607l § 1 of the CPC, the court serves the EAW together with the translation obtained from the public prosecutor (Art. 607l § 1a of the CPC). If due to particular circumstances it is not possible to prepare the translation before the hearing, the translation is ordered by the court. Moreover, the court may limit itself to the notification of the prosecuted person of the contents of the EAW if it does not hinder the relation of this person's rights, including those mentioned in Art. 607l § 2 of the CPC (i.e. the right to give declaration of consent to the surrender or of consent not to apply the rule of speciality, as provided in Art. 607e § 1 of the CPC). Finally, if the requested person on the basis of the EAW does not have a sufficient command of Polish, that person is entitled to the gratuitous help of an interpreter (Art. 72 § 1 of the CPC).

According to Art. 607l § 2 of the CPC, if the requested person expresses such a wish, the court will take from him and record in the transcript the declaration of consent to the surrender or of consent to Art. 607e § 1 of the CPC not being applied. The consent to the surrender, as understood under Art. 607l § 2 of the CPC, should encompass all

²⁰⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Światłowska), Art. 607l.

²¹⁰ Article 42 of the Polish Constitution 2. Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He may, in particular, choose counsel or avail himself - in accordance with principles specified by statute - of counsel appointed by the court.

²¹¹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Światłowska), Art. 607l.

²¹² Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2013, Grajewski (Steinborn), Art. 607l.

²¹³ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2012, Hofmański, Art. 607l.

Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2013, Grajewski (Steinborn), Art. 607l.

offences which the EAW concerns. While from Art. 13 (1) of the FD 2002/584/JHA it follows that the arrested person indicates that he or she consents to surrender and in addition to that the arrested person may express renunciation of entitlement to the speciality rule, referred to in Article 27(2). As argued by Nita-Światłowska, when Art. 607l § 2 of the CPC is juxtaposed with Art. 13 (1) of the FD 2002/584/JHA, the former one regulates the matter at hand in a different manner than the latter one.²¹⁴

It is crucial to point out that the declaration, pursuant to Art. 607l § 2 of the CPC, may not be withdrawn, of which fact the requested person is instructed. The obligation to instruct the requested person about that lies on the court which takes from the requested person the declaration. Importantly, if the requested person was solely instructed at an earlier stage by the public prosecutor about the fact that the declaration may not be withdrawn this is insufficient to meet the standard imposed by Art. 607l § 2 of the CPC. In that regard it is vital to note that the earlier declaration to the public prosecutor (Art. 607k of the CPC) does not trigger procedural consequences. Furthermore, as decided by the Supreme Court,²¹⁵ the requested person has to be instructed about all the consequences that the declaration provided Art. 607l § 2 of the CPC entails, meaning that the declaration is irrevocable and that the speciality rule under Art. 607e § 1 of the CPC will not be applied. Only if the requested person is aware of these consequences, the declaration will be deemed to be given voluntarily and consciously. Finally, the requested person is entitled to be advised by a defence counsel of a choice of that person or appointed *ex officio* on the basis of Art. 78 § 1 and 80a of the CPC.

Lastly, if information provided by the issuing Member State is insufficient to decide on the surrender of the requested person, the court requests the judicial authority that issued the EAW to furnish supplementary information within a specified time limit (Art. 607z § 1 of the CPC). However, if the judicial authorities of the Member State which issued the EAW does not observe the time limit, the EAW is examined on the basis of the initially received information (Art. 607z § 2 of the CPC).

D. Decision on surrender – time limits

The decision on surrender is issued by the circuit court within 40 days of the arrest of the requested person. If the requested person makes the declaration referred to in Article

²¹⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Światłowska), Art. 607l.

²¹⁵ Postanowienie Sądu Najwyższego z dnia 17 stycznia 2013 r. [Decision of the Supreme Court of the 17th of January 2013], V KK 160/12.

607l § 2 (the requested person expressed consent to the surrender *or* consent to Art. 607e § 1 of the CPC not being applied), this time limit is of three days and starts running from the date on which the declaration was made (Art. 607m § 1 of the CPC). In that regard it is crucial to discuss the shortened time limit for concluding the surrender proceedings as prescribed by Art. 17 (2) of FD 2002/584/JHA in light of Art. 607l § 3 and Art. 607m § 1 of the CPC.²¹⁶ According to Art. 17 (2) of FD 2002/584/JHA, in cases where the requested person *consents to his surrender*, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given. While Art. 607m § 1 of the CPC prescribes the shortened time limit for issuing the decision on also in cases where the requested person consents to Art. 607e § 1 of the CPC not being applied (rule of speciality).²¹⁷

Furthermore, surrender proceedings should be concluded in a final manner within 60 days of the arrest of the requested person or within 10 days of the date, on which the declaration referred to in Article 607l § 2 is made (Art. 607m § 1a of the CPC). Importantly, in particularly justified cases, when the time limits referred to in Art. 607m § 1a of the CPC cannot be observed, surrender proceedings should be concluded in a final manner within 30 days of the expiry of the above time limits. The judicial authority, which issued the EAW, should be informed of the delay and reasons thereof (Art. 607m § 2 of the CPC). For instance, the reason for the delay might be requesting supplementary information from the issuing Member State (Art. 607z of the CPC).²¹⁸ However, it should be noted that Art. 17 (7) of the FD 2002/584/JHA requires the Member State which cannot observe the time limits provided in the FD 2002/584/JHA to inform Eurojust about the delay.²¹⁹

Finally, in the case referred to in Article 607k § 4, the time limits referred to in Art. 607m § 1 and 2 of the CPC, will start running of the day that the permission was issued (Art. 607m § 3 of the CPC). Art. 607k § 4, which implements Art. 20 of the FD 2002/584/JHA, of the CPC refers to cases where a separate provision of Polish law stipulates that the prosecution of the person against whom a EAW was issued is dependent upon the permission of a competent authority, Art. 13 of the CPC applies before filing the case with the court. In cases concerning executing EAWs by Polish

²¹⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607m.

²¹⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607m.

²¹⁸ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607m.

²¹⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607k.

judicial authorities, Art. 13 of the CPC is applied in order to revoke immunity of a person whom the EAW concerns.²²⁰

E. An appeal against executing a EAW

The decision of the court on surrender on the basis of a EAW is subject to interlocutory appeal, which is filed within three days of the publication of the decision and, if the prosecuted person is deprived of liberty and has not been brought to the court hearing, of its being served, and Art. 252 of the CPC applies accordingly (Art. 607l § 3 of the CPC). The circumstances which the interlocutory appeal may concern go as follows:

- 1) the court's decision to execute or to refuse to execute a EAW
- 2) the court's decision concerning postponement of the surrender (Art. 607o of the CPC)
- 3) the court's decision that the execution of a EAW is admissible in cases when a EAW and a motion for extradition to a third State are submitted with respect to the same requested person (Art. 607y § 1 of the CPC)
- 4) the court's decision to suspend the proceedings in case prescribed in Art. 607y § 1 and 2 of the CPC (Art. 22 § 2 of the CPC)

The decision of the court precluding the possibility of delivering a judgement is subject to interlocutory appeal.²²¹ Furthermore, the interlocutory appeal may be filed against a decision pertaining to a preventive measure and other decision in cases indicated by the law (Art. 459 § 1 and 2 of the CPC). The interlocutory appeal may be filed by the parties and also by a person directly concerned with the decision, unless the law provides otherwise (Art. 459 § 3 of the CPC).

It is necessary to discuss the issue of possible prosecution for other offences than the ones specified in the EAW at hand (Art. 27 (4) and Art. 28 (3) FD 2002/ 584). According to Art. 607za § 1 of the CPC, a motion of a competent judicial authority of the issuing Member State for consent for the prosecution or execution of penalty of imprisonment or measure involving deprivation of liberty for offences predating the surrender or for consent to a further surrender, is heard by the circuit court which ruled with respect to the surrender. Art. 607za § 1 of the CPC does not determine whether on

²²⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607k.

²²¹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607l.

that court's decision there is an appeal or not. However, as decided by the Appellate Court in Wrocław, on the basis of Art. 607l § 3 of the CPC it can be deduced that the interlocutory appeal is applicable also in cases of such court's decisions.²²²

F. Surrender of a requested person

According to Art. 607n § 1 of the CPC, a requested person, against whom a final and binding decision on surrender was issued, is surrendered to a competent judicial authority of the issuing State no later than within seven days of the day on which the decision on surrender becomes final and binding. The surrender should take place as promptly as it is possible.²²³ The date of the surrender should be scheduled by the competent authorities of the Member State which issued the EAW and the Polish authorities. The exchange of information between these authorities is conducted directly.

Under Art. 607n § 2 of the CPC, if the surrender of the requested person within the time limit referred to in Art. 607n § 1 of the CPC is not practicable due to an event of force majeure or a danger to the life or health of this person, the requested person is surrendered to a competent judicial authority of the issuing State no later than within 10 days of the newly fixed time limit. In the literature there is a divergence of opinions as to the interpretation of the passage 'the newly fixed time limit.'²²⁴ In the view of Steinborn, the surrender should take place within 10 days from the definite cessation of the cause of the delay.²²⁵ Steinborn indicates that the competent authorities of the Member States which issued the EAW and the competent Polish authorities should schedule a new date of the surrender on the basis of the EAW. The new date cannot be scheduled for later than within 10 days from the cessation of the reasons set out in Art. 607n § 2 of the CPC.²²⁶ Moreover, Steinborn is of the opinion that the Polish court does not have to issue a decision on the new date of the surrender since the new date is a result of negotiations between the competent authorities of the issuing Member State and Poland. On the other hand, Hofmański, Sadzik, Zgryzek, and Grzegorzczak assume that after the

²²² Postanowienie Sądu Apelacyjnego we Wrocławiu z dnia 11 grudnia 2009 r. [Decision of the Appellate Court in Wrocław of the 11th of December 2009], II AKz 631/09.

²²³ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2013, Grajewski (Steinborn), Art. 607n.

²²⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607n.

²²⁵ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2013, Grajewski (Steinborn), Art. 607n.

²²⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2013, Grajewski (Steinborn), Art. 607n.

cessation of the cause of the delay, a new date of the surrender is scheduled.²²⁷ However, in the view of the above-mentioned authors, the Polish court has to issue a decision in that regard. Consequently, the surrender should take place within the next 10 days from the day on which such a decision is issued.²²⁸

Finally, if the issuing Member State fails to take a person liable to surrender into custody within the time limits laid down in Art 607n § 1 or 2 of the CPC, the immediate release of such person is ordered, unless he is deprived of liberty in another case (Art. 607n § 3 of the CPC). The sanction imposed by Art. 607n § 3 of the CPC applies solely in cases where the requested person has been previously taken into custody.²²⁹ It is significant to note that the reason because of which the issuing Member State failed to take a person liable to surrender is irrelevant. For instance, it includes situations in which the issuing Member State informs the Polish side that the transfer will not take place or when the requested person is actually not taken into custody by the issuing Member State.²³⁰

G. Mandatory grounds for non-execution of the European Arrest Warrant

Art. 3 of the FD 2002/584/JHA/JHA	Art. 607p of the CPC
<p>The judicial authority of the Member State of execution (hereinafter executing judicial authority) shall refuse to execute the European arrest warrant in the following cases:</p> <p>1) if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;</p>	<p>§ 1. The execution of a European warrant will be denied if:</p> <p>1) the offence on which the European warrant is based, where Polish criminal courts have jurisdiction to prosecute the offence, is covered by amnesty,</p> <p>2) a final judicial decision was issued against the requested person in connection with the same offence and, in the case of sentencing for the same offence, the requested person is either</p>

²²⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607n.

²²⁸ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607n.

²²⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2016, Buczma, Art. 607n.

²³⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Nita-Swiatłowska), Art. 607n.

<p>2) if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;</p> <p>3) if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.</p>	<p>serving or has served his penalty or, according to the laws of the State, where the sentence was passed, the penalty cannot be executed,</p> <p>3) a final and binding decision on surrender to a different Member State of the European Union was issued against a requested person,</p> <p>4) the person who is the subject of the European warrant may not be held criminally responsible for the acts on which the arrest warrant is based, owing to his age,</p> <p>5) it would violate human and citizen freedoms and rights,</p> <p>6) the warrant was issued in connection with a political offence committed without the use of violence.</p> <p>§ 2. If a European warrant was issued against a requested person who is a Polish citizen, the warrant may be executed on the condition that the act on which it is based has not been committed in the territory of the Republic of Poland or on a Polish aircraft or vessel and that it constitutes an offence under the law of the Republic of Poland or that it would constitute an offence under the law of the Republic of Poland had it been committed in the territory of the Republic of Poland, both at the time of its perpetration and at the time, when the European warrant was submitted.</p>
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In October 2006, the Polish legislator introduced several amendments to Chapter 65b of the CPC, which regulates executing of a EAW by Polish judicial authorities. The aim of these amendments was to differentiate the legal situation of a foreigner and a Polish citizen with regard to executing a EAW.²³¹ With regard to Polish nationals the following limitations were introduced:

- 1) The allegedly committed act by the suspected person must constitute a criminal offence under the Polish criminal law – double criminality is required pursuant to Art. 607p § 2 of the CPC. However, an exception

²³¹ Gardocka 2011, p. 5.

was upheld in cases of 32 categories of offences as enumerated in Art. 607w of the CPC.²³² ; and

- 2) A Polish citizen cannot be surrendered on the basis of a EAW if the act on which it is based has been committed in the territory of the Republic of Poland or on a Polish aircraft or vessel.

H. Facultative reasons for denial of execution of the European Arrest Warrant

Art. 4 of FD 2002/584/JHA	Art. 607r of the CPC
<p>The executing judicial authority may refuse to execute the European arrest warrant:</p> <ol style="list-style-type: none"> 1. if, in one of the cases referred to in Article 2(4), the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State; however, in relation to taxes or duties, customs and exchange, execution of the European arrest warrant shall not be refused on the ground that the law of the executing Member State does not impose the same kind of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State; 2. where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based; 3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings; 4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction 	<p>§ 1. A judicial authority may refuse to execute a European warrant, if:</p> <ol style="list-style-type: none"> 1) the act on which the European warrant is based, other than that mentioned in Article 607 w, does not constitute an offence under Polish law, 2) criminal proceedings are pending against the requested person in Poland for the same offence on which the European warrant is based, 3) a final and binding judicial decision refusing to institute criminal proceedings, discontinuing or concluding the proceedings was issued with respect to the same offence on which the European warrant is based, 4) under Polish law the statute of limitations for prosecution or execution of penalty has expired and the offence falls within the jurisdiction of Polish courts, 5) the European warrant relates to an offence which, according to Polish law, was committed in whole or in part in the territory of the Republic of Poland, or on a Polish aircraft or vessel, 6) the offence to which the European warrant relates is punishable in the issuing State with a penalty of life imprisonment or other measure involving deprivation of

²³² Art. 2 (2) of the FD 2002/584/JHA.

<p>of that Member State under its own criminal law;</p> <p>5. if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;</p> <p>6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;</p> <p>7. where the European arrest warrant relates to offences which:</p> <p>(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or</p> <p>(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory</p>	<p>liberty without the possibility of applying for reduction.</p> <p>§ 2. The provisions of § 1 point 1 do not apply if the act does not constitute an offence because Polish law does not impose the same kind of tax or duty or does not include a tax, duty, customs and exchange regulation of the same kind as the law of the issuing State.</p>
<p><i>in absentia proceedings</i></p>	
<p>Art. 4a FD 2009/299/JHA</p> <p>Decisions rendered following a trial at which the person did not appear in person</p> <p>1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:</p>	<p>Art. 607r of the CPC</p> <p>§ 3. The judicial authority may also refuse to execute a European warrant issued for the purpose of executing a penalty or measure involving the deprivation of liberty, imposed in the absence of the requested person, unless:</p> <p>a) the requested person is summoned to participate in the proceedings or otherwise notified of the time and place of the trial or hearing and instructed that failure to attend does not impede the issue of the judgment or if the requested person is assisted by a defence counsel, who</p>

<p>(a) in due time:</p> <p>(i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial; and</p> <p>(ii) was informed that a decision may be handed down if he or she does not appear for the trial; or</p> <p>(b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial; or</p> <p>(c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:</p> <p>(i) expressly stated that he or she does not contest the decision; or</p> <p>(ii) did not request a retrial or appeal within the applicable time frame; or</p> <p>(d) was not personally served with the decision but:</p> <p>(i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and</p> <p>(ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.</p>	<p>attended the hearing or trial,</p> <p>b) after the judgment is served on the requested person together with the instruction of his rights, the time limit and manner of submitting of a petition in the issuing State to conduct new court proceedings in the same case and with his participation, the requested person has failed to submit such a petition within the prescribed time limit or declared that he does not object to the judgment,</p> <p>c) the authority, which issued the European warrant assures that immediately after the requested person was surrendered to the issuing State, he is served a copy of the judgment with the instruction of his rights, the time limit and manner of submitting of a petition in the issuing State to conduct new court proceedings in the same case and with his participation.</p>
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2. In case the European arrest warrant is issued for the purpose of executing a custodial sentence or detention order under the conditions of paragraph 1(d) and the person concerned has not previously received any official information about the existence of the criminal proceedings against him or her, he or she may, when being informed about the content of the European arrest warrant, request to receive a copy of the judgment before being surrendered. Immediately after having been informed about the request, the issuing authority shall provide the copy of the judgment via the executing authority to the person sought. The request of the person sought shall neither delay the surrender procedure nor delay the decision to execute the European arrest warrant. The provision of the judgment to the person concerned is for information purposes only; it shall neither be regarded as a formal service of the judgment nor actuate any time limits applicable for requesting a retrial or appeal.

3. In case a person is surrendered under the conditions of paragraph (1)(d) and he or she has requested a retrial or appeal, the detention of that person awaiting such retrial or appeal shall, until these proceedings are finalised, be reviewed in accordance with the law of the issuing Member State, either on a regular basis or upon request of the person concerned. Such a review shall in particular include the possibility of suspension or interruption of the detention. The retrial or appeal shall begin within due time after the surrender.

The Polish legislator supplemented Art. 607r of the CPC with § 3²³³ in order to transpose Art. 4a of the FD 2002/584/JHA into the Polish legal order. As indicated in the literature, Art. 607r § 3 of the CPC is not entirely in line with Art. 4a of the FD 2002/584/JHA.

²³³ *Ustawa z dnia 29 lipca 2011r. o zmianie ustawy - Kodeks karny, ustawy - Kodeks postępowania karnego oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary* [Bill of 29 July 2011 Amending the Criminal Code, the Code of Criminal Procedure and Corporate Criminal Liability Act], *Dziennik Ustaw* [Journal of Laws], (2011), Doc. No. 191, item. 1135.

First, Art. 607r § 3 (a) of the CPC implements Art. 4a (1)(a) of the FD 2002/584/JHA. Pursuant to Art. 607r § 3 (a) of the CPC, the judicial authority may also refuse to execute a EAW issued for the purpose of executing a penalty or measure involving the deprivation of liberty, imposed in the absence of the requested person, unless:

the requested person is summoned to participate in the proceedings or otherwise notified of the time and place of the trial or hearing and instructed that failure to attend does not impede the issue of the judgment or if the requested person is assisted by a defence counsel, who attended the hearing or trial.

It is crucial to note that Art. 607r § 3 (a) of the CPC does not differentiate summoning in person (summoning the requested person directly) from actually receiving official information of the scheduled date and place of the trial by other means (summoning the requested person indirectly). Because of that Art. 607r § 3 (a) of the CPC is not in accordance with Art. 4a (a)(i) of the FD 2002/584/JHA. The latter provision imposes a different regulation for the two above-described circumstances.²³⁴ Pursuant to Art. 4a (a)(i) of the FD 2002/584/JHA if a person was summoned by other means (meaning not summoned in person) there is an additional requirement that that person ‘actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial.’²³⁵ Furthermore, Art. 607r § 3 (a) of the CPC does not apply if the requested person was assisted by a defence counsel.²³⁶

Second, Art. 607r § 3 (b) of the CPC implements Art. 4a (1)(c) of the FD 2002/584/JHA. Pursuant to Art. 607r § 3 (a) of the CPC, the judicial authority may also refuse to execute a EAW issued for the purpose of executing a penalty or measure involving the deprivation of liberty, imposed in the absence of the requested person, unless:

after the judgment is served on the requested person together with the instruction of his rights, the time limit and manner of submitting of a petition in the issuing State to conduct new court proceedings in the same case and with his participation, the requested person has failed to submit such a petition within the prescribed time limit or declared that he does not object to the judgment

²³⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607r.

²³⁵ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607r.

²³⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607r.

Art. 607r § 3 (b) of the CPC is not entirely in compliance with Art. 4a (1)(c) of the FD 2002/584/JHA, which speaks about the requested person's 'the right to a retrial, or an appeal.'²³⁷ While Art. 607r § 3 (b) of the CPC speaks about the requested person right to conduct new court proceedings in the same case. As it follows, the scope of Art. 607r § 3 (b) of the CPC is narrower than the one of Art. 4a (1)(c) of the FD 2002/584/JHA. However, as claimed by Steinborn, taking into account the wording of Art. 4a (1)(c) of the FD 2002/584/JHA and the principle of conforming interpretation of national law with EU law, the passage 'new court proceedings' in Art. 607r § 3 (b) of the CPC has to be interpreted as including the right to an appeal.²³⁸

Finally, Art. 607r § 3 (c) of the CPC implements Art. 4a (1)(d) of the FD 2002/584/JHA. Pursuant to Art. 607r § 3 (c) of the CPC, the judicial authority may also refuse to execute a EAW issued for the purpose of executing a penalty or measure involving the deprivation of liberty, imposed in the absence of the requested person, unless:

the authority, which issued the European warrant assures that immediately after the requested person was surrendered to the issuing State, he is served a copy of the judgment with the instruction of his rights, the time limit and manner of submitting of a petition in the issuing State to conduct new court proceedings in the same case and with his participation

The Polish legislator omitted to include in Art. 607r § 3 (c) of the CPC to right to appeal, which unequivocally follows from Art. 4a (1)(d) of the FD 2002/584/JHA.²³⁹ Similarly to Art. 607r § 3 (b) of the CPC, the interpretation of the 'new court proceedings' as envisaged in Art. 607r § 3 (c) of the CPC, should encompass the right to an appeal.²⁴⁰ Furthermore, according to Art. 607u of the CPC, if a EAW was issued for the purpose of executing a penalty or a measure involving deprivation of liberty imposed in the conditions defined in Art. 607r § 3 (c) of the CPC, the requested person is instructed of his right to request a copy of the judgment. The issuing State is immediately notified of the request for a copy of the judgment having being submitted and, after the judgment is received, it will be served on the requested person. Finally, the submission of the request does not halt the execution of the EAW.

²³⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607r.

²³⁸ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2013, Grajewski (Steinborn), Art. 607r.

²³⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607r.

²⁴⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Górski & Sakowicz), Art. 607r.

I. Decentralised procedure of executing EAWs

Similarly to the procedure of issuing a EAW by Polish judicial authorities, the procedure of executing EAWs is decentralised. As argued above, the judicial authorities competent are public prosecutors and circuit courts. Annex III attached to the report contains statistics on the number of EAWs issued by other Member States of the European Union to Poland.

V. Request for a preliminary ruling

In 2016, Sąd Rejonowy dla Łodzi – Śródmieście w Łodzi (hereinafter referred to as the “Regional Court for Cenral Łódź, Łódź”) requested for a preliminary ruling under Article 267 TFEU in a EAW-matter.²⁴¹ The request for a preliminary ruling concerned the interpretation of Art. 26 (1) of FD 2002/584/JHA, as amended by FD 2009/299/JHA. The request has been made in proceedings between JZ and the Prokuratura Rejonowa Łódź — Śródmieście (Prosecutor for the District of Łódź, Poland) concerning the request by JZ for the deduction, from the total period of the custodial sentence imposed on him in Poland, of the period during which he was made subject, by the Member State which executed the EAW, namely the United Kingdom, to the electronic monitoring of his place of residence, in conjunction with a curfew.

The question referred by the Regional Court for Central Łódź, Łódź goes as follows:

‘Must Article 26(1) of [Framework Decision 2002/584/JHA], in conjunction with Article 6(1) and (3) [TEU] and Article 49(3) of the [Charter], be interpreted as meaning that the term “detention” also covers measures applied by the executing Member State consisting in the electronic monitoring of the place of residence of the person to whom the arrest warrant applies, in conjunction with a curfew?’

While answering the preliminary ruling, the Court of Justice of the European Union (CJEU) pointed out that the terms ‘detention’ and ‘deprivation of liberty’ as used interchangeably in the FD 2002/584/JHA.²⁴² Furthermore, in the view of the CJEU the above-mentioned concepts are similar. Moreover, a person can be deprived of his liberty

²⁴¹ Case C 294/16 PPU *JZ v. Prokuratura Rejonowa Łódź – Śródmieście*, EU: C:2016:610.

²⁴² Case C 294/16 PPU *JZ v. Prokuratura Rejonowa Łódź – Śródmieście*, EU: C:2016:610, para. 40.

not only by imprisonment, but, in exceptional cases, also by other measures that are so restrictive that they must be treated, in the same way as imprisonment in the strict sense.²⁴³ The CJEU concluded that the Polish court did not have to regard the measures imposed on JZ in the United Kingdom as a deprivation of liberty, even although it that court free to offer ‘more generous’ treatment and to deduct the periods during which JZ was subject to these measures from the total period of the custodial sentence imposed on him.²⁴⁴

It is crucial to note that the Polish courts in general refer a low number of preliminary rulings to the Court of Justice of the European Union.²⁴⁵ However, there are currently initiatives led by NGOs to encourage the judges to refer more preliminary rulings to the Court of Justice of the European Union. To illustrate that point, since 2017, the Helsinki Committee of Human Rights is organising a series of trainings for judges and lawyers. These trainings concern procedures of referring preliminary rulings and consequences to of referring a preliminary ruling in relation to the case being adjudicated.²⁴⁶ Importantly, the focus of these training is on cases regarding potential human rights violations.²⁴⁷ Finally, the Helsinki Committee of Human Rights issued recently a manual for judges entitled “Pytania prejudycjalne w obszarze praw człowieka” (Preliminary rulings in the sphere of human rights).²⁴⁸

VI. Summons of an accused to stand trial

A. The procedures by which the accused is summoned to a trial hearing

The procedures by which the accused is summoned to a trial hearing are formulated in Chapter 15 of the CPC (Arts. 128-142). As noted in the literature, these procedures are absolutely crucial from the perspective of the right to fair and public trial.²⁴⁹ The legislator in Arts. 128-129 of the CPC distinguished between different types of service

²⁴³ Case C 294/16 PPU *JZ v. Prokuratura Rejonowa Łódź – Śródmieście*, EU: C:2016:610, para. 44.

²⁴⁴ van der Mei 2017, p. 891.

²⁴⁵ Szewiła 21-11-2014.

²⁴⁶ Grzeszczak 2018.

²⁴⁷ Grzeszczak 2018.

²⁴⁸ Grzeszczak 2018.

²⁴⁹ Boratyńska 2016, p. 217.

such as, judgments and orders (Art. 128 of the CPC), and summons and notifications (Art. 129 of the CPC). Art. 129 of the CPC is formulated in an imprecise manner since it blurs the distinction between notifications and summons. The aforementioned provision goes as follows:

Art. 129. Summons and notifications.

§ 1. A letter of summons should specify its sender and contain information in what case, in what capacity, at what time and place the addressee is to appear and whether his attendance is obligatory. The addressee should also be advised of the consequences of his absence.

§ 2. Provisions of § 1 apply accordingly to notifications. § 3. If a time limit, within which a procedural act should be accomplished starts running from the day of service, the addressee should be notified thereof.

§ 3. If a time limit, within which a procedural act should be accomplished starts running from the day of service, the addressee should be notified thereof.

Wezwanie (hereinafter referred to as a “letter of summons”) is directed to the accused and *osobowe źródła dowodowe* (personal sources of evidence, e.g. witnesses, experts etc.), who after receiving the letter of summons, have an obligation to participate in the action in connection with legal proceedings to which the letter of summons refers.²⁵⁰ Furthermore, while being served with the letter of summons to the trial, the accused is instructed of the contents of Arts. 374, 376, 377, 422, and 447 § 5 of the CPC (Art. 353 § 4 of the CPC).²⁵¹ While *zawiadomienie* (hereinafter referred to as a “notification”) is directed to the other parties, *quasi*-parties, and legal representatives of the parties.²⁵² The addressee of a notification has a right to participate in the action in connection with legal proceedings which the notification concerns. Furthermore, the CPC does not provide for negative consequences of absence of the addressee of the notification.²⁵³ This is in contrast to the recipients of the letter of summons, whose participation may be enforced by arrest and he or she may be brought to trial (Art. 382 of the CPC).

According to Art. 129 § 1 and 2 of the CPC, the letter of summons and the notification shall include the following information:

²⁵⁰ Boratyńska 2016, p. 217.

²⁵¹ Articles enumerated in Art. 353 § 4 of the CPC will be discussed in further sections of the report.

²⁵² Boratyńska 2016, p. 217.

²⁵³ Boratyńska 2016, p. 217.

- 1) who is its sender;
- 2) information what the case concerns, however, it cannot be limited to providing only the case reference number;
- 3) in what capacity the summoned person is to appear, i.e. whether the person has to appear as a witness, expert, etc.;
- 4) at what time and place the addressee is to appear and whether his attendance is obligatory; and
- 5) information about the consequences of contumacy, which is a result of realisation of the principle of right to information prescribed in Art. 16 of the CPC. Importantly, if that information is missing in the letter of summons, it cannot cause negative consequences for the addressee.

According to Art. 129 § 3 of the CPC, if a time limit, within which a procedural act should be accomplished starts running from the day of service, the addressee should be notified thereof. In cases where the failure to accomplish the procedural act follows from lack of proper instruction, it cannot result in negative consequences for the addressee.²⁵⁴ Art. 129 § 3 of the CPC expresses the principle of right to information (Art. 16 § 1 of the CPC).²⁵⁵ Finally, Art. 129 § 3 of the CPC is in line with Art. 100 § 8 of the CPC pursuant to which after the announcement or while serving the decision or order, participants to the proceedings should be instructed of their rights, time limit and manner of submitting an appeal or about the fact that the decision cannot be appealed.²⁵⁶

B. Confirmation of receipt

The issue of advice of delivery of writs is envisaged in Art. 130 of the CPC, which goes as follows:

Art. 130. Advice of delivery

Writs are served with advice of delivery. The recipient confirms the delivery by legibly signing his name on the returnable receipt, on which the postal worker puts his signature and specifies the manner of service.

Art. 130 of the CPC encompasses all writs, including the letter of summons and the notification. The recipient (the addressee or other person authorised to the receipt) confirms the delivery by legibly signing his name and surname on the returnable receipt.

²⁵⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 129.

²⁵⁵ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 129.

²⁵⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 129.

Furthermore, the postal worker delivering the writ puts his or her signature, which does not have to be legible nor to include name and surname, and specifies the manner of service.²⁵⁷ The confirmation of receipt of writ (especially a letter of summons) is of utmost importance, therefore, it is attached to the case files. That confirmation is a proof of delivery.²⁵⁸ It is significant to note that a party may not invoke not receiving the writ, if being notified of its delivery, the party did not report for its receipt.²⁵⁹

Furthermore, in a cases of refusal to accept the writ, refusal or inability to confirms the delivery by the addressee, the delivery worker makes on the returnable receipt a reference. Then the writ is deemed to have been served and the writ is returned to the authority sending the writ. Finally, a service accomplished in a manner contrary to the provisions of Chapter 15 of the CPC is deemed effective if the addressee acknowledged the receipt of correspondence (Art. 142 of the CPC).

C. Manner of service – the authority charged with summoning an accused

Art. 131. Manner of service.

§ 1. Summons, notifications and other writs, from the service of which time limits begin to run are served by a postal operator within a meaning of the Act of 23 November 2012 Postal Law or by an employee of the agency sending a writ or, in case of necessity, by the Police.

§ 2. If, in a given case, the number of aggrieved parties is so significant that an individual notification of their rights would cause serious obstacles to the proceedings, they are informed by an announcement in the press, radio or television.

§ 3. If there exists a duty to serve a decision, the provisions of § 2 apply accordingly. However, it should always be served upon this aggrieved party who requested it within a final time limit of seven days since the announcement.

Pursuant to Art. 131 of the CPC different authorities are charged with summoning an accused. Consequently, a letter of summons may be served by:

²⁵⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 130.

²⁵⁸ Postanowienie Sądu Najwyższego - Izba Karna z dnia 15 stycznia 2002 r. [Decision of the Supreme Court – Criminal Division of the 15th of January 2002], V KZ 56/01.

²⁵⁹ Postanowienie Sądu Najwyższego - Izba Karna z dnia 20 października 1998 r. [Decision of the Supreme Court – Criminal Division of the 20th October 1998], III KZ 182/98.

- 1) a postal operator within a meaning of the *ustawa z 23.11.2012 r. – Prawo pocztowe* (hereinafter referred to as “the Act of 23 November 2012 Postal Law”); or
- 2) an employee of the agency sending the letter of summons; or
- 3) in case of necessity, by the Police

A postal operator within a meaning of the Act of 23 November 2012 Postal Law is an entrepreneur authorised to perform postal service activity on the basis of an entry in the register of postal operators. Furthermore, the letter of summons may be served by an employee of the agency sending it if the recipient, while being present in court proved his identity. Then the letter of summons is served directly to him, with advice of delivery. Finally, the letter of summons is only served by the Police in case of necessity, meaning that this possibility is an exception from the general rule envisaged in Art. 131 of the CPC. This manner of service can only be used if the service of the letter of summons pursuant to the general rule would very likely be ineffective or if it is justified by the need to determine the whereabouts of the addressee.²⁶⁰ In the literature it is argued that the case of necessity may follow also from the short period remaining and the attempt to serve the letter of summons by the postal operator has already took place and failed.²⁶¹

D. Different forms of service under the CPC

The CPC foresees three forms of service:

- 1) doręczenie bezpośrednie (hereinafter referred to as “direct service”)
- 2) doręczenie pośrednie (hereinafter referred to as “indirect service”)
- 3) doręczenie zastępcze (hereinafter referred to as “substitute service”)

Since the CPC does not provide legal definitions of these different forms, they are distinguished on the basis of interpretation of provisions of Chapter 15 of the CPC.²⁶² It is crucial to point out that scholars in the field of Polish criminal procedural law categorise forms of service in various ways. However, that discussion is more of doctrinal nature and does not affect significantly the interpretation of the relevant provisions of the CPC.

²⁶⁰ Wyrok Sądu Najwyższego z 2.3.2005 r. [Judgement of the Supreme Court of the 2nd of April 2005], IV KK 344/04.

²⁶¹ Boratyńska 2016, p. 219.

²⁶² Boratyńska 2016, p. 219.

a. Direct service – the summons in person

To begin with, direct service takes place when the writ, including a letter of summons, is served upon the addressee in person (Art. 132 § 1 of the CPC). Furthermore, another type of direct service is the one envisaged in Art. 134 § 3 of the CPC. According to the aforementioned provision, correspondence to an addressee who is not a natural person or to a defence counsel or an attorney is served upon the person employed in the addressee's office. Although the addressee of the writ may not receive the writ himself, the CPC creates a legal fiction that serving the writ upon the person employed in the addressee's office is equivalent to serving the writ to the addressee or in cases of legal persons to their legal representatives.²⁶³

Finally, by means of direct service a person may be summoned or notified by telephone or in another manner adequate to the circumstances and a copy of the message is left in the records of the case with the signature of the person who sent it (Art. 137 of the CPC). However, that method is only applied in urgent cases. Pursuant to Art. 137 of the CPC, another manner adequate to the circumstances is interpreted as fax, e-mail, etc.

Summons by fax or e-mail

In 2013, the legislator introduced the possibility of serving the letter of summons by fax or e-mail. It is necessary to note that serving writs by fax or e-mail also falls under the scope of direct service. This manner of service is applicable once the addressee gives his or her consent by providing the judicial authority with the fax number or e-mail address. Moreover, in case that this manner of service is used, it has to be indicated in the case files. In such cases, the proof of data transmission is treated as confirmation of delivery (Art. 132 § 3 of the CPC). Consequently, if a letter of summons is served by e-mail, the registration of the message in the sender's account as sent renders the service valid.

Importantly, once the addressee provides his or her contact details, he is obliged to check and read the correspondence delivered that way. Therefore, the addressee's nonfeasance to do so, does not impact the validity of the service of the letter of summons. Crucially, the addressee should notify the judicial authority about a breakdown rendering the devices used to receive a fax or e-mail out of order. From the moment of such a notification, the letter of summons sent by fax or e-mail cannot be deemed to be served validly.

²⁶³ Boratyńska 2016, p. 219.

b. Indirect service – the summons to a designated person

Having discussed direct service (i.e. summons in person), now it is crucial to examine the procedure of indirect service (i.e. delivering the summons to a designated person), which is regulated by Art. 132 § 2 of the CPC. Indirect service signifies serving the writ upon a third party, assuming that due to the relations specified in the CPC, between the third party and the addressee of the writ, the third party will forward the writ to the addressee without delay.²⁶⁴ According to Art. 132 § 2 of the CPC, if an addressee is temporarily absent from home, a writ is served upon an adult member of his household and - in the absence of such a person - upon the house administration, caretaker or village headman, if they agree to serve the writ on the addressee. Indirect service, as understood in Art. 132 § 2 of the CPC, has twofold meaning – *sensu stricto* and *sensu largo*. Indirect service *sensu stricto* takes place if the addressee is temporarily absent from home and the writ is served upon an adult member of his household.²⁶⁵ While indirect service *sensu largo* takes place if the addressee is temporarily absent from home and the writ is served upon the house administration, caretaker or village headman.²⁶⁶

It is crucial to note that the literal interpretation of Art. 132 § 2 of the CPC might suggest that only under the *sensu largo* meaning, one of the above-mentioned subjects has to undertake to serve the writ to the addressee. However, in the literature it is accepted that in both cases envisaged by the aforementioned provision, the writ will be served upon the person who is not the addressee, only if that person undertakes to serve the writ to the addressee.²⁶⁷ Otherwise, it would have been impossible to argue that indirect service *sensu stricto* is effective if the adult household member had not agreed to serve the writ to the addressee. Finally, the adult member of the household, the house administration, caretaker, or village headman has to pass on the received writ to the addressee promptly. The legislator in order to make the indirect service effective accepted the presumption that the person who accepted to serve the writ to the addressee will forward it to him without delay.²⁶⁸ However, this presumption can be rebutted by evidence at the stage of judicial proceedings.

²⁶⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 130.

²⁶⁵ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 132.

²⁶⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 132.

²⁶⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 132.

²⁶⁸ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 132.

When the writ is served by means of indirect service (Art. 132 § 2 of the CPC), Art. 133 § 2 of the CPC applies accordingly. Consequently, the person serving a document places a note about it being left in the addressee's mail box, affixes it to the door of the address's apartment or leaves it in another visible place with information when and where the correspondence was left.

Serving the writ by means of indirect service is effective if the person serving the writ receives the confirmation that the writ is served upon the adult member of the household, or to other persons indicated in Art. 132 § 2 of the CPC. Therefore, as long as the formal conditions prescribed in Art. 132 § 2 of the CPC are fulfilled, the writ is deemed to be validly served. Furthermore, the authority sending the writ is not obliged to investigate whether the addressee of the writ is indeed only temporarily absent or it is a long-term absence. Nevertheless, if the absence of the addressee was a long-term one, and the subject indicated in Art. 132 § 2 of the CPC incorrectly did not refuse to accept the writ, at the same time not notifying the addressee or the sending authority about the circumstances due to which he could not provide the addressee with the received writ, the service is not valid.²⁶⁹ Consequently, such service cannot cause the addressee any negative procedural consequences. Finally, if the writ was served in a manner which breached Art. 132 § 2 of the CPC and, as a consequence, Art. 117 § 2 of the CPC (Participation in the trial, notification) must result in the conclusion that there has been a violation of the addressee's right to defence, which is prescribed in Art. 6 of the CPC.²⁷⁰

Temporarily absent from home

Another key issue to discuss is what "temporarily absent from home" of the addressee means under Art. 132 § 2 of the CPC. First, "home" is the place where the addressee of the writ stays with the intention of a longer - and not only short-term - stay. As argued by Gapski and Gapska, the literal interpretation of the aforementioned provision suggests that the legislator identifies the domicile address with the postal

²⁶⁹ Wyrok Sądu Najwyższego z dnia 28 czerwca 2007 r. [Judgement of the Supreme Court of 28th June 2007], III KK 179/07.

²⁷⁰ Wyrok Sądu Najwyższego z dnia 12 stycznia 2009 r. [Judgement of the Supreme Court of the 1st of January 2009], II KK 18/07.

Wyrok Sądu Najwyższego z dnia 23 maja 2013 r. [Judgement of the Supreme Court of the 23rd of May 2013], III KK 96/13.

Wyrok Sądu Najwyższego z dnia 29 stycznia 2014 r. [Judgement of the Supreme Court of the 29th of January 2008], IV KK 425/13.

address.²⁷¹ However, in practice these two addresses do not necessarily correspond with each other.²⁷²

In the literature there is a divergence between opinions of scholars regarding interpretation of the passage “temporarily absent”.²⁷³ On the one hand, Pachowicz maintains that “temporary absence from home” within the meaning of Art. 132 § 2 of the CPC is an absence that is not intended to breach the bond with the addressee’s current place of residence.²⁷⁴ Therefore, Pachowicz argues that this absence can last from few to several days, including situations when the addressee is staying in another town or even a country (e.g. holidays). According to Pachowicz, it is crucial that the addressee’s absence from home finishes before the passage of the date which the writ concerns.²⁷⁵ Gapska and Gapski, who are proponents of the that position, argue that interpreting the notion of being “temporarily absent” in a stricter manner would be in contradiction with Art. 139 § 1 of the CPC.²⁷⁶

Moreover, Gapska and Gapski maintain that the narrower interpretation would facilitate abuse of Art. 132 § 2 of the CPC in order to unjustifiably suspend the course of judicial proceedings.²⁷⁷ One of the consequences of Art. 139 § 1 of the CPC is that the writ is still deemed to be served if the addressee because of his prolonged absence did not collect the writ nor got acquainted with its content. Since the legislator envisaged negative consequences for not changing the place of residence without informing the court of the new address, it follows that still in such cases indirect service is applicable. As it follows, the addressee should take into account that there exists the possibility of sending correspondence to him in connection with pending proceedings. Therefore, if the addressee is leaving the place of residence for longer, he should inform the court about the change of address, or at least stay in contact with the adult member of the household to control the received correspondence.

What is more, Gapska and Gapski point out that the person serving the writ usually does not have grounds to assume that the addressee’s absence will be longer than temporary.²⁷⁸ That applies especially in cases where if the adult member of the

²⁷¹ Gapska & Gapski 2015, p. 15.

²⁷² Gapska & Gapski 2015, p. 15.

²⁷³ Gapska & Gapski 2015, p. 15.

²⁷⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Pachowicz), Art. 132.

²⁷⁵ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Pachowicz), Art. 132.

²⁷⁶ Gapska & Gapski 2015, p. 16-19.

²⁷⁷ Gapska & Gapski 2015, p. 16-19.

²⁷⁸ Gapska & Gapski 2015, p. 21.

household agreed to serve the writ on the addressee without informing the person serving the writ of the reasons and length of the addressee's absence.²⁷⁹ The authors continue that it would be unreasonable to require from the person serving the writ to always conduct a factually correct assessment whether or not the addressee is temporarily absent or is absent for a long-term.²⁸⁰ In contrast to Pachowicz, Gapska and Gapski indicate that it is rather doubtful that the addressee's absence from home should finish before the date which the writ concerns. These authors are of the opinion that this circumstance cannot be assessed by either the adult member of the household or the person serving the writ, as none of them has an insight into the content of the writ being served.²⁸¹ The person serving the writ can partially conduct such assessment by checking the annotations written on the envelope. However, this method does not solve the issue whether or not serving the writ starts running any other procedural time limits. Moreover, Gapska and Gapski argue that it would not be rational to make dependent the case-by-case assessment of the notion of "temporarily absent from home" on the length of the procedural time limits, which running is intertwined with serving the writ.²⁸²

On the other hand, Sakowicz claims that "temporarily absent from home" signifies short-term absence in a very narrow scope.²⁸³ Sakowicz indicates that the absence results from temporary leaving the home by the addressee, without breaching the bond with the current place of residence (e.g. the addressee is at the workplace). Furthermore, Sakowicz discusses the notion of long-term absence of the addressee at his place of residence. In cases where there are no grounds for presuming that the addressee would return to the place of residence in the coming days, the adult member of the household has a duty to refuse to accept the service of the writ.²⁸⁴ Moreover, that adult member of the household should inform the person serving the writ about the reasons for the refusal. Nonetheless, if in these circumstances the adult member of the household decided to accept the writ, he had the obligation to inform the addressee or the court about the circumstances because of which he could not pass on the received writ to the addressee.²⁸⁵

An adult member of the household

²⁷⁹ Gapska & Gapski 2015, p. 22.

²⁸⁰ Gapska & Gapski 2015, p. 22.

²⁸¹ Gapska & Gapski 2015, p. 22.

²⁸² Gapska & Gapski 2015, p. 22.

²⁸³ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 132.

²⁸⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 132.

²⁸⁵ Wyrok Sądu Najwyższego z dnia 28 czerwca 2007 r. [Judgement of the Supreme Court of the 28th of June 2007], III KK 179/07.

Within the scope of Art. 132 § of the CPC, ‘an adult’ is a person who is of legal age in light of Art. 10 of *Kodeks cywilny z dnia 23 kwietnia 1964 r.* (The Civil Code). Therefore, an adult is a person who has attained eighteen years of age. Now it is necessary to examine who falls under the scope of the ‘member of the household’. The status of the ‘member of the household’ have all the adult relatives living together with the addressee of the writ in a flat or a house.²⁸⁶ With regard to these people, it is irrelevant whether or not they run a household together. On the other hand, people unrelated to the addressee are not ‘members of the household’ even if they live with the addressee.²⁸⁷ They are only deemed to be ‘members of the household’ if the addressee of the writ includes them in the household and they run the household together.²⁸⁸ However, if it is not a case, the unrelated people living with the addressee are treated as addressee’s neighbours.

c. Substitute service

To begin with, the substitute service (Art. 133 § 1 and 2 of the CPC) is only admissible if it is not possible to leave the writ by means of the direct or indirect service. As confirmed in the case law,²⁸⁹ the substitute service is of a subsidiary nature to Art. 132 of the CPC. According to Art. 133 § 1 of the CPC, if it is not possible to serve a writ in a manner indicated in Art. 132 of the CPC (direct and indirect service), a writ sent through the intermediation of a postal operator within the meaning of the Act of 23 November 2012 Postal Law is left at the closest unit of such an operator. A writ sent in a different manner is left at the closest Police station or at a competent municipal office. Furthermore, the person serving a document places a note about it being left as prescribed in Art. 133 § 1 of the CPC in the addressee’s mail box, affixes it to the door of the address’s apartment or leaves it in another visible place with information when and where the correspondence was left and that it should be collected within seven days. It is significant to note that the sequence of the places at which the note is left should be kept. Consequently, the starting point should be that the note is left in the addressee’s

²⁸⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 132.

²⁸⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 132.

²⁸⁸ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 132.

²⁸⁹ Wyrok Sądu Najwyższego - Izba Karna z dnia 23 stycznia 2014 r. [Judgement of the Supreme Court – Criminal Division of the 23rd January 2014], V KK 268/13.

mail box, only if that is not possible then it should be affixed to the door of the addressee's apartment, and only as a last resort the note is left in another visible place.²⁹⁰

In case of ineffective expiry of this term, the notification is to be repeated once again. Significantly, if these actions were accomplished, the document is turned to the authority which sent it with a note that the document was not collected within the specified term. Then the document is deemed to have been served (Art. 133 § 2 of the CPC). Therefore, there is a 'presumption' of serving a summons on the defendant if the summons was sent to the address indicated by the defendant during the pre-trial stage of the proceedings (e.g. during police investigations). The service of a letter of summons is deemed effective even when there is no confirmation that the defendant actually received the letter of summons.

d. The relation between Art. 133 § 2 of the CPC and Arts. 138-139 of the CPC

As decided by the Supreme Court,²⁹¹ the substitute service (Art. 133 § 2 of the CPC) allows the accused to collect the writ left in cases where the absence of the accused is longer than only temporary.²⁹² However, Art. 133 § 2 of the CPC applies only in cases where the absence from the place of residence does not deviate from standard circumstances or needs (e.g. related to work, holidays, taking care of everyday affairs).²⁹³ In that regard the Supreme Court indicated that the longer leave from the place of residence (*de facto* the change of the place of residence) or stay abroad, requires notifying the court about that, likewise stay abroad requires the appointment of the service agent. If the accused does not comply with these obligations, the writ is sent to the last address known to the court and is deemed to be served (Art. 138 and 139 of the CPC).²⁹⁴ Therefore, in the above-described situations, the legal basis for the effective service are Arts 138-139 of the CPC, and not Art. 133 § 2 of the CPC.

e. Fictitious service

²⁹⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 133.

²⁹¹ Postanowienie Sądu Najwyższego - Izba Karna z dnia 29 sierpnia 2012 r. [Decision of the Supreme Court of the 29th of August 2012], V KZ 46/12.

²⁹² Temporarily absent from home as understood under Art. 132 § 2 of the CPC.

²⁹³ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 133.

²⁹⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 133.

Writs, including letter of summons, are delivered to the address known or given by the party to the agency sending the writ. Importantly, if a party has changed his or hers place of residence without informing the court of the new address or does not reside at the address indicated to the court, also due to being kept in custody in another case, any correspondence sent to the original address is deemed to have been served (Art. 139 § 1 of the CPC). As a consequence, if the writ was sent to the address indicated by the accused, it is deemed to be served, even if the accused did not receive it because he did not actually reside at that address. As decided in case law,²⁹⁵ in such a situation, the court does not have an obligation to determine whether the information provided by the accused about the place of residence corresponds to the reality. However, Art. 139 § 1 of the CPC does not apply to correspondence sent for the first time after the final acquittal of the accused (Art. 139 § 3 of the CPC). Art. 139 of the CPC is in line with the amended version of Art. 75 § 1 CPC. Pursuant to Art. 75 § 1 of the CPC, accused is obliged to inform the agency conducting the proceedings of every change of his residence (including being deprived of liberty in another case). Regarding the accused deprived of liberty on a basis of a legally binding judgement, the obligation to inform should be *ex officio* done by the state.²⁹⁶

As Bodnar explains,²⁹⁷ Art. 138 of the CPC prescribes fictitious service. According to Art. 138 of the CPC, both a party and a person who is not a party but whose rights were violated, residing abroad, is obliged to appoint a service agent in Poland. If that person, including the accused, fails to do so, a writ is sent to the last known address in Poland and, if there was no such address, attached to the record of the case. Then the writ is deemed have been served. To begin with, the judicial body is not obliged to use the procedure of service of by foreign legal assistance (Art. 585 of the CPC). Moreover, the passage “residing abroad” is interpreted as residing always in another country or changing the place of residence or stay already during the proceedings. Pursuant to that solution, it does not matter whether the person involved in court proceedings is a Polish citizen or a foreigner – the decisive element is always the place of residence.²⁹⁸ Importantly, Art. 138 of the CPC demands appointment of a service agent (i.e. a person

²⁹⁵ Postanowienie Sądu Najwyższego z dnia 16 listopada 1998 r. [Decision of the Supreme Court of the 16th of November 1998], III KZ 138/98.

²⁹⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 139.

²⁹⁷ Bodnar 2016, p. 2.

²⁹⁸ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 132.

or an institution with contact details), and not indicating an address in Poland.²⁹⁹ That service agent receives the correspondence from the court on behalf of the party and a person who is not a party but whose rights were violated. Prior to the first interrogation, the suspect is instructed of the duties and consequences mentioned in, *inter alia*, Arts. 138-139 of the CPC (Art. 300 § 1 of the CPC).

The consequence of not complying with the obligation imposed in Art. 138 of the CPC is that the writ is sent to the last known address in Poland and, if there was no such address, attached to the record of the case. Then the writ is deemed have been served. However, this consequence can only take place if the party and a person who is not a party but whose rights were violated were instructed about the obligation to appoint a service agent in Poland. It follows from Art. 16 of the CPC which prescribes the principle of the right to information. Regarding the accused, from Art. 300 of the CPC follows an additional obligation to instruct him about contents of Art. 138 of the CPC. Finally, Art. 138 of the CPC is not applicable if service is possible by e-mail or fax.

f. Exceptions

Art. 132 § 4 of the CPC excludes in certain circumstances the applicability of Art. 132 § 2 of the CPC (indirect service to an adult household member, the house administration, caretaker or village headman, Art. 132 § 2 of the CPC), Art. 132 § 3 of the CPC (direct service by means of fax or e-mail), and Art. 133 § 3 of the CPC (indirect service by leaving the writ to a person authorised to collect it in the addressee's place of permanent employment). Firstly, these methods do not apply to the service on the accused of the notification about the date of the first main trial, which is interpreted as the first (scheduled) date of the main trial, it is not important whether it is the "first" main trial or the next main trial conducted in the re-examination procedure.³⁰⁰ The adopted solution is linked to the abolition of the obligatory participation of the accused in the main trial in cases of summary offences (Art. 374 § 1 and 1a of the CPC).³⁰¹ It is crucial to note that indeed Art. 132 § 4 of the CPC excludes service by Art. 132 § 2 and 3, Art. 133 § 3 of the CPC, however, Art. 132 § 4 of the CPC does not exclude service pursuant to Art. 133 § 2 of the CPC. Therefore, the notification about the date of the first main trial may

²⁹⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 132.

³⁰⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 132.

³⁰¹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 133.

be served by the substitute service under Art. 133 § 2 of the CPC.³⁰² It is valid to recall that notifications are served upon persons whose presence at the main trial is not mandatory.

Secondly, the above-described procedures do not apply to the service on the accused of the notification about the date of the hearing referred to in Art. 341 § 1 of the CPC (Conditional discontinuation of proceedings), Art. 343 § 5 of the CPC (Consideration of a motion to sentence the accused without holding a trial), Art. 343a of the CPC, Art. 420 § 1 of the CPC (Supplementing the judgment with the decision), and to the service of the decision issued at a hearing referred to in Art. 341 of the CPC, Arts. 343 and 343a of the CPC. In these cases it is not of relevance whether it is the first court sitting or subsequent court sitting, or whether it has been adjourned. Finally, the exception applies to the judgment referred to in Art. 500 § 1 (Penal order).

The writs which fall under the scope of the exception envisaged is Art. 132 § 4 of the CPC have to be delivered to the addressee in person (Art. 132 § 1 of the CPC). Otherwise the writs can be served by substitute service pursuant to Art. 133 § 1 and 2 of the CPC. The legislator introduced that exception in order to increase the protection guaranteed to the defendants in respect of writs of utmost importance to their case.³⁰³ Finally, if the writ at hand falls under one of the exceptions of Art. 132 § 4 of the CPC and it was not served by one of the two applicable methods, in the future that might pose a ground for reopening of judicial proceedings on request (Art. 540b § 1 of the CPC).

g. Continuation of the adjourned trial

According to Art. 402 § 1 of the CPC, if the presiding judge, upon ordering an adjournment,³⁰⁴ fixes the date and place when the trial will be continued, those present at the adjourned trial, whose presence was mandatory, are obliged to appear at the continued trial without summons. In such cases, the oral announcement by the presiding judge of an order on the adjournment of the trial (Art. 100 § 1 of the CPC) is an oral form of summons to appear, with all its procedural consequences. Therefore, Art. 285 of the CPC, which prescribes certain disciplinary penalties, applies accordingly in such

³⁰² Postanowienie Sądu Apelacyjnego w Katowicach - II Wydział Karny z dnia 11 maja 2016 r. [Decision of the Appellate Court in Katowice – II Criminal Division of the 11th of May 2016], II AKz 219/16.

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³⁰⁴ Adjournment within the meaning of Art. 402 § 1 of the CPC is to be interpreted as a break, which the presiding judge may order to allow the parties to prepare motions concerning evidence, to introduce new evidence, to take a rest or for other important reason (Art. 401 § 1 of the CPC). Each adjournment of the trial may not exceed 35 days (Art. 401 § 2 of the CPC).

cases. The accused will fall under the scope of “those present at the adjourned trial, whose presence was mandatory” if his presence was ordered to be mandatory (Art. 374 § 1 of the CPC). Moreover, the accused will fall under the scope of the above-mentioned category in cases of indicatable offences during the procedures referred to in Art. 385 and Art. 386 of the CPC (Art. 374 § 1a of the CPC). Importantly, the accused in the above-described cases is also summoned orally.

Furthermore, the persons entitled to attend do not have to be notified of the new date, even if they did not participate in the adjourned trial (Art. 402 § 1 of the CPC). If these people are interested in the further course of the proceedings, they have to obtain information about the course of the case on their own. It applies equally to the information of the adjournment of the trial and the new scheduled date of its continuation.³⁰⁵ Moreover, it can be concluded that the failure to appear at the adjourned trial excludes the admissibility of submitting a complaint about the lack of a proper notification of the new date of the trial in which the person entitled to attend wanted to participate.³⁰⁶

Finally, the lack of an obligation to notify the next date of the trial of persons entitled to appear on it, who did not participate in the adjourned trial, does not prevent their notification being ordered on the general principles. Therefore, the presiding judge or the court can issue a notification if they deem it advisable.³⁰⁷ On the other hand, as specified in the case law,³⁰⁸ since the accused did not want to participate in the trial, which was declared by his defence counsel, the court does not have an obligation to compel the accused to appear. In such cases, the defence counsel of the accused should take care of his best interests and notify him about subsequent dates of the trial.

h. Court hearing

As a final remark concerning service it is worth mentioning that the announcement of the order setting the dates of trial is equivalent to summoning those present to participate in the trial and notifying them of the dates thereof (Art. 349 § 8 of the CPC). By this

³⁰⁵ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Ponikowski & Zagrodnik), Art. 402.

³⁰⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Ponikowski & Zagrodnik), Art. 402.

³⁰⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Ponikowski & Zagrodnik), Art. 402.

³⁰⁸ Wyrok Sądu Apelacyjnego w Szczecinie - II Wydział Karny z dnia 29 grudnia 2016 r. [Judgement of the Appellate Court in Szczecin – II Criminal Division of the 29th of December 2016] II AKa 145/16.

solution, the number of summons and notifications issued is significantly reduced.³⁰⁹ Importantly, the scope of Art. 349 § 8 of the CPC encompasses not only the first main trial, but each subsequent trial, which date was set and announced at the court hearing.³¹⁰

E. Challenging the effectiveness of service

As decided by the Supreme Court,³¹¹ Art. 439 § 1 point 11 of the CPC does not apply to challenging the effectiveness of service, to be more specific the notification about the date of the main trial. The effectiveness of service may be challenged on the basis of Art. 117 § 2 in jo. 133 § 2 of the CPC, or even Art. 6 of the CPC.

Podhalańska, as a defence counsel, in cases where the letter of summons was not served upon the accused directly or by means of the substitute service, would contest that manner of service.³¹² Gajewska-Kraczkowska, who also is a defence counsel, expressed the same opinion.³¹³ Therefore, in cases where the letter of summons was served upon an adult member of the household, Podhalańska would argue that such manner of service is invalid and breaches the accused's right to defence (Art. 6 of the CPC).³¹⁴ The interviewee stressed that properly conducted service, especially in cases of the letter of summons, guarantees that the accused receives the information about something that is crucial for him (being summoned to participate in the main trial). On the other hand, the interviewee was in favour of the solution pursuant to the substitute service (Art. 133 § 2 of the CPC). Podhalańska maintained that the accused has the duty to regularly check the correspondence from the judicial authorities, because he must be aware that the writs will be sent to the address he provided to the judicial authorities.³¹⁵ Finally, as Podhalańska claimed if the substitute service was not in force under the CPC, service would have to be repeated until factually delivering the writ to the accused. While that could result in multiple adjourning of the main trial.³¹⁶

According to Podhalańska the burden of proof, in cases where the writ (including the letter of summons), was served upon an adult member of the household, is

³⁰⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Ważny), Art. 349.

³¹⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Ważny), Art. 349.

³¹¹ Postanowienie Sądu Najwyższego - Izba Karna z dnia 23 sierpnia 2017 r. [Decision of the Supreme Court of the 23rd of August 2017], V KK 307/17.

³¹² Podhalańska 07-06-2018.

³¹³ Gajewska-Kraczkowska 05-06-2018.

³¹⁴ Podhalańska 07-06-2018.

³¹⁵ Podhalańska 07-06-2018.

³¹⁶ Podhalańska 07-06-2018.

on the accused.³¹⁷ Importantly, Gardocka and Gajewska-Kraczkowska agreed with that statement.³¹⁸ Therefore, if the accused does not prove that the adult member of the household did not convey the writ to him, the judicial authorities will deem that the writ have been served validly. However, Podhalańska concluded that certainly that method (i.e. service upon the adult member of the household) can be contested in course of judicial proceedings, especially if the alleged invalidity of the service can be justified logically.³¹⁹

Podhalańska is of the opinion that a problem linked to service in Poland is not the system itself but the unawareness of the clients which results from their lack of knowledge and ignorance. The clients tend not to pay sufficient attention to the matters connected with correspondence and informing the judicial authorities about changing the place of residence.³²⁰ As a consequence later the writs are served by the means of the substitute service to an address provided to the court by the accused, however, the accused in the meantime might have left the territory of Poland without informing the court about that. In her experience of Podhalańska has observed that the vast majority of the problems follows from that that people do not fully understand the kind of the situation they are involved in (i.e. being a suspect/ an accused in criminal proceedings).³²¹ Consequently, they leave the territory of Poland with some minor unsettled cases, hoping that the whole case will *vanish*.

As argued by Podhalańska, the attitude of the accused poses a real problem with the practice of service in Poland and not the provisions regulating that matter. In her practice the most commons issues are that the accused do not collect the writ left in accordance with Art. 133 § 2 of the CPC, despite being informed about that duty twice in the space of seven days.³²² Moreover, the interviewee indicated only rarely the unawareness of the accused concerning the served writ follows from the misconduct of the competent authorities. Similarly, Gajewska-Kraczkowska is not an opponent of the substitute service because *it is not the task of the administration of justice to determine where a person lives*. In the view of Gajewska-Kraczkowska, if the accused provides the judicial authority with an address, he has to face the consequences of that.³²³

³¹⁷ Podhalańska 07-06-2018.

³¹⁸ Gajewska-Kraczkowska 05-06-2018.

³¹⁹ Podhalańska 07-06-2018.

³²⁰ Podhalańska 07-06-2018.

³²¹ Podhalańska 07-06-2018.

³²² Podhalańska 07-06-2018.

³²³ Gajewska-Kraczkowska 05-06-2018.

Furthermore, Podhalańska continued that the problems linked to service are rather a matter of a disregarding attitude of the accused.³²⁴ Podhalańska claimed that in Poland the lack of proper civic education during school years results in disrespectful attitude towards duties the accused owe the court.³²⁵ Importantly, the accused do not treat instructions provided by the prosecutors sufficiently serious.³²⁶ This problem is especially pressing in cases where the accused do not have a defence counsel. Often defence counsels explain in a more comprehensible way to the accused that is crucial to regularly check the correspondence from the court and to inform the judicial authorities about changes of the place of residence.

VII. *In absentia* proceedings under the CPC

A. Amendment to the Code of Criminal Procedure

In order to understand how currently the CPC regulates the presence of the accused at the main trial, it is crucial to put it in a broader context. Before the major amendment to the CPC passed by the Parliament in 2013,³²⁷ which entered into force in 2015, the presence of the accused at the main trial was mandatory. Therefore, pursuant to the previous regime of Art. 374 of the CPC, the starting point was that the accused's presence at the main trial was mandatory, with the exceptions to that rule prescribed in the CPC. According to Podhalańska,³²⁸ that was a guarantee that the accused participated in the main trial and was aware of the particularities of his case. Gajewska-Kraczkowska explained that the legislative amendment was justified by the legislator with the view that ordering the accused to be always present was too paternalistic.³²⁹ Furthermore, the legislator indicated that the accused should have a choice whether he wants to defend himself in the court or not. In the view of the legislator, the amendment to the CPC was dictated by the legislator's will to materialise the accused's right to defence.³³⁰

Interestingly, the legislator indicated that one of the reasons for the legislative amendment was the wish to broaden the adversarial features of the Polish criminal

³²⁴ Podhalańska 07-06-2018.

³²⁵ Podhalańska 07-06-2018.

³²⁶ Podhalańska 07-06-2018.

³²⁷ *Ustawa o zmianie ustawy – Kodeks Postępowania Karnego oraz niektórych innych ustaw z dnia 27 września 2013 r.* [Bill Amending the Code of Criminal Procedure and other legislative acts of 27 September 2013] *Dziennik Ustaw* [Journal of Laws] (2013), item 1247.

³²⁸ Podhalańska 07-06-2018.

³²⁹ Gajewska-Kraczkowska 05-06-2018.

³³⁰ *Projekt ustawy o zmianie ustawy – Kodeks postępowania karnego i niektórych innych ustaw* [Draft Bill Amending the Code of Criminal Procedure and other legislative acts]. Doc. No. 870 of 8 November 2012, p. 83.

procedure system. What is more, as pointed out by Gajewska-Kraczkowska and Podhalańska, the mandatory presence of the accused, under the previous regulation of Art. 374 of the CPC, resulted in enormous number of delayed proceedings and considerable problems with bringing the accused by force to stand the trial.³³¹ Furthermore, demanding the mandatory presence of the accused was significantly slowing down the judicial proceedings. Importantly, that phenomenon was taking place especially in cases with numerous co-accused.

B. Zasada wolnościowa (the principle of freedom)

Since the 1st of July, 2015, the participation of the accused at the main trial is governed by a system which is based on the *zasada wolnościowa* (hereinafter referred to as the “principle of freedom”).³³² As indicated above, pursuant to the principle of freedom, the presence of the accused at the trial as a general rule is not mandatory. According to Art. 374 § 1 of the CPC, the accused has the right to participate in the main trial. Therefore, since the presence of the accused is his right then the participation is clearly not mandatory. The accused can exercise the right to participate in the main trial but does not have to. Hence, except for cases specified in the CPC, the accused cannot be forced to participate in the main trial.³³³ It is crucial to note that the starting point of the current solution is that the mandatory presence of the accused is an exception to the general rule pursuant to which the presence is the accused’s right.³³⁴

The legislator as justifications of the amendment to Art. 374 of the CPC provided several reasons such as, the widening of the adversarial features of the Polish judicial proceedings and departure from the excessive paternalistic approach towards the accused.³³⁵ Furthermore, the legislator sought to eliminate the excessive length of judicial proceedings caused by the mandatory participation of the accused at the main trial.³³⁶ According to Gajewska-Kraczkowska, this legislative solution may lead to a *grotesque* situation that at the main trial the public prosecutor is not present (the prosecutor’s presence is not mandatory after certain stage of the proceedings), the

³³¹ Gajewska-Kraczkowska 05-06-2018.

Podhalańska 07-06-2018.

³³² Drajewicz 2015, p. 574.

³³³ Drajewicz 2015, p. 574.

³³⁴ Drajewicz 2015, p. 575.

³³⁵ *Projekt ustawy o zmianie ustawy – Kodeks postępowania karnego i niektórych innych ustaw* [Draft Bill Amending the Code of Criminal Procedure and other legislative acts]. Doc. No. 870 of 8 November 2012, p. 83.

³³⁶ *Projekt ustawy o zmianie ustawy – Kodeks postępowania karnego i niektórych innych ustaw* [Draft Bill Amending the Code of Criminal Procedure and other legislative acts]. Doc. No. 870 of 8 November 2012, p. 83.

accused is not present (despite being notified about the main trial, the accused decided not to appear), there is no defence counsel (absence of the accused is not a ground for appointment of a defence counsel *ex officio*).³³⁷ Hence, the only actors present in the courtroom are the judge and the clerk of the court.³³⁸

From the accused's right to participate in the main trial (Art. 374 § 1 of the CPC) it unequivocally follows that unjustified failure to appear at the main trial of the accused, who was duly notified of its date and place, does not prevent the court from conducting the proceedings and adjudicating the case.³³⁹ The same applies for unjustified failure to appear at the deferred or adjourned trial. At the same time, since the accused has the right to participate in the trial, and not the obligation, he may appear at the trial and leave the courtroom at any time without being exposed to negative procedural consequences for that reason.³⁴⁰ Finally, Art. 374 § 1 of the CPC applies to both accused who are not deprived of liberty and accused in custody. Furthermore, if the accused deprived of liberty in another case did not notify about it the court, despite having such obligation (Arts. 75 § 1 and 139 § 1 of the CPC), the court may hear the case in his absence as long as his presence is not mandatory.

C. Participation in trial procedure – notification

A person entitled to participate in a trial procedure is notified of its time and place, unless the law provides otherwise (Art. 117 § 1 of the CPC). Notification of the date and place of a trial procedure is a guarantee that the accused can exercise his right to participate in the main trial. Consequently, a trial procedure is not conducted if a concerned party fails to turn up and there is no evidence that he received prior notification (Art. 117 § 2 of the CPC). As confirmed by the Supreme Court, the court must have an indisputable evidence that the accused has been served the notification about the date place of the trial in accordance with Chapter 15 of the CPC.³⁴¹ Furthermore, the trial procedure is also halted if there is reason to suspect that the absence is due to natural disaster or other extraordinary obstacles or when the concerned party duly justified his absence and requested not to carry out the procedure without his attendance, unless the law provides otherwise (Art. 117 § 2 of the CPC). Lastly, it is

³³⁷ This issue will be discussed in further sections.

³³⁸ Gajewska-Kraczkowska 05-06-2018.

³³⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Ponikowski & Zagrodnik), Art. 374.

³⁴⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Ponikowski & Zagrodnik), Art. 374.

³⁴¹ Wyrok Sądu Najwyższego z dnia 2 marca 2005 r. [Judgement of the Supreme Court of the 2nd of March 2005], IV KK 344/04.

significant to indicate that announcement of the order setting the dates of trial is equivalent to summoning those present [at the court hearing] to participate in the trial and notifying them of the dates thereof (Art. 349 § 8 of the CPC).

While being served with the notification of the date of the trial, the accused deprived of liberty, whose presence at the trial is not obligatory, should be instructed of the right to file a motion to be brought to the trial. Such motion should be filed within 7 days of the service of such notification (Art. 353 § 3 of the CPC).

D. The presence of the accused at the appellate proceedings

In the course of appeal proceedings, the presence of the accused is regulated by Arts. 450 § 2 and 451 of the CPC. Drajewicz explains that the participation of the accused in appellate trial is in general not mandatory.³⁴² Drajewicz points out that this is confirmed by the wording of Art. 450 § 2 of the CPC. According to the aforementioned provision, the participation in the trial of other parties (e.g. the accused) is mandatory if the president of the court or the court finds it necessary. Moreover, the failure of the duly notified parties (e.g. the accused) to appear does not halt the conduct of the case, unless their participation is mandatory (Art. 450 § 3 of the CPC). If the presence of the accused at the appellate trial is ordered mandatory by the presiding judge, the presiding judge issues an order (Art. 93 § 2 of the CPC). Moreover, if the presence of the accused at the appellate trial is ordered mandatory by the court, the court issues a decision (Art. 93 § 1 of the CPC). Importantly, interlocutory appeal is not applicable in these cases (Art. 426 § 1 and Art. 459 § 1 and 2 of the CPC *a contrario*).³⁴³

Lastly, on a motion of the accused in custody filed within seven days of the service of notification of the acceptance of his appeal, the appellate court may have him brought to a hearing, unless the attendance of the defence counsel is deemed sufficient by the court (Art. 451 of the CPC). What is more, a motion submitted after the expiry of the prescribed term should be considered, if it does not cause the necessity of deferring the trial (Art. 451 of the CPC). The accused should be advised of his right to file the above-described motion. If the court decides not to bring the accused that does not have a defence counsel to a hearing, the court appoints a defence counsel for him *ex officio* (Art. 451 of the CPC).

E. Exceptions to the principle of freedom

³⁴² Drajewicz 2015, p. 580.

³⁴³ Drajewicz 2015, p. 580.

To begin with, there are two exceptions to the principle of freedom, pursuant to which the presence of the accused is mandatory. Firstly, the presiding judge or the court may decide that the presence of the accused at the main trial is mandatory (Art. 374 § 1 of the CPC). This solution ensures that the presiding judge or the court may react in cases where they deem that the accused presence is necessary.³⁴⁴ For instance, because of the complexity of the case. If the presence of the accused at the main trial is ordered mandatory by the presiding judge, the presiding judge issues an order (Art. 93 § 2 of the CPC). Moreover, if the presence of the accused at the main trial is ordered mandatory by the court, the court issues a decision (Art. 93 § 1 of the CPC). Importantly, interlocutory appeal is not applicable in these cases (Art. 459 § 1 and 2 *a contrario*).

According to Gajewska-Kraczkowska, in practice the judges tend to order the presence of the accused mandatory pursuant to Art. 374 § 1 of the CPC.³⁴⁵ The scope of mandatory presence of the accused is not specified in Art. 374 § 1 of the CPC. Therefore, it can be deduced that the presiding judge or the court have a wide margin of interpretation in that respect. Consequently, the presence of the accused may be ordered mandatory at various stages of the main trial. However, taking into account Art. 419 § 1 of the CPC,³⁴⁶ the accused obligation to appear at the main trial cannot encompass the announcement of the judgement. If the presiding judge or the court orders the presence of the accused at the main trial to be mandatory (Art. 374 § 1 of the CPC), then the accused receives a letter of summons, not a notification about the main trial. In such a scenario, if the accused fails to appear in the court without justification, the court has at its disposal certain enforcement measures such as, arresting the accused and bringing him to trial by force as long as the accused presence is found indispensable.

According to Art. 374 § 1a of the CPC, in the cases concerning indictable offences, the presence of the accused is mandatory during the procedures referred to in Arts. 385 (Presentation of charges) and 386 (Examination of the accused) of the CPC. It is worth mentioning that under Art. 7 § 2 of the CC, an indictable offence is a prohibited act punished by imprisonment for at least three years, or a more severe penalty. In cases falling under the scope of Art. 374 § 1a of the CPC, the president of the court orders to summon the accused each time to the first scheduled date of the main trial. If the accused is deprived of liberty, the president of the court issues an order that he is

³⁴⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Ważny), Art. 374.

³⁴⁵ Gajewska-Kraczkowska 05-06-2018.

³⁴⁶ Art. 419 of the CPC. The failure of the parties, their defence counsels or attorneys to appear does not prevent the judgement from being announced.

brought to the trial (Art. 350 § 2 and 3 of the CPC). As indicated above, the scope of the mandatory presence of the accused under Art. § 1a of the CPC is limited to the following procedures:

- 1) A concise presentation of charges by the public prosecutor or the presiding judge (Art. 385 § 1 or 2 of the CPC); and
- 2) Instructing the accused of his right to give explanations, to refuse to give explanations or answer questions, to file motions concerning evidence, about the consequences of not using that right. Furthermore, the accused is instructed about the content of Art. 100 § 3 and 4, Art. 376, 377, 419 § 1, and Art. 422 of the CPC (Art. 386 § 1 of the CPC)
- 3) Asking the accused whether he pleads guilty to the offence and whether he wishes to provide explanations and, if so, what explanations (Art. 386 § 1 of the CPC).

Consequently, once these procedures are performed, the nature of the presence of the accused in the main trial transforms *ex lege* from obligatory to non-obligatory.³⁴⁷ It is intertwined with the accused's right to participate in the main trial under Art. 374 § 1 of the CPC). However, if before completing the actions under Arts. 385 and 386 of the CPC, the court decides that the accused's participation is mandatory, then the above-described transformation does not take place. It is vital to note that then the basis of the mandatory presence of the accused is Art. 374 § 1 2nd sentence of the CPC.³⁴⁸

Taking into account the dynamics of the judicial proceedings, it is admissible that the court may re-examine the necessity of the mandatory presence of the accused.³⁴⁹ Therefore, if the circumstances for which the presence was considered mandatory are not present at the further stage of the main trial, the court may overturn its earlier decision. Importantly, the result of the reconsideration might be a decision stating that the presence of the accused at the main trial is not mandatory.³⁵⁰ On the other hand, the result might be a decision recognising the mandatory presence of the accused in a narrower or broader scope than the one set out in the originally issued decision on this matter. In any case, a decision ordering the presence of the accused mandatory must contain justification.

³⁴⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Ważny), Art. 374.

³⁴⁸ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Ważny), Art. 374.

³⁴⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Ważny), Art. 374.

³⁵⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Ważny), Art. 374.

Lastly, in the event that the accused fails to appear [at the main trial] without good cause when his presence is mandatory the presiding judge orders that he should immediately be brought to the trial, and adjourns or defers the trial. Art. 376 § 1 of the CPC, third sentence, applies accordingly (Art. 382 of the CPC). In the event of unjustified failure to appear of the accused, whose presence at the trial is mandatory, it is necessary to examine the reasons for such situation. In particular it should be checked whether the accused is in his place of residence.³⁵¹ Moreover, if there are grounds for doing so, for doing so, the accused may be arrested and brought to the trial. If that fails, the court may issue an order for detention on remand of the accused and a “wanted” warrant for the accused pursuant to Art. 279 of the CPC.

F. Removal of the accused

Removal of the accused from the courtroom is possible if the accused, despite being warned by the presiding judge, persists in disturbing the order of the hearing or offending the authority of the court. In such a case the presiding judge may have the accused temporarily removed from the courtroom (Art. 375 § 1 of the CPC). However, allowing the accused to return, the presiding judge immediately informs him of the progress of the hearing and allows him to provide explanations with regard to evidence introduced in his absence (Art. 375 § 2 of the CPC).

G. Admissibility of conducting or continuing the trial despite the absence of the accused, whose presence is mandatory

a. Absence of the accused – Art. 376 of the CPC

According to Art. 376 of the CPC, if the accused, whose presence at the trial is mandatory, has already provided explanations and left the courtroom without the presiding judge’s permission, the hearing may proceed despite his absence. It is vital to highlight that Art. 376 of the CPC is *lex specialis* in relation to Art. 374 § 1 and 1a of the CPC, to the extent the latter provisions are the basis for the mandatory presence of the accused at the main trial.³⁵² Art. 376 § 1 or 2 or 3 of the CPC permits the court in certain circumstances to conduct the trial despite the absence of the accused whose presence is mandatory. Ponikowski and Zagrodnik demonstrate that Art. 376 of the CPC has a

³⁵¹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Ważny), Art. 376.

³⁵² Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Ponikowski & Zagrodnik), Art. 376.

narrow scope.³⁵³ As it follows Art. 376 § 1 of the CPC applies only if three cumulative conditions are fulfilled:

- 1) The accused's presence at the trial is mandatory (pursuant to Art. 374 § 1 and 1a of the CPC); and
- 2) The accused has already provided explanations – under Art. 374 § 1a of the CPC, the presence of the accused is mandatory [only] during the procedures referred to in Arts. 385 and 386 of the CPC. Accordingly, after the procedures referred to in Arts. 385 and 386 of the CPC (including that the accused has to be asked whether he wishes to provide explanations, and if so, what explanations), his presence is not mandatory anymore. As follows, in such cases the condition 1) the accused's presence at the trial is mandatory is not fulfilled. Hence, Art. 376 of the CPC applies only to cases where the presence of the accused is mandatory under Art. 374 § 1 of the CPC. Moreover, the passage “provided explanations” concerns only explanations provided by the accused during the court proceedings, not preparatory proceedings;³⁵⁴ and
- 3) The accused left the courtroom without the presiding judge's permission – for instance, the accused did not return to the courtroom after a break; and
- 4) There are no grounds to assume that leaving the courtroom was caused by reasons independent from the accused (e.g. the accused lost consciousness during the break or the accused was arrested as a suspect in another case);³⁵⁵ and
- 5) The court does not find the presence of the accused at the main trial indispensable.

However, since the decision under Art. 374 § 1 of the CPC is based on the recognition of the accused's presence as mandatory, it may be assumed that in the event of failure to appear by the accused, the consequence will be ordering coercive measures, rather than a withdrawal from the decision.³⁵⁶ Consequently, the court may order that the

³⁵³ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Ponikowski & Zagrodnik), Art. 376.

³⁵⁴ Wyrok Sądu Najwyższego z dnia 6 czerwca 2011 r. [Judgement of the Supreme Court of the 6th of June 2011], V KK 174/11.

Wyrok Sądu Apelacyjnego w Katowicach z dnia 27 stycznia 2012 r. [Judgement of the Appellate Court in Katowice the 27th of January 2012], II AKa 519/11.

³⁵⁵ Wyrok Sądu Najwyższego z dnia 17 lutego 1984 r. [Judgement of the Supreme Court of the 2nd of April 2008], IV KR 134/83.

³⁵⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Ponikowski & Zagrodnik), Art. 376.

accused be arrested and brought to trial by force, if his presence is found indispensable (Art. 376 § 1 of the CPC). The decision on the arrest and bringing the accused to trial by force is subject to interlocutory appeal to another equivalent panel of the same court (Art. 376 § 1 of the CPC).

The provision of Art. 376 § 1 of the CPC applies accordingly, if the accused who has already provided explanations, having been notified of the date of a deferred or adjourned trial, fails to appear at that trial without justification (Art. 376 § 2 of the CPC). Since the conditions pursuant to Art. 376 § 1 of the CPC are already discussed in the section above, here the focus will be only on the additional conditions applying to Art. 376 § 2 of the CPC. Consequently, Art. 376 § 2 of the CPC only applies if the accused was properly notified about the new date of the deferred or adjourned trial. It is an absolutely unconditional requirement for assuming that the failure to appear was a conscious choice of the accused. That requirement is fulfilled if the accused is informed about the date of the trial by means of a notification or a letter of summons as provided in Art. 129 of the CPC.³⁵⁷ Moreover, the accused is instructed about the contents of Art. 376 of the CPC, while being served with the notification of the date of the trial or the letter of summons to the trial (Art. 353 § 4 of the CPC). Finally, the accused also instructed about the contents of Art. 376 of the CPC, while being served the copy of the indictment (Art. 338 § 1a of the CPC).

In regard to the application of Art. 376 § 2 of the CPC, Ponikowski and Zagrodnik demonstrated an interesting relation between the aforementioned provision and Art. 133 § 1 and 2 of the CPC.³⁵⁸ As these authors demonstrated, it happens that the accused, whose presence at the trial is mandatory, during the break in the trial or adjournment of the trial, was deprived of liberty in another case. If the accused in such situation fails to fulfil his obligation (notifying the court about the change of his place of residence (Art. 75 § 1 and Art. 139 § 1 of the CPC)), notification of a new date of the main trial, which was previously deferred or adjourned, by serving a letter of summons to the main trial pursuant to Art. 133 § 1 and 2 of the CPC to the address known to the court (the previous place of residence of the accused), is effective.³⁵⁹ Since the service is effective it gives grounds for continuing the hearing during the absence of the accused on the basis of Art. 376 § 2 of the CPC. Importantly, the accused deprived of liberty is guaranteed unrestricted opportunity to exchange correspondence with the court and may

³⁵⁷ Postanowienie Sądu Najwyższego - Izba Karna z dnia 10 stycznia 2013 r. [Decision of the Supreme Court – Criminal Division of the 10th of January 2013], III KK 123/12.

³⁵⁸ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Ponikowski & Zagrodnik), Art. 376.

³⁵⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Ponikowski & Zagrodnik), Art. 376.

provide the court with written information, justifying the failure to appear at the main trial, through the prison administration authorities.³⁶⁰

Finally, if a co-accused, who has justified his absence, fails to appear at a deferred or adjourned hearing, the court may conduct the hearing to the extent not directly concerning the absentee accused, if this does not limit his right to defend himself (Art. 376 § 3 of the CPC). For Art. 376 § 3 of the CPC to apply, two cumulative conditions have to be fulfilled:

- 1) The co-accused has justified his absence; and
- 2) The court deems that the absence of the co-accused will not limit the accused's right to defend himself.

b. Incapability of the accused to participate in the trial – Art. 377 § 1 of the CPC

To begin with, Art. 377 of the CPC prescribes further grounds in which the court may decide that the proceedings are conducted in the absence of the accused whose presence is mandatory. Significantly, Art. 377 of the CPC is of facultative nature and should be applied only in exceptional cases. Therefore, Art. 377 of the CPC can only be applied if from the circumstances of the case it follows that the absence of the accused whose presence is mandatory, will not restrict his right to defence nor have an unfavourable influence on the judgement. Although the court has discretion to conduct the proceedings in the absence of the accused, the court should first thoroughly consider whether the circumstances of the case justify such a decision.³⁶¹

According to Art. 377 § 1 of the CPC, if the accused, by his own fault, renders himself incapable of participating in a trial or hearing in which participation is mandatory, the court may decide that the proceedings be conducted in his absence, even if he has not yet provided explanations. The accused must have rendered himself incapable to participate in a trial or hearing in a deliberate and conscious way. For example, by committing self-injury, intoxication, drug abuse, or not taking medications.³⁶² The court has to issue a decision that the proceedings will be conducted in the absence of the accused whose presence was mandatory. That decision is not subject to interlocutory appeal (Art. 459 § 2 of the CPC). Before issuing that decision,

³⁶⁰ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Ponikowski & Zagrodnik), Art. 376.

³⁶¹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Ważny), Art. 377.

³⁶² Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz (Ważny), Art. 377.

the court considers a medical certificate from the physician who diagnosed such an incapacity and examines him in the capacity of an expert. (Art. 377 § 2 of the CPC). The condition of incapacity to participate in the trial may also be diagnosed by a test not connected with a violation of bodily integrity, made with the use of an appropriate device (Art. 377 § 2 of the CPC). For instance, by means of breathalyser or a drug test.

c. Failure to appear – Art. 377 § 3 of the CPC

According to Art. 377 § 3 of the CPC, the court may conduct the proceedings in the absence of the accused, whose presence at the trial is mandatory if:

- 1) **The accused, notified of the date of the trial, declares that he will not participate in the trial** – the declaration can be made for instance, in writing, orally for the record, or via information carriers. Crucially, this declaration cannot be presumed from the mere fact that the accused is not present at the trial. The declaration has to be made explicitly. Furthermore, the accused can revoke the declaration by simply appearing at the trial. Moreover, the accused's declaration does not relieve the court of the duty to notify the accused about the subsequent dates of the trial.³⁶³
- 2) **The accused makes it impossible to bring him to the trial** – this condition applies equally to the accused deprived of liberty and to the accused who is not deprived of liberty. The passage “making it impossible” encompasses various behaviours (actions and declarations) which express the accused's will not to appear at the trial. However, these behaviours have to be performed by the accused himself and not by third parties. For example, the accused does not open the doors to the flat to the law enforcement agencies or refuses to leave the prison cell.³⁶⁴ Finally, the passage “making it impossible” encompasses cases where the accused is brought to the trial and declares that he does not want to participate in the trial and wishes to leave the courtroom;³⁶⁵ or
- 3) **The accused notified personally of the trial fails to appear without justification** – the accused was served the letter of summons in person and the accused confirmed the delivery by legibly signing his name (Art. 132 § 1

³⁶³ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Ponikowski & Zagrodnik), Art. 377.

³⁶⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Ponikowski & Zagrodnik), Art. 377.

³⁶⁵ Postanowienie Sądu Najwyższego z dnia 8 listopada 2006 r. [Decision of the Supreme Court of the 8th of November 2006], III KK 83/06.

of the CPC) or the accused was informed in person, by the court, about the new date of the deferred or adjourned trial. As specified by the Supreme Court, Art. 377 § 3 of the CPC excludes service under Art. 132 § 2 (service upon an adult member of the household) and 3 (service by fax or e-mail) of the CPC, Art. 139 § 1 of the CPC (fictitious delivery), Art 133 § 1 and 3 of the CPC . In regard to the assessment of the “without justification” condition, the same conditions apply as in the case of the application of Art. 376 of the CPC.

Even if one of the above-discussed conditions applies, the court may decide the accused be arrested and brought to trial by force (Art. 377 § 3 of the CPC). The court has to be of the opinion that the presence of the accused is indispensable. The decision on the arrest and bringing the accused to trial by force is subject to interlocutory appeal to another equivalent panel of the same court (Art. 377 § 3 of the CPC). If the accused has not yet given explanations before the court, Article 396 § 2 may apply or the reading of his previous explanations may be found sufficient. The accused may be interrogated by using the means referred to in Article 177 § 1a (Art. 377 § 4 of the CPC).

d. Difference between Art. 376 of the CPC and Art. 377 § 1 and 3 of the CPC

As explained in the literature, Art. 377 § 1 and 3 of the CPC and Art. 376 of the CPC have the same aim, meaning to regulate cases where the court may conduct proceedings despite the absence of the accused, whose presence is mandatory.³⁶⁶ The difference is that under Art. 376 § 1 and 2 of the CPC the court may only conduct proceedings in the absence of the accused if the accused has already provided explanations to the court (or refused to). While under Art. 377 § 1 and 3 of the CPC, the court may conduct the proceedings in the absence of the accused and adjudicate the case, despite the fact that the accused did not provide explanations.³⁶⁷

H. Announcement and service of the judgement

³⁶⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Ponikowski & Zagrodnik), Art. 376.

³⁶⁷ Drajewicz 2015, p. 577-580.

Until April 2016,³⁶⁸ under Art. 100 § 3 of the CPC, the courts had obligation to serve the judgement to the accused if the judgement was announced in his absence. The amended Art. 100 § 3 of the CPC provides that the judgement is served on persons entitled to file an appeal, if the law so provides. In consequence, in principle, the judgement issued at the main trial or the hearing, is not served *ex officio* if the parties were present on the promulgation of the judgement or could participate in the public main trial or hearing and get acknowledged with the judgement's content, because they had information about the time of the main trial or the hearing. The legislator prescribes in some circumstances serving the judgement *ex officio*.³⁶⁹ To illustrate that point, the judgement is served *ex officio* in cases where the accused deprived of liberty was not assisted by a defence counsel, and was not present at the pronouncement of the judgement despite a motion to be brought to the trial, at which the judgement was to be pronounced (Art. 422 § 2a of the CPC). In the view of Pachowicz,³⁷⁰ such a regulation seems to make the parties solely responsible ones for the consequences of unjustified failure to appear at the main trial or hearing and the lack of interest in the course of the judicial proceedings and the judgements issued on them. Pachowicz pointed out that this remark is in line with the amendment to Art. 132 § 4 of the CPC.³⁷¹ The legislator removed from Art. 132 § 4 of the CPC the passage that Art. 132 § 2 and 3 of the CPC and Art. 133 § 3 do not apply to service of judgement issued at a hearing, with the exception of the judgement referred to in Art. 500 § 1 of the CPC.

I. The consequences of the absence of the accused to the enforceability of the decision resulting from it

As explained by all the interviewees, pursuant to the CPC there are no consequences of the absence of the accused whose presence was not mandatory, to the enforceability of the decision resulting from it. This position is in accordance with the Supreme Court's case law.³⁷² As the Supreme Court specified, absence of the accused, whose presence was not ordered mandatory pursuant to Art. 374 of the CPC, does not qualify as an absolute ground for reversing the judgement (Art. 439 § 1 point 11 of the CPC). What is

³⁶⁸ *Ustawa z dnia 11 marca 2016 r. o zmianie ustawy - Kodeks postępowania karnego oraz niektórych innych ustaw* [Bill of 11 March 2016 Amending the Code of Criminal Procedure and other legislative acts], *Dziennik Ustaw* [Journal of Laws], (2016), item. 437.

³⁶⁹ *Kodeks Postępowania Karnego* [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 100.

³⁷⁰ *Kodeks Postępowania Karnego* [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Pachowicz), Art. 100.

³⁷¹ *Kodeks Postępowania Karnego* [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Pachowicz), Art. 100.

³⁷² *Wyrok Sądu Najwyższego - Izba Karna z dnia 16 grudnia 2016 r.* [Judgement of the Supreme Court of the 16th of December 2016], III KK 297/16.

more, if the presence of the accused is not mandatory, infringing Art. 117 § 2 of the CPC does not constitute an absolute ground for reversing the judgement (Art. 439 § 1 point 11 of the CPC).³⁷³ Nevertheless, in such cases the court has to examine the influence of the infringement of Art. 117 § 2 of the CPC on the contents of the judgement.

However, if the case was heard in the absence of the accused whose presence was mandatory and none of the exceptions applied (Arts. 376, 377, and 402 § 1a of the CPC), such a situation constitutes an absolute ground for reversing the judgement (Art. 439 § 1 point 11 of the CPC).³⁷⁴ Pursuant to Art. 439 § 1 point 11 of the CPC, regardless of the limits of the appeal, of the objections raised and impact of the flaw on the contents of the judgement, the appellate court in a hearing reverses the appealed judgement if the case was heard in the absence of the accused whose presence was mandatory. In cases concerning indictable offences the court is not competent to deem that the presence of the accused, during the procedures referred to in Art. 385 and Art. 386 of the CPC, is not necessary. This applies even in cases where the accused failed to appear at the main trial despite being served the letter of summons and did not provide justification for that failure. Therefore, conducting the procedures referred to in Arts. 385 and 386 of the CPC in the absence of the accused whose presence was mandatory (Art. 374 § 1a of the CPC), constitutes an absolute ground for reversing the judgement (Art. 439 § 1 point 11 of the CPC), unless one of the grounds provided in Art. 377 or 402 § 1a of the CPC applies. Furthermore, conducting the main trial in the absence of the accused whose presence was mandatory (Art. 374 § 1 of the CPC), falls under the scope of Art. 439 § 1 point 11 of the CPC, unless the circumstances provided for in Art. 376, Art. 377 or Art. 402 § 1a of the CPC occurred.

In cases where the presence of the accused at the trial is mandatory and the accused is aware of objectively existing reasons for which he could not fulfil the obligation to appear at the trial, the accused should duly justify his absence to the court.³⁷⁵ However, if the accused, knowing the date of the main trial, did not duly justify his absence to the court, the court is entitled to decide that the ground envisaged in Art. 117 § 2 of the CPC is not fulfilled. Therefore, the court may hear the case on the basis of

³⁷³ Sąd Apelacyjny w Białymstoku w II Wydziale Karnym z dnia 20 czerwca 2016 r. [Judgement of the Appellate Court in Białystok – II Criminal Division of the 20th of June 2016], II Aka 65/16.

³⁷⁴ Wyrok Sądu Najwyższego z dnia 4 lutego 2009 r. [Judgement of the Supreme Court of the 4th of February 2009], V KK 331/08.

³⁷⁵ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Ponikowski & Zagrodnik), Art. 374.

Art. 376 § 2 of the CPC. Consequently, Art. 439 § 1 point 11 of the CPC does not apply. This is confirmed in case law.³⁷⁶

It is significant to note that the court may still hear the case on the basis of Art. 376 § 2 of the CPC even if the accused's absence was caused by for example, the deprivation of liberty of the accused, the accused's hospitalisation, or serious deterioration of accused's health. Again, such cases do not fall under the scope of , Art. 439 § 1 point 11 of the CPC. However, this only applies if the accused, without special efforts or having to overcome exceptional difficulties, had the opportunity to notify the court before the scheduled date of the hearing about the occurrence of such circumstances.³⁷⁷

J. Assessment of the system pursuant to the principle of freedom

According to Podhalańska the current system which adheres to the principle of freedom is not inherently flawed. As pointed out by the interviewee, if the accused is a mentally healthy adult and he was properly instructed about the risks and consequences of not appearing at the main trial, then there is no valid reason for which the proceedings should freeze in case the accused indeed decides not to appear in the court. On the other hand, Podhalańska noted that on the side of the authorities responsible for the prosecution of offences there is a lack of motivation to effectively convey to the accused the instructions concerning service, participation in the main trial, and the accused's obligations towards the administration of justice. Quite commonly the consequence of that is that the main trial is held in the absence of the accused while the procedural formalities are fulfilled. Moreover, frequently in these cases the accused person leaves the territory of Poland in the course of judicial proceedings. Then after couple of years the convicted person, after learning about a EAW against him, is unable to understand how it happened that the sentence was issued against him, because *he did not know anything about the trial*.

³⁷⁶ Postanowienie Sądu Najwyższego z dnia 17 czerwca 2003 r. [Decision of the Supreme Court of the 17th of June 2003], II KK 11/03.

Postanowienie Sądu Najwyższego z dnia 12 listopada 2007 r. [Decision of the Supreme Court of the 12th of November 2007], III KK 402/06.

Wyrok Sądu Apelacyjnego w Katowicach z dnia 27 stycznia 2012 r. [Judgement of the Appellate Court in Katowice of the 27th of January 2012], II AKa 519/11.

³⁷⁷ Postanowienie Sądu Najwyższego z dnia 28 marca 2007 r. [Decision of the Supreme Court of the 28th of March 2007], II KK 231/06.

Postanowienie Sądu Najwyższego z dnia 13 lipca 2005 r. [Decision of the Supreme Court of the 13th of July 2005], II KK 388/04.

In the view of Podhalańska, there is a strong probability that a pressing problem linked to the principle of freedom is that the Polish society does not receive sufficient civic education.³⁷⁸ Furthermore, Podhalańska mentioned that while assessing the principle of freedom it is crucial to remember about the low public awareness concerning the individual's duties and rights towards the state, which results from various reasons, including the behaviour of judiciary and law enforcement agencies. Apparently, the prosecutors treat their duty to instruct the suspect of his rights and obligations (including that the accused has to inform about the change of place of residence) in a dismissive manner. With regard to that issue Podhalańska concluded that as a result the accused are often not aware of the severe consequences following from not fulfilling their obligations.³⁷⁹

Gajewska-Kraczkowska underlined that the solution pursuant to which the presence of the accused is his right, is not mistaken. As follows from Gajewska-Kraczkowska's professional experience, under the previous system, which was demanding mandatory presence as a rule, the cases were regularly adjourned, because of the accused's failure to appear.³⁸⁰ On the other hand, as a risk connected to the principle of freedom, Gajewska-Kraczkowska mentioned the mentality of the Polish society. Gajewska-Kraczkowska argued that accused do not treat the principle of freedom as the legislator envisaged – as their right to attend the trial and to defence or to make a conscious choice not to attend the trial. Contrariwise, the accused rather have the mentality of – *I do not have to go, therefore, I will not*.³⁸¹ With regard to the latter strategy, the accused risk that the court will issue a verdict solely on the basis of the presented evidence.

Finally, Gajewska-Kraczkowska explained that the absence of the accused at the main trial is not a ground for the appointment of the defence counsel *ex officio* by the court.³⁸² That appointment takes place in cases where the CPC prescribes it to be obligatory (Arts. 79 and 80 of the CPC) or when the court deems that the accused must also have a defence counsel due to other circumstances impeding the defence (Art. 79 § 2 of the CPC). As pointed out by Gajewska-Kraczkowska, the absence of the accused

³⁷⁸ Podhalańska 07-06-2018.

³⁷⁹ Podhalańska 07-06-2018.

³⁸⁰ Gajewska-Kraczkowska 05-06-2018.

³⁸¹ Gajewska-Kraczkowska 05-06-2018.

³⁸² Gajewska-Kraczkowska 05-06-2018.

does not fall under the scope of Art. 79 § 2 of the CPC. The aforementioned provision concerns rather the cases of mental impairment of the accused.³⁸³

a. The principle of freedom vs. issuing a EAW

Podhalańska highlighted that commonly the accused do not appear at the promulgation of the sentence. Importantly, as Podhalańska continued, theoretically speaking at that stage of the procedure they are aware of the facultative nature of their presence and time limits for filing an appeal.³⁸⁴ However, the common scenario in such cases goes as follows: a person was interrogated as a witness and no proceedings were conducted against him. In the meantime that person legally leaves the territory of Poland and at certain point the competent authority starts criminal proceedings against that person, therefore, changing his status from a witness into the one of a suspect. Importantly, that person at the moment of leaving Poland had every right to leave the country and did not have an obligation to inform the authorities responsible for the prosecution of criminal offences where he was going – because that person was leaving while being only a witness in the case.³⁸⁵

As explained by Podhalańska, the problem, *inter alia*, lies in the attitude of the public prosecutors, who instead of thinking about whether to use a little milder mechanism than EAW, directly file a motion for issuing a EAW.³⁸⁶ However, if the public prosecutors at the expense of more bureaucratic workload sought judicial assistance from foreign judicial authorities (Art. 585 of the CPC), that suspected person perhaps would have voluntarily appeared at the interrogation to provide explanations. Moreover, that would allow the suspect to provide the authorities responsible for the prosecution of the offences information about his place of residence. Thanks to such a solution the wanted person would have a chance to cooperate with the law enforcement authorities.³⁸⁷ As follows from the experience of Podhalańska commonly after the wanted person was surrendered on the basis of a EAW, the case is dismissed because it is so trivial.³⁸⁸ Podhalańska in that regard concluded that the pressing problem in the Polish practice of issuing EAWs is that the authorities responsible for the prosecution of offences do not use other mechanisms of transnational nature, but only issue EAWs. Podhalańska would suggest improving already existing institutions of transnational

³⁸³ Gajewska-Kraczkowska 05-06-2018.

³⁸⁴ Podhalańska 07-06-2018.

³⁸⁵ Podhalańska 07-06-2018.

³⁸⁶ Podhalańska 07-06-2018.

³⁸⁷ Podhalańska 07-06-2018.

³⁸⁸ Podhalańska 07-06-2018.

nature such as judicial assistance (Art. 585 of the CPC), while using EAW as a last resort.³⁸⁹

K. Presence of the accused via means of telecommunications

In Poland, the accused cannot be present via means of telecommunications. Podhalańska is in favour of introducing the possibility of the presence of the accused via means of telecommunications.³⁹⁰ She indicated that such manner is already being used with respect to witnesses and experts. Moreover, Gajewska-Kraczkowska stated that she commonly encounters cases where witnesses and experts are present via telecommunications.³⁹¹ Gajewska-Kraczkowska indicated that there should be no obstacles with using that manner with regard to the accused.³⁹²

VIII. Reopening of the proceedings at request of the accused (Art. 540b of the CPC)

Art. 540b of the CPC was introduced to the CPC in 2011.³⁹³ This provision is a basis for reopening on request of judicial proceedings concluded with a final and binding court judgement in the event of passing the judgement in the absence of the accused. However, the reopening of the judicial proceedings is only admissible if several cumulative conditions prescribed by Art. 540b of the CPC are fulfilled. What is more, a request to reopen the proceedings should be prepared and signed by a defence counsel or attorney (Art. 545 § 2 of the CPC). Importantly, the primary objective of introducing Art. 540b of the CPC was to implement the FD 2009/299/JHA into the Polish legal order.³⁹⁴

A. Conditions set out in Art. 540b § 1 of the CPC

Art. 540b of the CPC. Reopening on request.

³⁸⁹ Podhalańska 07-06-2018.

³⁹⁰ Podhalańska 07-06-2018.

³⁹¹ Gajewska-Kraczkowska 05-06-2018.

³⁹² Gajewska-Kraczkowska 05-06-2018.

³⁹³ *Ustawa z dnia 29 lipca 2011r. o zmianie ustawy - Kodeks karny, ustawy - Kodeks postępowania karnego oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary* [Bill of 29 July 2011 Amending the Criminal Code, the Code of Criminal Procedure and Corporate Criminal Liability Act], Dziennik Ustaw [Journal of Laws], (2011), Doc. No. 191, item. 1135.

³⁹⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Świecki), Art. 540b.

§ 1. Judicial proceedings concluded with a final and binding court judgment may be reopened at the request of the accused, submitted within a final time limit of one month of the day on which he learns of the judgment issued against him, if the case is heard in the absence of the accused, who was not served a notification of the date of the hearing or trial, or such a notification was not served on him personally and he is able to prove that he was not aware of the date and the possibility of a judgment being delivered in his absence.

Following cumulative conditions emerge from Art. 540b § 1 of the CPC:

- 1) **A final and binding court judgement was issued** – a judgement which settles the criminal responsibility of the accused, hence, on the basis of that judgement the person is either acquitted or convicted. A final and binding court judgement is interpreted exclusively as a judgement closing the proceedings in the case at hand;³⁹⁵ *and*
- 2) **the case was heard in the absence of the accused** – the legislator had primarily in mind situations where hearing the case and passing a judgement in the absence of the accused was fully admissible in the light of the provision of the CPC.³⁹⁶ It is vital to note that if the case was heard in the absence of the accused whose presence was mandatory, Art. 540b of the CPC is not applicable. In such cases the basis for reopening the proceedings is Art. 542 § 3 in jo. Art. 439 § 1 point 11 of the CPC (reopening *ex officio*);³⁹⁷ *and*
- 3) **the accused:**
 - a. **was not served a notification of the date of the hearing or trial;** or
 - b. **such a notification [about the date of the hearing or trial] was not served on him personally** – for instance, the notification was served upon the adult member of the household (Art. 132 § 2 of the CPC); *and*
- 4) **the accused is able to prove that:**
 - a. **he was not aware of the date [of the hearing or trial]** – as specified in case law,³⁹⁸ even if the accused was not served a notification of the date of the hearing or trial or the service was performed in other manner than the one specified in Art. 132 § 1-3 of the CPC, Art. 133 CPC, Art. 137,

³⁹⁵ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 540b.

³⁹⁶ Wyrok Sądu Apelacyjnego we Wrocławiu - II Wydział Karny z dnia 6 lutego 2014 r. [Judgement of the Appellate Court in Wrocław II Criminal Division], II AKz 29/14.

³⁹⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 540b.

³⁹⁸ Postanowienie Sądu Najwyższego - Izba Karna z dnia 1 marca 2017 r. [Decision of the Supreme Court – Criminal Division of the 1st of March 2017], SDI 95/16.

and Art. 138 of the CPC, the reopening of judicial proceedings at the request of the accused under Art. 540b § 1 of the CPC is inadmissible if it is determined that the accused was aware of the date. For example, in order to fulfil the discussed condition, it is permissible to interrogate the adult member of the household upon whom the notification was served, and who did not pass on the notification to the accused or passed it on with a delay;³⁹⁹ and

- b. **he was not aware of the possibility of a judgement being delivered in his absence** – in 2013, the legislator by the amendment to the CPC⁴⁰⁰ imposed an obligation to instruct the accused of the contents of Arts. 374, 376 and 377 of the CPC (the possibility of hearing the case in the absence of the accused) and Art. 422 of the CPC (the pronouncement of the judgement in the absence of the accused) while serving upon the accused the copy of the indictment (Art. 338 § 1a of the CPC). Furthermore, the legislator assumes that in certain circumstances the accused do not have to be notified of the new date of the adjourned trial (Art. 402 § 1 of the CPC), about what the accused has to be instructed (Art. 353 § 4a of the CPC). Therefore, if the accused was instructed in accordance with Art. 338 § 1a of the CPC, despite subsequently not being served the notification of the date of the hearing or trial or not being served in person such a notification, the accused cannot successfully invoke his unawareness about the possibility of a judgement being delivered in his absence. *A contrario*, if the accused was not instructed in accordance with Art. 338 § 1a of the CPC, then indeed he has chances to successfully invoke his unawareness of the possibility of delivering a judgement in his absence.⁴⁰¹

B. Negative premises for reopening pursuant to Art. 540b of the CPC

Art. 540b of the CPC. Reopening on request

³⁹⁹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Świecki), Art. 540b.

⁴⁰⁰ *Ustawa o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw z dnia 27 września 2013r.* [Bill Amending the Code of Criminal Procedure and other legislative acts of 27 September 2013]. Dziennik Ustaw [Journal of Laws], (2013), item. 1247.

⁴⁰¹ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Świecki), Art. 540b.

§ 2. The provisions of § 1 do not apply in cases referred to in Article 133 § 2, Article 136 § 1 and Article 139 § 1, and also if the defence counsel has participated in the trial or hearing.

Art. 540b § 2 of the CPC enumerates alternative negative premises which if one of them is fulfilled, the request of the accused to reopen judicial proceedings concluded with a final and binding is dismissed. As follows, Art. 540b § 1 of the CPC does not apply in the following circumstances:

- 1) The writ, including a letter of summons and notification, is deemed to have been served by the means of the substitute service (Art. 133 § 2 of the CPC);⁴⁰² or
- 2) If the accused refused or was unable to acknowledge the reception of the notification of the date of the hearing or trial (as mentioned in Art. 540b § 1 of the CPC) or the judgement delivered in his absence (as mentioned in Art. 540b § 1 of the CPC) (Art. 136 § 1 of the CPC);⁴⁰³ or
- 3) The notification of the date of the hearing or trial or the judgement delivered in the absence of the accused are deemed to be served if the accused had changed his place of residence without informing the court of the new address or did not reside at the address indicated to the court, also due to being kept in custody in another case (Art. 139 § 1 of the CPC);⁴⁰⁴ or
- 4) The defence counsel has participated in the trial or hearing.⁴⁰⁵

C. Facultative nature of Art. 540b of the CPC

It is crucial to note that the reopening of judicial proceedings on the basis of Art. 540b § 1 of the CPC is of a facultative nature.⁴⁰⁶ Therefore, the court adjudicating the case retains discretion as to the assessment whether the reopening in the case at hand would be *purposeful*.⁴⁰⁷ The legislator justified that choice by arguing that not always negligence on the side of the competent authorities while performing service of the writ (for example the judgement) results in restricting the procedural rights of accused in

⁴⁰² Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 540b.

⁴⁰³ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 540b.

⁴⁰⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 540b.

⁴⁰⁵ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 540b.

⁴⁰⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Świecki), Art. 540b.

⁴⁰⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Świecki), Art. 540b.

criminal proceedings.⁴⁰⁸ The legislator as an example invoked a situation of non-delivery or defective service of the judgement passed at a hearing against which the time limits prescribed for submitting appeals run from the day of the promulgation of the judgement, and not its service to the accused (informative service). In the view of the legislator, reopening of judicial proceedings in the above-described situation would be ungrounded.⁴⁰⁹

Since the court *may* reopen the judicial proceedings when the cumulative conditions prescribed in Art. 540b § 1 of the CPC are present, even if indeed the conditions are fulfilled, the court is not obliged to reopen the judicial proceedings at the request of the accused.⁴¹⁰ As specified in case law,⁴¹¹ this signifies that even if all the conditions set out in Art. 540b § 1 of the CPC are fulfilled, the court should only reopen the judicial proceedings if it finds that the examination of the case in the absence of the convicted person could have significantly impacted the course of judicial proceedings, procedural guarantees of the convicted person, and the substance of the decision.

D. Time limits

The request of the accused to reopen judicial proceedings concluded with a final and binding judgement must be submitted within a final time limit of one month of the day on which he learns of the judgement issued against him. As specified in case law,⁴¹² Art. 540b § 1 of the CPC, does not prescribe calculating the time limit of one month from the day on which the convicted person received the copy of the judgement. On the contrary, the time limit is calculated from the day on which the accused (or rather the convicted person at that stage) learns of the judgement issued against him. Otherwise, the convicted individual could significantly delay the date from which the time limit runs by

⁴⁰⁸ *Rządowy projekt ustawy o zmianie ustawy - Kodeks karny i niektórych innych ustaw* [Governmental draft bill amending the Criminal Code and other legislative acts] no. 4342, Sejm Rzeczypospolitej Polskiej VI Kadencja Prezes Rady Ministrów [Sejm of the Republic of Poland. The Prime Minister]. 20-06-2011, p. 9-11.

⁴⁰⁹ *Rządowy projekt ustawy o zmianie ustawy - Kodeks karny i niektórych innych ustaw* [Governmental draft bill amending the Criminal Code and other legislative acts] no. 4342, Sejm Rzeczypospolitej Polskiej VI Kadencja Prezes Rady Ministrów [Sejm of the Republic of Poland. The Prime Minister]. 20-06-2011, p. 9-11.

⁴¹⁰ *Kodeks Postępowania Karnego* [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 540b.

⁴¹¹ *Postanowienie Sądu Apelacyjnego w Katowicach - II Wydział Karny z dnia 12 lipca 2016 r.* [Decision of the Appellate Court in Katowice – II Criminal Division of the 12th of July 2016], II AKz 306/16.

⁴¹² *Postanowienie Sądu Apelacyjnego w Katowicach - II Wydział Karny z dnia 5 maja 2017 r.* [Decision of the Appellate Court – II Criminal Division of the 5th of May 2017], II AKz 293/17.

not undertaking steps to obtain a copy of the judgement.⁴¹³ Moreover, the day on which the calculation of a time limit begins is not included in this calculation (Art. 123 of the CPC).

Significantly, the president of the court issues a ruling in which he refuses to accept the request for reopening of judicial proceedings if the request was submitted after the final time limit. The ruling is subject to interlocutory appeal (Art. 530 § 2 in jo. Art. 545 § 1 of the CPC).⁴¹⁴ The final time limit of a month is subject to reinstatement in circumstances provided in Art. 126 of the CPC. Consequently, if the failure to observe a final time limit occurred due to reasons independent from the accused, the accused – within a final time limit of 7 days since the day when the obstacle ceased to exist – may file a request to reinstate the time limit.⁴¹⁵ At the same time the accused has to accomplish the action that was to be performed within the expired time limit (i.e. submitting a request for reopening of the judicial proceedings) (Art. 126 § 1 of the CPC). The requirement to submit the request for reopening within the final time limit signifies that before referring the case to the substantive examination of the case, the president of the competent court should determine whether the final time limit was observed.⁴¹⁶ If the date on which the accused learned about the judgement does not follow from the content of the request or from the case file, the applicant (the accused) should be requested to indicate when he learned of the judgment.⁴¹⁷

The motion for the reinstatement of time limit is decided by the court competent to reopen judicial proceedings (Art. 544 § 1 and 2 of the CPC). Finally, a refusal to reinstate a time limit is subject to interlocutory appeal (Art. 126 § 3 of the CPC). The interlocutory appeal is submitted to the same court adjudicating in the panel of three judges (Art. 545 § 3 of the CPC *per analogiam*).⁴¹⁸

E. Assessment of Art. 540b of the CPC

⁴¹³ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Świecki), Art. 540b.

⁴¹⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Świecki), Art. 540b.

⁴¹⁵ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Świecki), Art. 540b.

⁴¹⁶ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Świecki), Art. 540b.

⁴¹⁷ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Świecki), Art. 540b.

⁴¹⁸ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Sakowicz, Art. 540b.

With regard to Art. 540b of the CPC, Podhalańska indicated that the conditions that the accused has to fulfil in order to be granted reopening of the judicial proceedings at the request impose a very high standard. Both Gardocka and Gajewska-Kraczkowska discussed the condition that ‘the accused was not aware of the possibility of a judgement being delivered in his absence’ in the light of the Latin maxim *ignorantia iuris nocet* (not knowing the law is harmful).⁴¹⁹ As Gardocka explained the presumed knowledge of the law is accepted and the possibility of a judgement being delivered in the absence of the accused follows from the CPC. In the view of Gardocka, the institution of reopening judicial proceedings at the request of the accused pursuant to Art. 540b of the CPC is rather directed towards foreigners. As Gardocka explained, a foreigner could try to argue that in his homeland there is no possibility of delivering a judgement in the absence of the accused. Therefore, he could not assume that he would have been convicted in his absence. Finally, Gajewska-Kraczkowska claimed that taking into account the presumed knowledge of the law, the above-discussed condition imposes an extremely high burden of proof on the accused.⁴²⁰ All the interviewees⁴²¹ agreed that Art. 540b of the CPC concerns rare cases and is not a frequently used ground for reopening of judicial proceedings.

IX. Reopening *ex officio* (Art. 542 § 3 in jo. Art. 439 § 1 point 11 of the CPC)

According to Art. 542 § 3 in jo. Art. 439 § 1 point 11 of the CPC, proceedings are reopened *ex officio* only if the violation specified in Article 439 § 1 point 11 of the CPC [the case was heard in the absence of the accused whose presence was mandatory]⁴²²

⁴¹⁹ Gajewska-Kraczkowska 05-06-2018.

⁴²⁰ Gajewska-Kraczkowska 05-06-2018.

⁴²¹ Gardocka 04-06-2018.

Gajewska-Kraczkowska 05-06-2018.

Podhalańska 07-06-2018.

⁴²² See above the section ‘The consequences of the absence of the accused to the enforceability of the decision resulting from it’.

comes to light. In such cases, the reopening of the proceedings may take place only in favour of the accused. Importantly, reopening may not take place for the reasons mentioned in Art. 542 § 3 of the CPC, if they have already been examined in cassation proceedings (Art. 542 § 4 of the CPC). Importantly, the parties and other directly interested persons may request the performance of also these actions which the authorities may or are obliged to undertake *ex officio* (Art. 9 § 2 of the CPC). In cases where such the request under Art. 9 § 2 of the CPC is filed, the question arises whether the court having jurisdiction to reopen proceedings *ex officio* is obliged to respond to the request in a procedural manner. In the case law of the Supreme Court, two different reactions are permissible.⁴²³ First, when the court does not determine the existence of grounds for reopening the proceedings, the request submitted in the mode of Art. 9 § 2 of the CPC is attached to the case file without issuing a negative decision on it. The court has to notify the party who filed the request about non-finding of an infringement.⁴²⁴ Furthermore, the court has to instruct the party that an appeal is not admissible.⁴²⁵ Second, the court should indicate that it revised the contested judgement *ex officio* and issue a decision, in which the court states that there are no grounds for reopening the proceedings *ex officio*.⁴²⁶

X. Conclusion

That main aim of this report was to analyse the current state of affairs of the European Arrest Warrant in Poland. Furthermore, the focus of the report was on *in absentia* proceedings pursuant to the CPC. In the literature, it has been established that the European Arrest Warrant became a victim of its own success within the practice of Polish judicial authorities.⁴²⁷ Following the implementation of the FD 2002/584/JHA,

⁴²³ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Świecki), Art. 542.

⁴²⁴ Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary], 2018, Skorupka (Świecki), Art. 540b.

⁴²⁵ Postanowienie Sądu Najwyższego z dnia 21 maja 2008 r. [Judgement of the Supreme Court of the 21st of May 2008], V KZ 27/08.

⁴²⁶ Postanowienie Sądu Najwyższego z dnia 21 kwietnia 2005 r. [Judgement of the Supreme Court of the 21st of April 2005], II KO 59/04.

Postanowienie Sądu Najwyższego z dnia 19 kwietnia 2005 r. [Judgement of the Supreme Court of the 19th of April 2005], II KO 75/04.

⁴²⁷ Ostropolski 2013, p. 24.

the applicable legal provisions concerning the European arrest warrant obliged the law enforcement agencies to use this mechanism in cases where it was permissible. Therefore, the Polish judicial authorities had to issue EAWs even in clearly disproportional cases. That resulted in detriment to the reputation of Poland among its European partners. Consequently, in Poland, the issue of proportionality in relation to issuing the European arrest warrant has been subject of fierce debates not only in the academic but also in the political context.

In the literature and the political discussions, the most commonly indicated reason for the high number of EAWs issued by Poland was the principle of legality. Subsequently, the legislator decided to supplement Art. 607b of the CPC with the general clause of the interest of the administration of justice. The key objective of that amendment was to put an end to the considerable number of EAWs issued by Poland. However, it cannot be said that the result of the amendment is satisfactory. Rather years following the amendment revealed that the principle of legality was a ‘scapegoat’, while the matter itself has various roots. As demonstrated by the empirical data, which was collected for the purposes of this report, the problems with regard to the substantial number of EAWs issued by Poland are not of a purely legal nature. That is why solely mitigating the effects of the principle of legality by a legislative amendment will not solve that issue. The policymakers while contemplating this issue should start viewing it in a broader context. Hence, taking into account, political, economic, and social factors.

Following the implementation of the FD 2002/584/JHA into the Polish legal order, controversies arose in the doctrine around certain aspects regarding issuing and executing the EAWs in the Polish practice. Issues such as, the constitutionality of surrendering a Polish citizen on the basis of a EAW or inadmissibility of interlocutory appeal to the decision on the subject of the EAW, have been already clarified in the case law. On the other hand, the interpretation which circuit court qualifies as the ‘local circuit court’ (Art. 607a of the CPC) at the stage of preparatory proceedings still has to be further analysed.

The report demonstrated that Chapters 65a and 65b of the CPC are not fully in accordance with the FD 2002/584/JHA. To illustrate that point, the report identified vital discrepancies between Art. 4a of the FD 2002/584/JHA and Art. 607r § 3 of the CPC. That analysis revealed that Art. 607r § 3 of the CPC omits to explicitly include a right to appeal (Art. 4a (1)(c) and (d) of the FD 2002/584/JHA) and does not differentiate between summoning in person and indirectly (Art. 4a (1)(a)(i) of the FD 2002/584/JHA). What is more, the further analysis showed that the part D of the EAW form (Art. 2 (3) of the FD 2009/299/JHA) is transposed correctly into the Polish legal

order. Moreover, Art. 4a of the FD 2002/584/JHA is transposed in Art. 540b of the CPC. The latter provision added to the CPC a new basis for reopening proceedings at the request of the accused. As observed in the literature and by the interviewees, Art. 540b of the CPC imposes a set of cumulative conditions. Importantly, fulfilling these cumulative conditions is overwhelmingly demanding because of the high burden of proof on the accused. Therefore, in practice, Art. 540b of the CPC is rarely invoked with success.

Regarding service in Poland, the CPC prescribes direct service, indirect service, substitute service, and fictitious service. The report identified specific conditions applying to each type of service. The direct service under Art. 132 of the CPC corresponds to ‘personal service’ (i.e. service as a result of which the accused has himself received the summons).⁴²⁸ Indirect (Art. 132 of the CPC) and substitute service (Art. 133 § 3 of the CPC) does not entirely correspond to service by other means as a result of which the defendant has ‘actually received official information of the scheduled date and place of that trial in such a manner that it is unequivocally established that he or she is aware of the scheduled trial’ (Art. 4a(1)(a) FD 2002/584/JHA). Importantly, the substitute service and the fictitious service provide for a ‘presumption’ of serving a summons on the defendant. Consequently, the service of a summons is deemed effective if the summons was sent to the address indicated by the accused to the competent authorities, even when there is no confirmation that the defendant actually received the summons. Finally, neither the literature nor the interviewees identified correlation between the practice of service and the practice concerning EAWs issued by Poland.

Regarding *in absentia* proceedings, under the CPC the general rule is that the presence of the accused at the main trial is not mandatory. The CPC adheres to the system based on the principle of freedom pursuant to which the accused has a right to participate in the main trial. Remarkably, the presence of the accused is mandatory only in limited circumstances pursuant to the CPC. In the words of Gardocka,⁴²⁹ currently conducting judicial proceedings in the absence of the accused is *a standard practice*. Noteworthy, the presiding judge or the court retain discretion to decide that the presence of the accused at the main trial is mandatory (Art. 374 § 1 of the CPC). In consequence, the presence of the accused may be ordered mandatory in the course of the main trial. If the accused fails to appear, the presiding judge or the court may order coercive

⁴²⁸ C-108/16 PPU - *Dworzecki* [2016] ECLI:EU:C:2016:346, para. 45.

⁴²⁹ Gardocka 04-06-2018.

measures. On the other hand, in certain circumstances even in cases where the presence of the accused is mandatory, the main trial may be conducted in the absence of the accused. Moreover, under the CPC it is irrelevant whether the accused was not present at the trial itself but was present at the hearing at which the court pronounced the judgement. The same applies for cases where in course of the trial several hearings are held and the accused is present at some but not all of these hearings.

In the above-discussed circumstances, it is assumed that the accused decided not to exercise his right to participate in the main trial. The legislator justified the introduction of the principle of freedom by the wish to respect the choice of the accused and deviate from the paternalistic approach. However, similarly to the problems concerning proportionality in issuing EAWs by the Polish judicial authorities, the legislator disregarded the wider context in relation to *in absentia* proceedings. The report identified significant differences between the assumption of the legislator (i.e. the accused has the right to participate in the trial and he may consciously decide not to appear as part of his defence strategy) and the reality. The relation between academic sources and empirical data concerning *in absentia* proceedings in Poland is of interest. The first group of sources generally expressed favourable attitude towards the principle of freedom. The latter type of sources revealed that the accused tend to neither understand their rights nor treat their obligations towards the administration of justice with due diligence. Finally, the problem identified by the interviewees cannot be solved by means of a subsequent legislative amendment to the CPC. Therefore, if the legislator wishes to actually grant the accused the choice as to whether they appear at the trial or not, at first the legislator should ensure that Polish society receives substantial civic education concerning their rights and duties towards the state.

XI. Bibliography

Primary sources:

Projekt ustawy – o zmianie ustawy – Kodeks Karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks wykroczeń wraz z projektem podstawowego aktu wykonawczego [Draft Bill Amending the Criminal Code, Criminal Procedure Code and Minor Offences Code with the Draft Executive Regulation] Doc. No. 2031 of 19 Sept. 2003

Projekt ustawy o zmianie ustawy – Kodeks postępowania karnego i niektórych innych ustaw [Draft Bill Amending the Code of Criminal Procedure and other legislative acts]. Doc. No. 870 of 8 November 2012

Projekt ustawy o zmianie Konstytucji Rzeczypospolitej Polskiej z dnia 12 Maja 200 [Draft Bill on the Amendment of the Constitution of the Republic of Poland], Doc. No. 580 of 12 May 2006

Rządowy projekt ustawy o zmianie ustawy - Kodeks karny i niektórych innych ustaw [Governmental Draft Bill Amending the Criminal Code and other legislative acts]. Doc. no. 4342 of 20 June 2011

Rozporządzenie Ministra Sprawiedliwości z dnia 24 lutego 2012 r. w sprawie określenie wzoru europejskiego nakazu aresztowania [The Regulation of the Minister of Justice of 24 February 2012 concerning the form of the European arrest warrant]. Dziennik Ustaw [Journal of Laws], (2012), item 266

Rozporządzenie Ministra Sprawiedliwości z dnia 23 grudnia 2015 r., Regulamin urzędowania sądów powszechnych z dnia 23 grudnia 2015 r. [The Regulation of the Minister of Justice of 23 December 2015, Regulations of functioning of the common courts]. Dziennik Ustaw [Journal of Laws], (2015), item. 2316

Ustawa z dnia 18 marca 2004 r. o zmianie ustawy — Kodeks karny, ustawy — Kodeks postępowania karnego oraz ustawy — Kodeks wykroczeń [Bill of 18 March 2004 on Amendments to the Criminal Code, the Criminal Procedure Code and the Petty Offences Code]. Dziennik Ustaw [Journal of Laws], (2004), Doc. No. 69, item. 626

Ustawa z dnia 8 września 2006 r. o zmianie Konstytucji Rzeczypospolitej Polskiej [Bill of 8 September 2006 on the Amendment to the Constitution of the Republic of Poland] Dziennik Ustaw [Journal of Laws], (2006), Doc. No. 200, item. 1471

Ustawa o zmianie ustawy – Kodeks Postępowania Karnego oraz niektórych innych ustaw z dnia 27 września 2013 r. [Bill Amending the Code of Criminal Procedure and other legislative acts of 27 September 2013] Dziennik Ustaw [Journal of Laws], (2013), item 1247

Ustawa z dnia 11 marca 2016 r. o zmianie ustawy - Kodeks postępowania karnego oraz niektórych innych ustaw [Bill of 11 March 2016 Amending the Code of Criminal Procedure and other legislative acts], Dziennik Ustaw [Journal of Laws], (2016), item. 437

Ustawa z dnia 29 lipca 2011r. o zmianie ustawy - Kodeks karny, ustawy - Kodeks postępowania karnego oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary [Bill of 29 July 2011 Amending the Criminal Code, the Code of Criminal Procedure and Corporate Criminal Liability Act], Dziennik Ustaw [Journal of Laws], (2011), Doc. No. 191, item. 1135

Ustawa z dnia 5 listopada 2009 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks karny wykonawczy, ustawy – Kodeks karny skarbowy oraz niektórych innych ustaw [Bill of 5 November 2009 Amending the Criminal Code, the Code of Criminal Procedure, Executive Criminal Code, Tax Penal Code and some other legislative acts]. Dziennik Ustaw [Journal of Laws], (2009), Doc. No. 206, item. 1589

Case law:

Court of Justice of the European Union:

C-294/16 PPU *JZ v. Prokuratura Rejonowa Łódź – Śródmieście*, [2016] EU: C:2016:610

C-108/16 PPU - *Dworzecki* [2016] ECLI:EU:C:2016:346

C-216/18 PPU, *Minister for Justice and Equality v LM*, [2018] (still pending at the time of writing 06/2018)

Poland:

Postanowienie Sądu Najwyższego z dnia 21 maja 2008 r. [Judgement of the Supreme Court of 21st of May 2008], V KZ 27/08

Postanowienie Sądu Najwyższego z dnia 21 kwietnia 2005 r.[Decision of the Supreme Court of the 21st April 2005], II KO 59/04

Postanowienie Sądu Najwyższego z dnia 19 kwietnia 2005 r. .[Decision of the Supreme Court of the 19th April 2005], II KO 75/04

Postanowienie Sądu Najwyższego z dnia 17 stycznia 2013 r. [Decision of the Supreme Court of the 17th of January 2013], V KK 160/12

Postanowienie Sądu Apelacyjnego we Wrocławiu z dnia 11 grudnia 2009 r. [Decision of the Appellate Court in Wrocław of the 11th of December 2009], II AKz 631/09

Postanowienie Sądu Najwyższego z dnia 16 listopada 1998 r. [Decision of the Supreme Court of the 16th of November 1998], III KZ 138/98

Postanowienie Sądu Apelacyjnego w Katowicach - II Wydział Karny z dnia 11 maja 2016 r. [Decision of the Appellate Court in Katowice – II Criminal Division of the 11th of May 2016], II AKz 219/16

Postanowienie Sądu Najwyższego - Izba Karna z dnia 10 stycznia 2013 r. [Decision of the Supreme Court – Criminal Division of the 10th of January 2013], III KK 123/12

Postanowienie Sądu Najwyższego z dnia 10 stycznia 2013 r. [Decision of the Supreme Court of the 10th of January 2013], III KK 123/12

Postanowienie Sądu Najwyższego z dnia 8 listopada 2006 r. [Decision of the Supreme Court of the 8th of November 2006], III KK 83/06

Postanowienie Sądu Najwyższego - Izba Karna z dnia 15 stycznia 2002 r. [Decision of the Supreme Court – Criminal Division of the 15th of January 2002], V KZ 56/01

Postanowienie Sądu Najwyższego z dnia 15 stycznia 2002 r. [Decision of the Supreme Court], V KZ 56/01

Postanowienie Sądu Najwyższego z dnia 13 listopada 1996 r. [Decision of the Supreme Court of the 13th of November 1996], III RN 27/96

Postanowienie Sądu Najwyższego z dnia 17 czerwca 2003 r. [Decision of the Supreme Court of the 17th of June 2003], II KK 11/03

Postanowienie Sądu Najwyższego z dnia 12 listopada 2007 r. [Decision of the Supreme Court of the 12th of November 2007], III KK 402/06

Postanowienie Sądu Najwyższego - Izba Karna z dnia 23 sierpnia 2017 r. [Decision of the Supreme Court of the 23rd of August 2017], V KK 307/17

Postanowienie Sądu Najwyższego z dnia 28 marca 2007 r. [Decision of the Supreme Court of the 28th of March 2007], II KK 231/06

Postanowienie Sądu Najwyższego z dnia 13 lipca 2005 r. [Decision of the Supreme Court of the 13th of July 2005], II KK 388/04

Postanowienie Sądu Najwyższego - Izba Karna z dnia 1 marca 2017 r. [Decision of the Supreme Court – Criminal Division of the 1st of March 2017], SDI 95/16

Postanowienie Sądu Najwyższego - Izba Karna z dnia 29 sierpnia 2012 r. [Decision of the Supreme Court of the 29th of August 2012], V KZ 46/12

Postanowienie Sądu Apelacyjnego w Katowicach - II Wydział Karny z dnia 12 lipca 2016 r. [Decision of the Appellate Court in Katowice – II Criminal Division of the 12th of July 2016], II AKz 306/16

Postanowienie Sądu Apelacyjnego w Katowicach - II Wydział Karny z dnia 5 maja 2017 r. [Decision of the Appellate Court – II Criminal Division of the 5th of May 2017], II AKz 293/17

Postanowienie Sądu Apelacyjnego w Katowicach z dnia 3 lutego 2010 r. [Decision of the Appellate Court in Katowice of the 3rd of February 2010], II AKz 38/10

Postanowienie Sądu Apelacyjnego w Katowicach z dnia 8 czerwca 2010 r. [Decision of the Appellate Court in Katowice of the 8th of June 2010], II AKz 502/10

Postanowienie Sądu Apelacyjnego w Łodzi z dnia 15 lipca 2009 r. [Decision of the Appellate Court in Łódź], II AKz 470/09

Postanowienie Sądu Apelacyjnego w Katowicach z dnia 3 czerwca 2009 r. [Decision of the Appellate Court in Katowice of the 3rd of June 2009] II AKz 335/09

Postanowienie Sądu Okręgowego w Tarnowie z dnia 26 stycznia 2004 r. [Decision of the Circuit Court in Tarnów of the 26th of January 2004], II Kop 17/04

Postanowienie Sądu Apelacyjnego w Warszawie z dnia 4 marca 2010 r. [Decision of the Appellate Court in Warsaw of the 4th of March 2010], II AKz 138/10

Postanowienie Sądu Apelacyjnego w Krakowie z dnia 7 kwietnia 2009 r. [Decision of the Appellate Court in Kraków of the 7th of April 2009], II AKo 31/09

Postanowienie Sądu Apelacyjnego w Katowice z dnia 27 maja 2009 r. [Decision of the Appellate Court in Katowice of the 27th of May 2009], II AKz 343/09

Postanowienie Sądu Apelacyjnego w Łodzi - II Wydział Karny z dnia 20 lipca 2011 r. [Decision of the Appellate Court in Łódź – II Criminal Division of the 20th of July 2011], II AKz 380/11

Postanowienie Sądu Apelacyjnego w Warszawie z dnia 6 sierpnia 2004 r. [Decision of the Appellate Court of Warsaw of the 6th of August 2004], II AKz 391/04

Postanowienie Sądu Apelacyjnego w Katowicach - II Wydział Karny z dnia 5 lutego 2014 r. [Decision of the Appellate Court in Katowice – II Criminal Division of the 5th of February 2014], II AKz 60/14

Postanowienie Sądu Najwyższego z dnia 21 kwietnia 2005 r. [Decision of the Supreme Court of the 21st of April 2005], II KO 59/04

Postanowienie Sądu Najwyższego z dnia 19 kwietnia 2005 r. [Decision of the Supreme Court of the 19th of April 2005], II KO 75/04

Postanowienie Sądu Najwyższego z dnia 21 maja 2008 r. [Decision of the Supreme Court of the 21st of May 2008], V KZ 27/08

Postanowienie Sądu Najwyższego - Izba Karna z dnia 20 października 1998 r. [Decision of the Supreme Court – Criminal Division of the 20th October 1998], III KZ 182/98

Uchwała Sądu Najwyższego z dnia 20 stycznia 2005 r. [Resolution of the Supreme Court of the 20th of January 2005], I KZP 29/04

Wyrok Trybunału Konstytucyjnego z dnia 27 kwietnia 2005r., [Judgement of the Constitutional Tribunal of the 27th April 2005] P-1/05 *Stosowanie Europejskiego Nakazu Aresztowania do obywateli polskich* [Executing European Arrest Warrant against Polish nationals], OTK ZU [Jurisdiction of the Constitutional Tribunal. Official Collection] No 4/A/2005, item 42

Wyrok Sądu Najwyższego z dnia 24 czerwca 2008 r. [Judgement of the Supreme Court of the 24th of June 2008], III KK 49/08

Wyrok Sądu Najwyższego - Izba Karna z dnia 23 stycznia 2014 r. [Judgement of the Supreme Court – Criminal Division of the 23rd January 2014], V KK 268/13

Wyrok Sądu Najwyższego z dnia 12 stycznia 2009 r. [Judgement of the Supreme Court of the 1st of January 2009], II KK 18/07

Wyrok Sądu Najwyższego z dnia 23 maja 2013 r. [Judgement of the Supreme Court of the 23rd of May 2013], III KK 96/13

Wyrok Sądu Najwyższego z dnia 29 stycznia 2014 r. [Judgement of the Supreme Court of the 29th of January 2008], IV KK 425/13

Wyrok Sądu Najwyższego z dnia 28 czerwca 2007 r. [Judgement of the Supreme Court of the 28th of June 2007], III KK 179/07

Wyrok Sądu Najwyższego z dnia 2 marca 2005 r. [Judgement of the Supreme Court of the 2nd of March 2005], IV KK 344/04

Wyrok Sądu Najwyższego z dnia 6 czerwca 2011 r. [Judgement of the Supreme Court of the 6th of June 2011], V KK 174/11

Wyrok Sądu Apelacyjnego w Katowicach z dnia 27 stycznia 2012 r. [Judgement of the Appellate Court in Katowice the 27th of January 2012], II AKa 519/11

Wyrok Sądu Najwyższego z dnia 17 lutego 1984 r. [Judgement of the Supreme Court of the 2nd of April 2008], IV KR 134/83

Wyrok Sądu Najwyższego - Izba Karna z dnia 16 grudnia 2016 r. [Judgement of the Supreme Court of the 16th of December 2016], III KK 297/16

Wyrok Sądu Apelacyjnego w Białymstoku w II Wydziale Karnym z dnia 20 czerwca 2016 r. [Judgement of the Appellate Court in Białystok – II Criminal Division of the 20th of June 2016], II AKa 65/16

Wyrok Sądu Najwyższego z dnia 4 lutego 2009 r. [Judgement of the Supreme Court of the 4th of February 2009], V KK 331/08

Wyrok Sądu Najwyższego z dnia 28 czerwca 2007 r. [Judgement of Supreme Court of the 28th of June 2007], III KK 179/07

Wyrok Sądu Apelacyjnego w Katowicach z dnia 27 stycznia 2012 r. [Judgement of the Appellate Court in Katowice of the 27th of January 2012], II AKa 519/11

Wyrok Sądu Najwyższego z dnia 2 kwietnia 2008 r. [Judgement of the Supreme Court of the 2nd of April 2008], III KK 472/07

Wyrok Sądu Apelacyjnego we Wrocławiu - II Wydział Karny z dnia 6 lutego 2014 r. [Judgement of the Appellate Court in Wrocław II Criminal Division of the 6th of February 2014] II AKz 29/14

Wyrok Sądu Apelacyjnego w Szczecinie - II Wydział Karny z dnia 29 grudnia 2016 r. [Judgement of the Appellate Court in Szczecin – II Criminal Division of the 29th of December 2016], II AKa 145/16

Rada Legislacyjna [Legislative Council] 2004

Rada Legislacyjna; ‘Opinia o projekcie ustawy o zmianie ustawy – Kodeks karny oraz ustawy – Kodeks postępowania karnego [europejski nakaz aresztowania]’ [Legislative Council, ‘Opinion on the Bill amending the Criminal Code and Criminal procedure Code [European Arrest Warrant]] (author’s translation). *Przegląd Legislacyjny* 42, 2004

Rada Legislacyjna [Legislative Council] 2004

Rada Legislacyjna; ‘Opinia z 14 sierpnia 2003 r. o projekcie ustawy o zmianie ustawy – Kodeks karny oraz ustawy – Kodeks postępowania karnego’ [Legislative Council,

‘Opinion of the 14th August 2003, on the Bill amending the Criminal Code and Criminal Procedure Code’] (author’s translation). *Przegląd Legislacyjny* 2, 2004, s. 156

Commentaries:

Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary] 2012

Piotr Hofmański (ed.); *Kodeks postępowania karnego. Komentarz do artykułów 468-682. Tom III*. [The Code of Criminal Procedure. Commentary to Articles 468-682. Volume III] (author’s translation) 4th edition (2012), retrived from Legalis-C.H. Beck, last accessed on 27 June 2018

Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary] 2013

Jan Grajewski et al. (ed.); *Kodeks Postępowania Karnego. Komentarz*. [The Code of Criminal Procedure], 2013

Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary] 2014

Katarzyna Boratyńska et al.; *Kodeks Postępowania Karnego. Komentarz*. [The Code of Criminal Procedure. Commentary] (author’s translation) 5th edition (2014), retrieved from Legalis-C.H. Beck, last accessed on 29 June 2018

Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary] 2016

Sławomir Buczma et al.; *Postępowanie w sprawach karnych ze stosunków międzynarodowych. Komentarz do Działu XIII KPK*. [Procedure in criminal cases in international relations. Commentary to Division XIII of the CPC] (author’s translation) (2016), retrieved from Legalis-C.H. Beck, last accessed on 28 June 2018

Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary] 2018

Jerzy Skorupka et al.; *Kodeks Postępowania Karnego. Komentarz*. [The Code of Criminal Procedure. Commentary] (author’s translation) (2018), retrieved from Legalis-C.H. Beck, last accessed on 28 June 2018

**Kodeks Postępowania Karnego [The Code of Criminal Procedure] [Commentary]
2018**

Andrzej Sakowicz et al.; *Kodeks Postępowania Karnego. Komentarz*. [The Code of Criminal Procedure. Commentary] (author's translation) (2018), retrieved from Legalis-C.H. Beck, last accessed on 28 June 2018

Translated legislation:

Kodeks postępowania karnego [The Code of Criminal Procedure]

Kodeks postępowania karnego z dnia 6 czerwca 1997 r. (Dz. U. z 2017 r. poz. 1904 ze zm.) [The Code of Criminal Procedure of 6 June 1997 consolidated text, Journal of Laws of 2017, item 1904, as amended] as translated in: Joanna Ewa Adamczyk *The Code of Criminal Procedure*. 2nd edition, Warsaw: C. H. Beck, 2018 [English]

Secondary sources:

Bieńkowska et al. 2012

Beata Bieńkowska et al. (Ed.); *Wykład prawa karnego procesowego*. 2nd edition, Białystok: Temida 2, 2012

Bodnar 2016

Adam Bodnar; 'Do Ministra Sprawiedliwości ws. doręczeń pism procesowych i innej dokumentacji w postępowaniu karnym' [To the Minister of Justice in regard to service of writs in criminal proceedings] (author's translation) [Report] No. II.511.330.2016.VV, Warsaw: Biuro Rzecznika Praw Obywatelskich

Boratyńska 2016

Katarzyna Boratyńska et al.; *Postępowanie Karne* [Criminal Procedure]. 2nd edition, Warsaw: C. H. Beck, 2016

Budziło 2014

Krzysztof Budziło (ed.); *Selected Rulings of the Polish Constitutional Tribunal Concerning the Law of the European Union (2003-2014)*. Warsaw: Biuro Trybunału Konstytucyjnego, 2014

Dori 06-06-2018

Adriani Dori; 'Hic Rhodus, hic salta: The ECJ Hearing of the Landmark "Celmer" Case', in: *Verfassungsblog*, 06-06-2018. Retrieved via <https://verfassungsblog.de/hic-rhodus-hic-salta-the-ecj-hearing-of-the-landmark-celmer-case/> , last visited on 29 June 2018

Drajewicz 2014

Dariusz Drajewicz; 'Nieobecność oskarżonego na rozprawie głównej (art. 376 k.p.k.)' [Absence of the accused at the main trial (Art. 376 of the CPC)]. *Prawo i Prokuratura* 5, 2014, p. 25-50

Drajewicz 2015

Dariusz Drajewicz; 'Nieobecność oskarżonego na rozprawie w znowelizowanym Kodeksie postępowania karnego' [Absence of the defendant at a hearing as provided for in the amended Code of Penal Procedure]. *Monitor Prawniczy* 11, 2015, p. 574-583

Gapska & Gapski 2015

Edyta Gapska & Maciej P. Gapski; 'Doręczenie pisma dorosłemu domownikowi w postępowaniach sądowych i administracyjnych' [Service of Documents on an Adult Household Member in Judicial and Administrative Proceedings]. *Zeszyty Prawnicze* 15 (1), Katolicki Uniwersytet Lubelski Jana Pawła II, 2015, p. 1-46

Gardocka 2011

Teresa Gardocka; 'Europejski Nakaz Aresztowania. Analiza polskiej praktyki występowania do innych państw Unii Europejskiej z wnioskiem o wydanie osoby trybem europejskiego nakazu aresztowania' [Report] [European Arrest Warrant. Analysis of the Polish practice of issuing European Arrest Warrants to other Member States of the European Union]. *Instytut Wymiaru Sprawiedliwości*, 2011

Gardocka & Jagiello 2014

Teresa Gardocka & Dariusz Jagiello; 'The European arrest warrant sent from Poland to European Union states – practical remarks', in: Effectiveness of Extradition and the European Arrest Warrant'. Olsztyn: Wydawnictwo Uniwersytetu Warmińsko-Mazurskiego, 2014, p. 57-74

Górski & Sakowicz 2006

Adam Górski & Andrzej Sakowicz; 'Na przekór prawu UE. Implementacja europejskiego nakazu aresztowania' [In defiance of EU law. Implementation of European Arrest Warrant] (author's translation) *Analizy natolińskie 7 (11)*, Warszawa: Centrum Europejski Natolin, 2006, p. 1-8

Grzeszczak 2018

Robert Grzeszczak; *Pytania prejudycjalne w obszarze praw człowieka. Praktyczny podręcznik dla sędziów* [Preliminary rulings in the area of human rights. The manual for judges]. Warsaw: Helsinki Foundation of Human Rights, 2018. Retrieved via <http://www.hfhr.pl/wp-content/uploads/2018/06/Pytania-prejudycjalne-streszczenie-web.pdf>, last visited on 27 June 2018

Holub 2009

Jarosław Holub; 'Europejski nakaz aresztowania' (European Arrest Warrant). *Przegląd Bezpieczeństwa Wewnętrznego I (1)*, 2009, p. 125-136

Jakubiec 2015

Marek Jakubiec; 'Europejski nakaz aresztowania jako instrument europejskiej współpracy w sprawach karnych w świetle zasady podwójnej karalności' (European Arrest Warrant as the Instrument of the European Cooperation in Criminal Matters in Light of the Double Criminality Principle). *Internetowy Przegląd Prawniczy TBSP UJ 3*, 2015, p. 181-197

Karski 2012

Karol Karski; 'Geneza i skutki nowelizacji art. 55 Konstytucji RP: spojrzenie z punktu widzenia intencji ustrojodawcy' (Genesis and consequences of the amendment of Art. 55 of the Polish Constitution: analysis of the point of view of the legislator's intentions). *Kwartalnik Prawa Publicznego 12 (4)*, 2012, p. 7-25

Łazowski 2005

Adam Łazowski; 'Poland: constitutional tribunal on the surrender of Polish citizens under the European Arrest Warrant. Decision of 27 April 2005'. *European Constitutional Law Review 1*, 2005, p. 569-581

Maczak 13-05-2018

Marcin Matczak; '10 Facts on Poland for the Consideration of the European Court of Justice', in: *Verfassungsblog*, 13-05-2018. Retrieved via <https://verfassungsblog.de/10-facts-on-poland-for-the-consideration-of-the-european-court-of-justice/> , last visited on 29 June 2018

Malinowska-Krutul 2007

Karolina Malinowska-Krutul; 'Ektradycja a przekazanie w ramach europejskiego nakazu aresztowania' (Extradition and surrender on the basis of the European arrest warrant). *Prokuratura i Prawo* 6, 2007, p. 100-114

Muś 2006

Teresa Muś (ed.); 'Nowelizacja art. 55 Konstytucji RP przez Sejm V Kadencji' (Amendment to Art. 55 of the Constitution of the Republic of Poland by the Sejm of the 5th term). Warsaw: *Biuro Analiz Sejmowych* 1, 2006, p. 1-125

Nita 2007

Barbara Nita; 'Europejski nakaz aresztowania- europeizacja prawa karnego a standardy konstytucyjne państw członkowskich UE' [European arrest warrant – the europeanisation of criminal law and the constitutional standards in the member states of the European Union]. *Państwo i Prawo* 5, 2007

Nußberger 2008

Angelika Nußberger; 'Poland: The Constitutional Tribunal on the implementation of the European Arrest Warrant'. *International Journal of Constitutional Law* 6 (1), 2008, p. 162-170

Ostropolski 2013

Tomasz Ostropolski; 'Zasada proporcjonalności a europejski nakaz aresztowania' (The Proportionality Principle and the European Arrest Warrant). *Europejski Przegląd Sądowy*, 2013, p. 14-24

Plachta 2004

Michał Plachta; 'Opinia w sprawie projektu ustawy o zmianie Kodeksu karnego, Kodeksu postępowania karnego oraz Kodeksu wykroczeń (druk sejmowy nr 2031)' [The opinion concerning the draft bill amending the Criminal Code, the Code of Criminal Procedure, and the Petty Offences Code (doc. No. 2031)]. Warsaw: *Biuro Studiów i Ekspertyz*

The Polish Constitutional Tribunal Press Release 2005

Judgement of the Polish Constitutional Tribunal concerning European Arrest Warrant. The reference number of the case: P 1/05 (release of 27th April 2015). Retrieved from <http://www.statewatch.org/news/2005/apr/poland.pdf>, last visited on 29 June 2018

Praktyka stosowania europejskiego nakazu aresztowania w Polsce jako państwie wydającym [Practice of using the European arrest warrant in Poland as the issuing state] 2018.

Helsinki Foundation for Human Rights; 'Praktyka stosowania europejskiego nakazu aresztowania w Polsce jako państwie wydającym' [Practice of using the European arrest warrant in Poland as the issuing state] [Report]. 2018

Prokuratura Krajowa 22-12-2017

Prokuratura Krajowa [National Public Prosecutor's Office]; 'Europejski nakaz aresztowania wydaje sąd okręgowy, w którego okręgu prowadzone jest postępowanie przygotowawcze' [European arrest warrant is issued by the circuit court in whose judicial circuit the preparatory proceedings are conducted] (author's translation). Retrieved via <https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/europejski-nakaz-aresztowania-wydaje-sad-okregowy-ktorego-okregu-prowadzone-postepowanie-przygotowawcze/>, last accessed 29 June 2018

Ryczkowska 2010

Paulina Ryczkowska; 'Pojęcia i zasady wykonywania ENA' (Notion and rules of executing EAW) *Wrocławskie Studia Erazmiańskie* 5, 2010, p. 213-225

Sarnecki 2004

Paweł Sarnecki; 'Opinia w sprawie projektu ustawy o zmianie Kodeksu karnego, Kodeksu postępowania karnego oraz Kodeksu wykroczeń (druk sejmowy nr 2031)' [The opinion concerning the draft bill amending the Criminal Code, the Code of Criminal Procedure, and the Petty Offences Code (doc. No. 2031)]. Warsaw: *Biuro Studiów i Ekspertyz*

Skibińska 14-05-2018

Ewa Skibińska; 'Europejski nakaz aresztowania' (European arrest warrant). *Czasopisma online C. H. Beck*, 14-05-2018. Retrieved from <http://czasopisma.beck.pl/monitor->

prawniczy/drukuj/europejski-nakaz-aresztowania-7/podglad-wydruku/ last visited on 29 June 2018

Sobczak 2008

Jacek Sobczak; 'Europejski Nakaz Aresztowania – dylematy i wątpliwości. Perspektywa polska'. *Rocznik Integracji Europejskiej* 2, 2008, p. 21-42

Szewiola 21-11-2014

Paulina Szewiola; 'Niewielka liczba pytań prejudycjalnych polskich sądów? Safjan: To kwestia bariery psychologicznej autor' in: *Gazeta Prawna. Prawo*, 21-11-2014. Retrieved via <http://prawo.gazetaprawna.pl/artykuly/836937,niewielka-liczba-pytan-prejudycjalnych-polskich-sadow-safjan-to-kwestia-bariery-psychologicznej.html> , last visited on 27 June 2018

Van der Mei 2017

Anne Pieter van der Mei; 'The European Arrest Warrant system: Recent developments in the case law of the Court of Justice'. *Maastricht Journal of European and Comparative Law* 24 (6), 2017, p. 883-903

Wawrzyńczak-Mistyga 2016

Katarzyna Wawrzyńczak-Mistyga; 'Implementacja decyzji ramowej w sprawie ENA w Polsce i w Wielkiej Brytanii – dekada współpracy i perspektywa zmian' [Implementation of the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States in Poland and the United Kingdom – a decade of cooperation and perspective on changes]. *Przegląd Prawniczy Uniwersytetu Warszawskiego* 1, 2016, p. 211-240

Zachuta 2014

Andrzej Zachuta; 'Prowadzenie rozprawy głównej albo posiedzenie bez udziału oskarżonego w trybie Art. 377 Kodeks Postępowania Karnego'. *Kultura bezpieczeństwa. Nauka - Praktyka - Refleksje* 16, 2014, p. 489-503

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Teresa Gardocka – Dean of the Faculty of Law at the SWPS University in Warsaw, Professor at the Faculty of Law of the SWPS University in Warsaw, the main areas of expertise are criminal law, criminal proceedings, international criminal law. Information available at <https://www.swps.pl/nauka-i-badania/pracownicy-naukowi/biogramy/5969-teresa-gardocka>

Gajewska-Kraczkowska 05-06-2018

Hanna Gajewska-Kraczkowska – advocate (Adv.), a member of the Warsaw Bar Association, counsel at the DZP Law Firm, docent of Criminal Procedure at the University of Warsaw, the main areas of expertise are criminal law, criminal economic law, and criminal proceedings. Information available at <https://www.dzp.pl/zespol/dr-hanna-gajewska-kraczkowska/40>

Podhalańska 07-06-2018

Urszula Podhalańska – advocate (Adv.), a member of the Warsaw Bar Association, partner at the Pietrzak Sidor & Partners Law Firm, the main areas of expertise are criminal law, criminal economic law, and criminal proceedings, especially those of a transnational nature, in particular proceedings resulting from issuances of EAWs and extradition proceedings. Information available at <http://www.pietrzaksidor.pl/en/zespol/>