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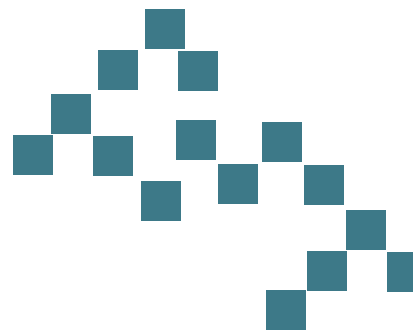
European Cooperation in Criminal Matters



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Wydawnictwo KUL, ul. Konstantynów 1 H
20-708 Lublin, tel. 81 45 45 678
e-mail: wydawnictwo@kul.lublin.pl
http://wydawnictwo.kul.lublin.pl

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Preface

Volume 3/2023 of the Review of European and Comparative Law is mostly devoted to the current problems of the European judicial cooperation in criminal matters. The main part of the volume consists of nine contributions concerning three topics: protection of fundamental rights in the judicial cooperation in criminal matters, perspectives for its further development and challenges in cross-border gathering of evidence in the EU.

Within the last few years the judicial cooperation in criminal matters in the European Union has, without a doubt, faced many challenges. An optimistic presumption of the minimum standard of protection of fundamental rights being offered in all EU legal systems has been negatively verified by the case-law of the Court of Justice of the European Union. Since such a presumption safeguarded smooth and effective mutual recognition of criminal decisions throughout the EU, the erosion of human rights protection was bound to result in a weakening of mutual trust between the Member States. Problems arising in this regard were addressed in the two first contributions to the volume, authored by Andrzej Sakowicz and Christina Peristeridou.

Tensions between the need to respect the rights of a suspect on one hand and smooth recognition and execution of judicial decisions on the other are particularly visible in the European Arrest Warrant (EAW) procedure. This valid topic was analyzed comparatively from Polish and Dutch perspective in the next paper of the volume. Vincent Glerum and Małgorzata Wąsek-Wiaderek focus on time-limits of detention on remand in the EAW procedure and the problem of the executing judicial authority responsible for applying detention pending surrender.

Although the package of EU directives concerning the rights of the suspects was conceived as a tool for strengthening the mutual trust, their implementation by the EU Member States appears unsatisfactory. As argued by André Klip in his contribution, even proper translation and interpretation of the Letter of Rights for the suspects do not relieve some Member States from what appear to be unavoidable problems in this respect. As proved by the Author, shortages in translation of the Letter of Rights may deprive the suspect of his right to defense.

The next contribution, provided by Vincent Glerum and Hans Kijlstra, outlines the desired developments in the judicial cooperation in criminal matters. The Authors argue that when applying instruments concerning judicial cooperation more attention should be devoted to the requirements of proportionality, effective judicial protection and coherence. The article proposes amendments to the existing legal and practical framework in line with the above-mentioned principles.

No right is substantive without a proper remedy. Therefore, the contribution of Paweł Wiliński and Karolina Kiejnich-Kruk focuses on critical analysis of remedies provided in two EU directives concerning the rights of the suspects. The Authors assess the chances to achieve the harmonisation of minimal standards with reference to access to effective remedies in the area of criminal procedure in EU.

The three remaining articles relate to the gathering of evidence in EU based on the European Investigation Order (EIO). In their paper, Sławomir Steinborn and Dawid Świeczkowski focus on the scope of possible verification in the issuing state of admissibility of evidence obtained upon the EIO, with a particular emphasis on the evidence which was not produced upon a request, but was rather already in possession of executing state authorities.

Eventually, the article of Marek Smarzewski and the commentary to the decision of the Polish Supreme Court elaborated by Jakub Kosowski concern the protection of banking secrecy in the framework of issuing the European Investigation Order in Poland. Both Authors wonder which authority (the public prosecutor or the court) should be authorised to issue the EIO when it comes to the information protected by banking secrecy.

We are deeply convinced that the papers published in this issue constitute an important contribution to the discussion currently taking place among both practitioners and academics about the future of the European judicial cooperation in criminal matters.

Marek Smarzewski
Małgorzata Wąsek-Wiaderek
Co-editors of the volume

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Erosion of the Principle of Mutual Recognition. European Arrest Warrant and the Principle of Mutual Recognition in the Light of the Recent CJEU Rulings

Andrzej Sakowicz
Professor, Dr. habil., Department of Criminal Proceeding, Faculty of Law, University of Bialystok, correspondence address: University of Bialystok, Mickiewicza 1, 15-213 Bialystok, Poland, e-mail: sakowicz@uwb.edu.pl
https://orcid.org/0000-0001-6599-4876

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Abstract: Effective implementation of mutual recognition in the Area of Freedom, Security, and Justice requires mutual trust between the Member States. Mutual trust has been eroded in some Member States due to the rule of law crisis. However, it is not only the rule of law crisis, but also the abandonment of the shared values of respect for fundamental rights as well as the differences in the prosecutorial systems of respective Member States, which have caused changes in the perception of the principle of mutual recognition. This paper will examine the evolving approach to the principle of mutual recognition based on the recent Court of Justice of the European Union rulings on the European arrest warrant. The analysis concludes that the CJEU attaches more importance to the protection of the principle of mutual recognition, the prosecution of perpetrators of crime, and the unwavering presumption of respect for fundamental rights by the Member States than to the effective protection of fundamental rights.

1. Introduction

It has been 25 years since the meeting of the European Council in Cardiff (15–16 June 1998) and its expression of its position on the need to start the process to improve mutual recognition and execution of judgements in criminal cases. The Cardiff meeting indicated that mutual recognition of criminal judgements was intended to strengthen the effective cooperation

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in criminal matters for the purpose of preventing cross-border crime, while, according to some researchers, also providing an alternative to the process of harmonisation of criminal law.[1] In essence, it was "the recognition by each Member State of decisions of courts from other Member States with a minimum of procedure and formality." In the following years, the European Council held a summit in Tampere (15–16 October 1999), which resulted in a declaration that mutual recognition of court decisions and judgements was to become a "milestone" of the cooperation in criminal as well as civil cases.[2] The Communication from the Commission to the Council and the European Parliament[3] was adopted on 26 July 2000. It concerned

1 See: Hans Nilsson, "Mutual Trust or Mutual Mistrust?," in *La Confiance Mutuelle Dans l'Espace Pénal Européen/Mutual Trust in the European Criminal Area*, eds. Gilles de Kerchove and Anne Weyembergh (Brussels: de l'Université de Bruxelles, 2005), 29; Valsamis Mitsilegas, "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU," *Common Market Law Review* 43, no. 5 (2006): 1278; Valsamis Mitsilegas, *EU Criminal Law* (Oxford: Hard Publishing, 2009), 116; Steve Peers, "Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?," *Common Market Law Review* 41, no. 5 (2004): 5–36; Susie Alegre and Marisa Leaf, "Mutual Recognition in European Judicial Cooperation: A step Too Far Too Soon? Case Study – the European Arrest Warrant," *European Law Journal* 10, no. 2 (2004): 200–217; Andrzej Sakowicz, "Some Reflections on the Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs," in *Current Problems of the Penal Law and the Criminology. Aktuelle Probleme des Strafrechts und der Kriminologie*, ed. Emil W. Pływaczewski (Białystok: Temida 2, 2009), 493–507.

2 "Presidency Conclusions, Tampere European Council, 15–16 October 1999," Council of the European Union, October 16, 1999, accessed March 21, 2023, https://www.refworld.org/docid/3ef2d2264.html. In point 33 we read that "Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities." See: Maria Fletcher, Robin Lööf, and Bill Gilmore, *EU Criminal Law and Justice* (Cheltenham: Edward Elgar Publishing, 2008), 105; Guy Stressens, "The Principle of Mutual Confidence between Judicial Authorities in the Area of Freedom, Justice and Security," in *L'espace pénal européen: enjeux et perspectives*, eds. Gilles de Kerchove and Anne Weyembergh (Bruxelles: Editions de l'Université de Bruxelles, 2002), 93.

3 Communication from the Commission to the Council and the European Parliament. Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495.

the issue of mutual recognition of judgements ending criminal proceedings,[4] and the European Council promulgated the Hague Programme,[5] that reaffirmed the importance of the principle of mutual recognition in the formation of a single judicial area.[6]

The above documents indicate that recognition of judgements generally implies their automatic acceptance and enforcement. It seems that the "automatism" of performance is a peculiar specificity of mutual recognition. It may lead to the situation where a judgement is recognised and enforced even in the case where the authorities of a particular Member State would not have issued such a judgement in their own legal system. This has been dictated not only by the growing need for a uniform judicial area within the EU, but by an insufficient process of harmonisation of criminal law. The rulings of the Court of Justice of the European Union (hereinafter the Court or the CJEU) concerning the *ne bis in idem* principle issued in the pre-Lisbon period excellently exemplify those facts. The joined cases *Hüseyin Gözütok* (C-187/01) and *Klaus Brügge* (C-385/01),[7] seeing

4 The Communication indicated that judicial cooperation could be based on the concept of mutual recognition "which, simply stated, means that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure in so far as it has extranational implications – would automatically be accepted in all other Member States, and have the same or at least similar effects there."

5 The Hague Programme: strengthening freedom, security and justice in the European Union, OJ C 53, 3.3.2005, pp. 1–14; Anne Weyembergh, "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme," *Common Market Law Review* 42, no. 6 (2005): 1574–1577.

6 Mitsilegas, *EU Criminal Law*, 116.

7 CJEU Judgement of 11 February 2003, *Hüseyin Gözütok and Klaus Brügge*, Case C-187/01 et C-385/01, ECLI:EU:C:2003:87, para. 33; Nadine Thwaites, "Mutual Trust in Criminal Matters: The ECJ Gives a First Interpretation of a Provision of the Convention Implementing the Schengen Agreement. The Judgement of 11 February 2003 in Joined Cases C-187/01 and C-385/01, Hüseyin Gözütok and Klaus Brügge," *German Law Journal* 4, no. 3 (2003): 252–262; Gerard Conway, "Judicial Interpretation and the Third Pillar. Ireland's Acceptance of the European Arrest Warrant and the Gözütok and Brügge Case," *European Journal of Crime, Criminal Law and Criminal Justice* 13, no. 2 (2005): 280–281; John A.E. Vervaele, "Case Law. Joined Cases C-187/01 and C-385/01, Criminal Proceedings against Hüseyin Gözütok and Klaus Brügge, Judgement of the Court of Justice of 11 February 2003," *Common Market Law Review* 41, no. 3 (2004): 795–812; Anne Weyembergh, "Comment on CJEU, 11 February 2003, Joined Cases C-187/01 and C-385/01 Criminal Proceedings v Hüseyin Gözütok and Klaus Brügge," in *The Court of Justice and European Criminal Law: Leading*

the differences in the operation of the judicial authorities of the Member States and noting the differences in their criminal policies, the Court stated that the *ne bis in idem* principle expressed in Article 54 of the Convention implementing the Schengen Agreement implied that "there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied." The CJEU came to a similar conclusion in the *van Esbroeck* case, where it recognised that the existence of different legal classifications of the same act in two countries cannot prevent the application of the *ne bis in idem* principle, precisely because of the mutual trust between the Member States, the identity of legal classification of such approach or the protected legal interest that does not necessarily requires specific conduct to be regarded as "the same act". The decisive criterion is the identity of the material acts understood as "the existence of a set of concrete circumstances which are inextricably linked together."[8] This statement is self-evident. In view of the diverse ways of expressing the statutory characteristics of criminal offences in the Member States, it is impossible to ensure the implementation of the guarantees provided by the *ne bis in idem* principle without accepting the existing differences in this regard.[9] More broadly, the trust that each Member State and its citisens should have in the administration of justice of other Member States is a logical consequence of the establishment of an area of freedom, security, and justice without internal borders, and the resistance of Member States

Cases in a Contextua Analysis, eds. Valsamis Mitsilegas, Alberto di Martino, and Leandro Mancano (Chicago: Hart Publishing, 2019), 199–211; Sibyl Stein, "Ein Meilenstein für das europäische ‚ne bis in idem'," *Neue Juristische Wochenschrift*, no. 16 (2003): 1162–1164; Daniel Thym, "Strafklageverbrauch bei Einstellung durch die StA," *Neue Zeitschrift für Strafrecht*, no. 6 (2003): 334–335.

8 CJEU Judgement of 9 March 2006, van Esbroeck, Case C-436/04, ECLI:EU:C:2006:165, point 36.

9 V. Mitsilegas demonstrates by examining the evolution of the *ne bis in idem* principle based on the Court's jurisprudence that the protection of fundamental rights can be the result of mutual trust; see Valsamis Mitsilegas, "The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice," *New Journal of European Criminal Law* 6, no. 4 (2015): 458–465.

to the concept of harmonisation of substantive and procedural criminal law by the EU legislature.

With the entry into force of the Treaty of Lisbon, the principle of mutual recognition found its way into the EU primary law. *De lege lata*, it is explicitly mentioned in Articles 67 (4), 70, 81 (1), and 82 of the TFEU. This allows for the assumption that the principle of mutual recognition is a constitutional principle that constitutes the basis of the Area of Freedom, Security and Justice. Although the adopted model of cooperation in criminal matters has been based on the respect for the differences and systemic autonomy in respective Member States, it is easier to trust and accept the decision of another country's court if the equivalence of national laws can be expected to be achieved at some point in the future. The original desire to use the mutual recognition mechanism as an alternative to harmonisation, which was dictated by the preservation of the status *quo* of national legal systems and the wrongly understood State's sovereign monopoly of power, could not be effective.[10] One must agree with P. Asp that it is unrealistic to effectively build the cooperation in criminal matters on the basis of the principle of mutual recognition while abandoning the process of harmonisation of criminal law.[11] Therefore, in Article 82 of the TFEU, it is rightly assumed that the cooperation in criminal matters within the EU is based on two methods: the principle of mutual recognition of judgements

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10 On the relationship between national sovereignty and the principle of mutual recognition, see Suzanne Andrea Bloks and Ton van den Brink, "The Impact on National Sovereignty of Mutual Recognition in the AFSJ. Case-Study of the European Arrest Warrant," *German Law Journal* 22, no. 1 (2021): 45–64; Massimo Fichera, "The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?," *European Law Journal* 15, no. 1 (2009): 70; Jan Komárek, "European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles," *Common Market Law Review* 44, no. 1 (2007): 9–40; Oresto Pollicino, "European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance Between Interacting Legal Systems," *German Law Journal* 9, no. 10 (2013): 1313–1355; Andrzej Sakowicz, *Zasada ne bis in idem w ujęciu paneuropejskim [The "ne bis in idem" Principle in Criminal Law in a Pan-European Perspective]* (Bialystok: Temida 2, 2011), 145–166.

11 Petter Asp, "Mutual Recognition and the Development of Criminal Law Cooperation within the EU," in *Harmonisation of criminal law in Europe*, eds. Erling Johannes Husabø and Asbjørn Strandbakken (Antwerpen–Oxford: Intersentia, 2005), 29.

and judicial decisions, and the approximation of laws and regulations of the Member States. Leaving aside the relationship between those mechanisms, the statement that harmonisation of criminal law contributes to a better implementation of mutual recognition should raise no objections. This condition is necessary, but not sufficient.[12]

Effective implementation of mutual recognition in the Area of Freedom, Security, and Justice requires mutual trust between the Member States.[13] The Member States must mutually accept the fact that their legal systems are based on this "foundation". There must be strong belief, including among both representatives of law enforcement authorities and judges of respective Member States, that the internal regulations of respective Member States are adopted by their legislatures with genuine and unquestionable democratic legitimacy derived from universal and free elections, and that they are based on the universal principles and values of the European legal culture. Those bodies must be aware that the legal systems of

12 Valsamis Mitsilegas, "Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice," *Common Market Law Review* 57, no. 1 (2020): 47.

13 Also Andrea Miglionico and Francesco Maiani, "One Principle to Rule Them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice," *Common Market Law Review* 57, no. 1 (2020): 13. The concept of mutual trust has been extensively elaborated by Auke Willems, see "Mutual Trust as a Term of Art in EU Criminal Law: Revealing Its Hybrid Character," *European Journal of Legal Studies* 9, no. 1 (2016): 211–249. A. Willems aptly notes that "Mutual recognition functions on a presumption of mutual trust. The logic is that the 'extraterritoriality of judicial decisions'" created by mutual recognition, will only be accepted if there is sufficient mutual trust between Member States," see Auke Willems, "The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal," *German Law Journal* 20, no. 4 (2019): 469. The CJEU also recognises mutual trust as a normative principle underlying cooperative regulatory instrument. In the Opinion 2/13 on the Accession of the EU to the European Convention on Human Rights (ECHR), the CJEU emphasised that "the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained," The CJEU Opinion 2/13 of 18 December 2014, point 191; Sacha Prechal, "Mutual Trust Before the Court of Justice of the European Union," *European Papers* 2, no. 1 (2017): 76. It should be noted that the relationship between mutual recognition and mutual trust is the subject of debate, see Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford: University Press, 2013); Jannemieke Ouwerkerk, *Quid Pro Quo?: A comparative law perspective on the mutual recognition of judicial decisions in criminal matters* (Larcier: Intersentia, 2011).

other countries, including in the area of criminal law, are characterised by a common standard of respect for the fundamental rights and freedoms of individuals. The standard does not have to be identical but must be convergent. Only then is it possible to move closer to effective and full implementation of the principle of mutual recognition. In this context, one must agree with the CJEU ruling, issued in respect of the *Puig Gordi and Others* case, that the high level of trust between Member States, on which the mutual recognition mechanism is based, is founded on the assumption that national courts issuing a European arrest warrant meet the requirements inherent in the fundamental right to a fair trial enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights. That fundamental right is of cardinal importance as it guarantees that all the rights which individuals derive from the EU law will be protected and that the values common to the Member States set out in Article 2 of the TEU, in particular the value of the rule of law, will be safeguarded.[14]

It would seem that with the creation of the single Area of Freedom, Security, and Justice, the integration process in the European criminal justice area would be strengthened. However, the opposite has happened, as illustrated by the recent case law of the CJEU concerning the European arrest warrant. Mutual trust has been eroded in some Member States (especially Poland and Hungary) due to the rule of law crisis. However, it is not only the rule of law crisis, but also the abandonment of the shared values of respect for fundamental rights by the Members States, as well as the differences in the prosecutorial systems of respective Member States, that have caused changes in the perception of the principle of mutual recognition. The purpose of this paper is to critically present those developments by means of the example of the case law of the CJEU on the "flagship" of mutual recognition, which undoubtedly is the European arrest warrant, and to point out the risks in the context of both the operation of the European Arrest Warrant and the very model of cooperation in criminal matters based on the principle of mutual recognition.

[14] CJEU Judgement of 31 January 2023, Puig Gordi and Others, Case C-158/21, ECLI:EU:C:2023:57; CJEU Judgement of 22 February 2022, Openbaar Ministerie, Case C562/21 PPU et C563/21 PPU, EU:C:2022:100, point 45.

2. Violation of the Fundamental Rights Imposing Limitation on the Principle of Mutual Recognition

The issue of protection of the fundamental rights in the area of freedom, security, and justice is complex. On the one hand, it can be seen that the legal framework based on the principle of mutual recognition has contributed to an enhanced protection of the fundamental rights. The supranational approach to the *ne bis in idem* principle in Article 54 of the Convention implementing the Schengen Agreement (Article 50 of the Charter of Fundamental Rights) is a good example. The fact that the *ne bis in idem* principle has received "supranational" application under Article 54 of the Schengen Convention is an expression of mutual trust in the legal systems of the Member States. It is thanks to mutual trust and the related mutual recognition of judgements in criminal cases, based on such trust, that it has become possible to protect individuals from being prosecuted again for the kindred offence, and that free movement of persons has become the reality as well as legal certainty has been guaranteed by respecting court judgements that have become finally enforceable despite the lack of harmonisation of the criminal legal regulations in the Member States.[15]

On the other hand, a normative possibility has provided for the refusal to execute mutual recognition instruments due to suspected violations of fundamental rights or basic principles of law. It is exemplified by Article 20(3) of the Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties[16] and Article 11(1)(f) of Directive 2014/41/EU regarding the European Investigation Order in criminal matters. There are few examples of this nature. The EU legislature has rarely pointed to the construction of fundamental rights as the basis for the refusal to implement a legal instrument. Usually, however, do mutual recognition instruments contain a general clause stating the need to respect the fundamental rights and the fundamental principles of law contained in Article 6 of the Treaty on European Union.[17]

15 See broadly Mitsilegas, "The Symbiotic Relationship," 459.

16 The Preamble to the same Directive 2014/41/UE affirms that the presumption of compliance by Member States with fundamental rights is rebuttable.

17 For example, Article 1(3) of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework

This is based on the assumption that membership in the European Union presumes the full respect of fundamental rights by all Member States, which, as emphasised by V. Mitsilegas, "creates mutual trust which in turn forms the basis of automaticity in inter-state cooperation in Europe's area of criminal justice."[18] However, there can be no automaticity in the application of the principle of mutual recognition in the enforcement of judgements. Although the cooperation needs to take place within a limited timeframe, under strict deadlines, and on the basis of a pro-forma form annexed to the Framework Decisions and directives, there is still a limited but exhaustive list of obligatory or optional grounds to refuse the recognition and execution of a judicial decision.[19] In addition, for the guarantee-related reasons, the list of obligatory grounds for any refusal to execute mutual recognition instruments cannot be reduced. The situation is different for optional grounds for any refusal. In this case, as the CJEU has stated in the *Wolzenburg* case,[20] a national legislature that chooses to limit the situations in which its executing judicial authority may refuse to surrender a requested person merely reinforces the system of surrender introduced by that Framework Decision to the advantage of the area of freedom, security, and justice.

As time has shown, the assumption based on a high level of mutual trust in the justice systems of the Member States has turned out to be an illusion. Quickly after the entry into force of the Treaty of Lisbon, which had

Decision, The Official Journal of the EU L 190, 18.7.2002, pp. 1–20. A similar approach regarding the protection of fundamental rights has been adopted in Article 3(4) of the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, The Official Journal of the EU L 327, 5.12.2008, pp. 27–46.

18 Mitsilegas, "The Symbiotic Relationship," 466; Valsamis Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice. From Automatic Inter-state Cooperation to the Slow Emergence of the Individual," *Yearbook of European Law* 31, no. 1 (2012): 319–372.

19 A different view is expressed by V. Mitsilegas, see Valsamis Mitsilegas, "The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness based on Earned Trust," *Revista Brasileira de Direito Processual Penal* 5, no. 2 (2019): 571–572.

20 CJEU Judgement of 6 October 2009, Wolzenburg, Case C-123/08, ECLI:EU:C:2009:616, point 58.

introduced a single legal regime within the European Union, there were symptoms in the case law of the Court indicating the possibility of limitation of the principle of mutual recognition by invoking the need to protect the fundamental rights. The CJEU was faced for the first time with the task of determining the normative position of fundamental rights in the European arrest warrant procedure under the case C-396/11, where Ciprian V. Radu claimed that the provisions of the Framework Decision on the EAW did not allow the executing authorities to check whether his right to a fair trial, the principle of presumption of innocence, and the right to liberty, which he derived from the Charter of Fundamental Rights and the European Convention on Human Rights (hereafter: the ECHR), were respected when the European arrest warrant was issued without his prior hearing. However, as C.V. Radu added, in accordance with Article 6 of the TEU, the provisions both of the Charter and the ECHR had become the provisions of the primary European Union law and, therefore, the Framework Decision 2002/584/JHA should have henceforth been interpreted and applied in accordance with the Charter and the ECHR. This view has been shared by Advocate General E. Sharpston in his Opinion of the Advocate General to the *Radu* case. The opinion states that:

> while the record of the Member States in complying with their human rights obligations may be commendable, it is also not pristine. There can be no assumption that, simply because the transfer of the requested person is requested by another Member State, that person's human rights will automatically be guaranteed on his arrival there. There can, however, be a presumption of compliance which is rebuttable only on the clearest possible evidence. Such evidence must be specific; propositions of a general nature, however well supported, will not suffice.[21]

[21] CJEU Judgement of 29 January 2013, Radu, Case C-396/11, ECLI:EU:C:2012:648. It seems that the position of AG E. Sharpston was inspired by the CJEU judgement in the *N.S. and Others* case (CJEU Judgement of 21 December 2011, Case C-411/10 et C-493/10, ECLI:EU:C:2011:865). In that case, the Court stated that the transfer of a person applying for an asylum under the Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1) would not have been possible if there were substantial grounds for believing that there were systemic flaws in the asylum procedure and reception

That view is not shared by the CJEU in its judgement of 29 January 2013.[22] According to the Court, the Framework Decision 2002/584 – by establishing a new simplified and more effective system for the surrender of persons convicted or suspected of having violated criminal law – contributes to the establishment of the area of freedom, security, and justice based on the high degree of trust that should exist between the Member States.[23] Considering that the provisions of the Framework Decision 2002/584 precisely define the cases of mandatory and optional refusal to execute a warrant, the judicial authorities of the Member States – outside those cases – are obliged to act upon a European arrest warrant.[24] A concurring position was expressed in the *Melloni* Case.[25] In that case, the Court examined whether Article 4a(1) of the Framework Decision 2002/584/JHA should have been interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of the defense of the person requested under the warrant. The case concerned a convict who was sentenced in Italy in absentia (*in absentia*) but was represented by a counsel. Meanwhile, the Spanish Constitution guaranteed the possibility of challenging a sentence *in absentia* in such a case, and therefore provided for a higher standard than that set

conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State (para. 86). See also Matilde Ventrella, "European Integration or Democracy Disintegration in Measures Concerning Police and Judicial Cooperation?," *New Journal of European Criminal Law* 4, no. 3 (2013): 299–309. In *N.S. and Others* Case, the Court put an end to the boundless trust, stating that: at issue here is the *raison d'ètre* of the European Union and the creation of an area of freedom, security and justice (…) based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights" (point 83). See also Willems, "The Court of Justice," 480.

22 CJEU Judgement of 29 January 2013, Radu, Case C-396/11, ECLI:EU:C:2012:648.

23 CJEU Judgement of 29 January 2013 Radu, Case C-396/11, ECLI:EU:C:2012:648, point 34; See also the Court's similar reasoning in the CJEU Judgement of 28 June 2012, West Case, Case C-192/12 PPU, ECLI:EU:C:2012:404, point 53.

24 CJEU Judgement of 29 January 2013, Radu, Case C-396/11, ECLI:EU:C:2012:648, point 35–36.

25 CJEU Judgement of 26 February 2013, Melloni, Case C-399/11, ECLI:EU:C:2013:107.

by the Framework Decision 2009/299/JHA, which specifically normalised the grounds for the refusal to execute an EAW in the event of a conviction *in absentia*.

Focusing on the effectiveness of the European arrest warrant, the Court stated that the harmonisation of the conditions for execution of the warrant in the event of conviction *in absentia* reflected "the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted in absentia who are the subject of a European arrest warrant."[26] It would be violated if Member States were allowed to invoke Article 53 of the Charter of Fundamental Rights to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not being provided for under the Framework Decision 2009/299, in order to avoid an adverse impact on the right to a fair trial and the rights of the defense guaranteed by the constitution of the executing Member State.[27] In the opinion of the CJEU, such a situation, by undermining the uniformity of the standard of protection of fundamental rights set forth in the Framework Decision 2009/299, would lead to a violation of the principles of mutual trust and mutual recognition, which the above-mentioned Framework Decision seeks to strengthen, and consequently would jeopardise its effectiveness.[28] Consequently, in that case,

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26 CJEU Judgement of 26 February 2013, Melloni, Case C-399/11, ECLI:EU:C:2013:107, point 62.

27 CJEU Judgement of 26 February 2013, Melloni, Case C-399/11, ECLI:EU:C:2013:107, point 63. It should be added that, Article 53 of the Charter of Fundamental Rights is not an isolated article, but has to be read in the light of Articles 51 and 52 Charter, which refer to the existence of the plurality of sources of protection for fundamental rights binding the Member States; John Vervaele, "The European Arrest Warrant and Applicable of Fundamental Rights in the EU," *Review of European Administrative Law* 6, no. 2 (2013): 52.

28 In the *Melloni* case, the Court noted that "although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute," para. 49. Some scholar considers that in the case of the EAW, the European legislature has determined the applicable conditions and standards of the mutual recognition procedure, its scope of application, the procedural requirements, and the optional and obligatory grounds for refusal. Thus, the voluntary and obligatory refusal grounds are pre-determined by the EU and may not be changed or supplemented at the national level; see Bloks and van den Brink, "The Impact on National Sovereignty," 58.

the Court has given priority to the effectiveness of mutual recognition based on presumed mutual trust.[29]

The presumption that national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at the EU level was called into question in the joined Cases *Aranyosi* and *Căldăraru*.[30] The issue in those cases was that the conditions of detention to which P. Aranyosi and R. Căldăraru would have been subjected in Hungarian and Romanian prisons, respectively, violated fundamental rights, in particular Article 4 of the Charter of Fundamental Rights prohibiting inhuman or degrading treatment or punishment. This was particularly evidenced by the judgements of the ECtHRs, which found that Romania and Hungary had violated Article 3 of the ECHR.

At the outset of its argument, the Court pointed out that the prohibition of inhuman or degrading treatment or punishment provided for in Article 4 of the Charter of Fundamental Rights was absolute. Moreover, it is also closely linked to the respect for human dignity referred to in Article 1 of the Charter.[31] Considering that the above provisions and Article 3 of the ECHR enshrine one of the fundamental values of the Union and its Member States, that all Member States must respect, the CJEU has presented a two-tier test for assessing the risk of inhuman or degrading treatment or punishment resulting from the execution of a European arrest warrant. First, a general assessment of the threat of inhuman or degrading

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29 See Mitsilegas, "The Symbiotic Relationship," 469.

30 CJEU Judgement of 5 April 2016, Aranyosi and Căldăraru, Case C-404/15 et C-659 PPU, ECLI:EU:C:2016:198. See also an interesting analysis of this judgement: Georgios Anagnostaras, "Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European arrest warrant: *Aranyosi* and *Caldararu*," *Common Market Law Review* 53, no. 6 (2016): 1675–1704; Adam Łazowski, "*Aranyosi* and *Caldararu* through the Eyes of National Judges," in *The Court of Justice and European criminal law: leading cases in a contextual analysis*, eds. Valsamis Mitsilegas, Alberto di Martino, and Leandro Mancano (Chicago: Hart Publishing, 2019), 438–454. For the need to accept different legal rules of another Member State in criminal law, see, for instance, Sacha Prechal, "Mutual Trust," 84–86. S. Prechal is right in saying that "Finally, 'equivalent' does not necessarily mean 'identical'. Mutual trust implies respect for a degree of difference, as long as an equivalent level of protection is assured," p. 84.

31 A similar judgement was issued in the judgement of the CJEU of 12 June 2003, Schmidberger, Case C-112/00, ECLI:EU:C:2003:333, point 80.

treatment should be carried out due to the general conditions of detention prevailing in the issuing Member State. Such an assessment has to take place where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by the EU law.[32] To this end, the executing judicial authority should rely on objective, reliable, accurate, and duly updated data on the conditions of imprisonment prevailing in the issuing Member State, which prove the existence of irregularities, whether systemic or general, or concerning certain groups of persons or certain penitentiary units. This information may come, in particular, from international court judgements, such as judgements of the ECtHR, court judgements of the issuing Member State, and decisions, reports, and other documents drafted by the Council of Europe bodies or originating from the United Nations system.[33]

A finding in the first stage of the test that there is a real threat of inhuman or degrading treatment in a Member State due to the general conditions of detention prevailing in the issuing Member State may lead to the refusal to execute the arrest warrant. A finding that there is an actual risk of a violation of Articles 1 and 4 of the Charter and Article 3 of the ECHR in a Member State obliges the judicial authority executing the Member State warrant to determine "whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State."[34] To this end, the executing authority should, on the basis of Article 15(2) of the Framework Decision 2002/584/JHA, request the judicial authority of the issuing Member State to immediately provide the necessary supplementary information with regard to the conditions under which the person covered by the European arrest warrant is to be detained in the indicated

32 CJEU Judgement of 5 April 2016, Aranyosi and Căldăraru, Cases C-404/15 et C-659 PPU, ECLI:EU:C:2016:198, point 88.

33 CJEU Judgement of 5 April 2016, Aranyosi and Căldăraru, Cases C-404/15 et C-659 PPU, ECLI:EU:C:2016:198, point 89.

34 CJEU Judgement of 5 April 2016, Aranyosi and Căldăraru, Cases C-404/15 et C-659 PPU, ECLI:EU:C:2016:198, point 92 and 94.

Member State.[35] If the executing judicial authority determines that there is a real risk of inhuman or degrading treatment in the specific case, the executing judicial authority must decide whether the surrender procedure should be brought to an end.[36]

The judgement of the CJEU under the joined Cases *Aranyosi* and *Căldăraru* is groundbreaking. As V. Mitsilegas rightly points out, it confirms "a shift from automatic mutual recognition based on uncritical mutual trust (…) to earned trust on the basis of an individualised assessment of the fundamental rights consequences of surrender on the ground."[37] The trust in the legal system of a Member State, including in the protection of fundamental rights, that is expressed at the stage of admission to the European Union, is not permanent. It may be diminished when legal changes occur in the legal system of such a state, that lead to violations of the values

35 CJEU Judgement of 5 April 2016, Aranyosi and Căldăraru, Case C-404/15 et C-659 PPU, ECLI:EU:C:2016:198, point 95.

36 CJEU Judgement of 5 April 2016, Aranyosi and Căldăraru, Case C-404/15 et C-659 PPU, ECLI:EU:C:2016:198, point 104; see Szilárd Gáspár Szilágyi, "Joined Cases Aranyosi and Căldăraru. Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant," *European Journal of Crime, Criminal Law and Criminal Justice* 24, no. 2–3 (2016): 197–219.

37 Valsamis Mitsilegas, "The European Model," 582. It is suggested that, under the joined cases *Aranyosi* and *Căldăraru* cases, the mutual trust presumption gave way to the protection of human dignity in the form of the prohibition of torture and inhuman and degrading treatment, governed under Article 1 and Article 4 EU Charter, and under Article 4 EU Charter; see Catherine Dupré, "The Rule of Law, Fair Trial and Human Dignity: The Protection of EU Values After *LM*," in *Defending Checks and Balances in the EU Member State*, eds. Armin von Bogdandy, et al. (Berlin: Springer, 2021), 437. An interesting evolution of the principle of mutual recognition is presented by E. Xanthopoulou, see Ermioni Xanthopoulou, "Mutual Trust and Rights in the EU Criminal and Asylum Law: Three Phases of Revolution and the Unchartered Territory Beyond Blind Trust," *Common Market Law Review* 55, no. 2 (2018): 489–509; Małgorzata Wąsek-Wiaderek, "Ryzyko naruszenia praw człowieka jako przesłanka odmowy wykonania europejskiego nakazu aresztowania (uwagi na tle najnowszego orzecznictwa trybunału sprawiedliwości unii europejskiej) [Risk if Human Rights Violations as a Premise for Refusal to Execute A European Arrest Warrant (Remarks Against the Background of Recent Jurisprudence of the Court of Justice of the European Union)]," in *Verba volant, scripta manent. Proces karny, prawo karne skarbowe i prawo wykroczeń po zmianach z lat 2015–2016. Księga pamiątkowa poświęcona Profesor Monice Zbrojewskiej*, eds. Tomasz Grzegorczyk and Radosław Olszewski (Warsaw: Wolters Kluwer, 2017), 486–498.

on which the European Union is founded (Article 2), particularly including fundamental rights. The mutual trust may also be weakened by changing practices of judicial authorities (e.g. in the execution of imprisonment sentences). The occurrence of such situations cannot be accepted through indiscriminate mutual trust.[38] Blind trust in the correctness of a Member State's legal system and the pursuit of effective prosecution in the space of freedom, security, and justice without internal borders cannot lead to a violation of dignity and compliance with the prohibition of inhuman or degrading treatment or punishment. What is important is not only the goal of achieving material justice, but also the path leading to it. The need to preserve a balance between substantive justice and formal justice is obvious, and the fundamental rights guaranteed by the Framework Decision 2002/584/JHA must not be illusory.

The formal approach to the joined Cases *Aranyosi* and *Căldăraru* was presented by Advocate General Y. Bot. Although the Advocate General acknowledged that the conditions in Hungarian and Romanian prisons demonstrated a persistent violation of the statutory principles set forth in Article 6(1) of the TEU,[39] he nevertheless concluded that a real risk of violation in the issuing Member State of the fundamental rights of the person to

[38] As noted by some researchers, however, "blind mutual recognition of foreign decisions is not feasible due to the lack of trust that is caused by the differences in member states' criminal justice systems"; see Gert Vermeulen, Wendy de Bondt, and Peter Verbeke eds., *Rethinking International Cooperation in Criminal Matters in The EU* (Antwerpen, Apeldoorn, Portland: Maku, 2012), 337. On the essence of mutual trust in Europe's area of freedom, security and justice, see Ester Herlin-Karnell, "From Mutual Trust to the Full Effectiveness of EU Law: 10 Years of the European Arrest Warrant," *European Law Review* 38, no. 1 (2013): 79; Damien Gerard, "Mutual Trust as Constitutionalism?," in *Mapping Mutual Trust Understanding and Framing the Role of Mutual Trust in EU law*, eds. Evelien Brouwer and Damien Gerard (European University Institute: EUI WORKING PAPERS, 2016), 75; Thomas Wischmeyer, "Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust," *German Law Journal* 17, no. 3 (2016): 339; Willems, "The Court of Justice," 469–470.

[39] Opinion of Advocate General Yves'a Bot delivered on 3 May 2016 under the Joined Cases C-404/15 and C-659 PPU, Aranyosi and Căldăraru Case, ECLI:EU:C:2016:140, point 85, 86–88. As a result Advocate General Bot concluded that "I can only say that, by laying down the principle stated in Article 1(3) of the Framework Decision, the Union legislature did not intend to allow the executing judicial authorities to refuse to surrender the requested person in circumstances such as those at issue in the present cases" (point 93).

be surrendered should not have constituted the grounds for the refusal to execute a European arrest warrant. According to Advocate General Y. Bot, adoption of a different position would have resulted in the introduction of the ground for the refusal to execute an arrest warrant that was not envisaged by the EU legislature and would have contradicted the principle of certainty of law. According to the Advocate General, the only "lifeline" in a situation of serious and persistent violation of fundamental rights by a Member State should be the use of the mechanism provided for in Article 7 (2 and 3) of the TEU, which leads to the suspension of the European arrest warrant mechanism. In the case of this conceptual framework, the Advocate General sees a strong involvement of political factors. The tardiness of the Member States in their recognition of a serious and persistent violation of fundamental rights by one of them, and the subsequent suspension of some mechanism for the cooperation with that state, will be more like the proverbial "*Waiting for Godot*" than a way to ensure an effective protection of fundamental rights.

However, it is impossible to approach the CJEU judgement under the joined Cases *Aranyosi* and *Căldăraru* in an uncritical manner. First, the Court did not answer whether the adopted approach applied only to cases involving violations of the fundamental rights set forth in Article 4 of the Charter, or perhaps to any fundamental right. However, it seems that such a possibility should only exist for fundamental rights that are non-derogable. It should therefore be reserved only to exceptional circumstances in which the execution of a European arrest warrant would violate human dignity.[40] Second, the Court did not clarify whether the Member State executing an EAW could request the issuing state to provide information on

[40] While it is sometimes necessary to lower the level of protection of fundamental rights in order to achieve effectiveness in the cross-border fight against crime and to promote the mutual trust inherent in the international cooperation in criminal matters, violations of the absolute rights set forth in Article 4 of the Charter are excluded; see a similar view expressed by: T. Wahl, "Refusal of European Arrest Warrants Due to Fair Trial Infringements," *Eucrime,* no. 4 (2020): 321. There are also opinions that advocate the full application of the protection of fundamental rights in the international cooperation in criminal matters; see, for example, Otto Lagodny, *Die Rechtsstellung des Auszuliefernden in der Bundesrepublik Deutschland* (Freiburg im Braisgau: Max-Planck-Institut für Ausländisches und Internationales Strafrecht, 1987), 256.

the conditions of detention on its own initiative, either, or whether it did so only at the request of the prosecuted person or his or her defense counsel. It seems that the judgement did not exclude the former possibility.[41] Third, with its clear emphasis on the need for mutual trust as a pillar of creating and maintaining a space without internal borders and the unique nature of the permissible exceptions to the surrender of the subject of a warrant, the CJEU marginalised the effects of "bringing to an end" of a European arrest warrant when there was a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter. In such an exceptional situation, the person subject to a European arrest warrant cannot count on impunity. In a situation where a European arrest warrant has been issued for the purpose of conducting criminal proceedings, the executing state should, in accordance with the *aut dedere aut iudicare* principle, proceed to the takeover of the prosecution, provided that it has its own jurisdiction in the specific case. On the other hand, when a European arrest warrant has been issued in the execution of a sentence of imprisonment, the executing state or the subject of the warrant may implement the procedure for the execution of the judgement in the territory of the executing state (pursuant to Article 4(5) under the Framework Decision 2008/909).

The essential statements of the judgement under the joined Cases *Aranyosi* and *Căldăraru* have been reiterated in the subsequent judgements of the Court. In its judgement under the Case C-220/18 PPU,[42] the Court indicated that the judicial authority of the executing state, when it had data proving the existence of systemic or general irregularities concerning the conditions of detention in the prisons of the issuing Member State, could not exclude the existence of a real risk that a person subject to a European arrest warrant would be subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter. The Court further assumed

41 Tomasz Ostropolski, "Naruszenie praw podstawowych jako przesłanka odmowy wykonania ENA – uwagi do wyroku Trybunału Sprawiedliwości z 5.04.2016 r. w sprawach połączonych C-404/15 Aranyosi i C-659/15 PPU Căldăraru [Infringement of Infotainments of Fundamental Rights as a Ground for Refusal to Execute an EAW: Remarks on the Judgement of the CJEU of April 5, 2016 in Jointed Cases C-404/15 Aranyosi and C-695/15 PPU Căldăraru]," *Europejski Przegląd Sądowy,* no. 11 (2016): 25.

42 CJEU Judgement of 25 July 2018, Generalstaatsanwaltschaft, Case C-220/18 PPU, ECLI:EU:C:2018:589.

that the executing judicial authority was required to assess only the conditions of detention in the prisons in which, according to the information available to it, it was likely that that person would be detained, including on a temporary or transitional basis. Moreover, the executing judicial authority must assess, to that end, solely the actual and precise conditions of detention of the person concerned that are relevant for determining whether that person will be exposed to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights. Finally, the executing judicial authority may take into account information provided by the authorities of the issuing Member State other than the issuing judicial authority that "would indicate that the person subject to the warrant will not be subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights."[43]

Under the *Dorobantu* Case, on the other hand, the Court went into unnecessary casuistry. Wanting to "have its cake and eat it", the CJEU based protection against inhuman or degrading treatment on an individual assessment of the situation of each person concerned by a European arrest warrant. This is a flawed assumption, as it merely amounts to an assessment of only the conditions of detention in the prisons in which, according to the information available to it, it is likely that that person will be detained, including on a temporary or transitional basis. What if the person subject to a warrant is surrendered after two months to another prison, where he or she will be exposed to an actual risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter? This is something the Court is no longer interested in. As stated by the Court under the *Dorobantu* Case (C-128/18):

> When implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but also, save in exceptional cases, they may not check

[43] CJEU Judgement of 25 July 2018, Generalstaatsanwaltschaft, Case C-220/18 PPU, ECLI:EU:C:2018:589, point 47.

whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the European Union.[44]

This leads to a simple conclusion. If you want positive execution of an arrest warrant, present information testifying that a few weeks after the surrender, the person covered by the warrant will be treated well, and "after that you can do as you please."[45] Besides, the Court itself pointed out that information on where a person was likely to be incarcerated "on a temporary or transitional basis" was sufficient for positive execution of a warrant. This position is wrong. Absolute rights do not apply either only at the time of the surrender or a few weeks later. Those legal regulations are in force at all times and all the Member States have pledged to uphold them. Therefore, I believe that if there is a real risk of inhuman or degrading treatment of the person subject to an arrest warrant in the issuing Member State, the executing judicial authority should refuse to surrender the person unless the authorities of the issuing state ensure that the person will not be subjected to inhuman or degrading treatment in penitentiary facilities throughout the period of the imprisonment sentence.

A slight clarification of the case law of the CJEU on the conditions under which the surrender of a person sought by a EAW can be refused because standards of detention in the issuing state infringe the prohibition of inhuman or degrading treatment was provided under the *Dorobantu* Case. The Court added that in assessing the actual risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter in view of the conditions prevailing in prisons, the executing judicial authority was obliged to take account of all the relevant physical aspects of the conditions of detention in the prison in which the person was actually intended to be detained, such as the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within the prison.[46] In the Court's opinion, indicating only

44 CJEU Judgement of 15 October 2019, Dorobantu, Case C-128/18 PPU, ECLI:EU:C:2018:589, point 47.

45 André Klip, "Eroding Mutual Trust in an European Criminal Justice Area without Added Value," *European Journal of Crime, Criminal Law and Criminal Justice* 28, no. 2 (2020): 112.

46 CJEU Judgement of 15 October 2019, Dorobantu, Case C-128/18 PPU, ECLI:EU:C:2018:589, point 85. The CJEU stresses that the detainee must have the possibility to move around normally within the cell. The Court also refers to its previous case law in which it indicated

"general deficiencies" would not allow the executing judicial authority to determine whether the surrender of a person might actually involve his or her inhuman or degrading treatment.[47]

The position that a refusal to execute an arrest warrant may only be allowed as an exception was upheld in the CJEU judgement of January 31, 2023 (under the Case C-158/21, *Lluís Puig Gordi and Others* Case).[48] The Court stated that a refusal to execute a warrant on the grounds of a violation of fundamental rights was not allowed if only an assessment of the individual situation of the persons concerned (an assessment *in concreto*) could lead to a finding of a real risk of a violation of fundamental rights in the issuing Member State. Thus, the Court correctly concluded that the Framework Decision 2002/584/JHA could not be interpreted in such a way as to call into question the effectiveness of the system of the judicial cooperation between the Member States.[49] Therefore, the examination, by the executing judicial authority, of the observance, by the courts of the issuing Member State, of the right laid down in the second Paragraph

that "a strong presumption of a violation of Article 3 of the ECHR arises when the personal space available to a detainee is below 3 m2 in multi-occupancy accommodation a presumption that is capable of being rebutted if the reductions in the required minimum personal space of 3 m2 are short, occasional and minor, if they are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities, if the general conditions of detention at the facility in which the detainee is confined are appropriate and there are no other aggravating aspects of the conditions of the individual concerned's detention."

47 CJEU Judgement of 15 October 2019, Dorobantu, Case C-128/18 PPU, ECLI:EU:C:2018:589. As the Court held in its judgement, "[i]n any event, the mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people or certain places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subjected to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State" (point 54). Similarly, CJEU Judgement of 5 April 2016, Aranyosi and Căldăraru, Case C-404/15 et C-659 PPU, ECLI:EU:C:2016:198, point 91 and 93; CJEU Judgement of 25 July 2018, Generalstaatsanwaltschaft, Case C-220/18 PPU, ECLI:EU:C:2018:589, point 61; see Ágoston Mohy, "The *Dorobantu* Case and the Applicability of the ECHR in the EU Legal Order," *Pécs Journal of International and European Law*, no. 1 (2020): 85–90.

48 CJEU Judgement of 31 January 2023, Lluís Puig Gordi and Others, Case C-158/21, ECLI:EU:C:2023:57.

49 CJEU Judgement of 31 January 2023, Lluís Puig Gordi and Others, Case C-158/21, ECLI:EU:C:2023:57, point 116.

of Article 47 of the Charter, can take place only in exceptional circumstances.[50]

3. Systemic Differences as a Barrier to an Effective System for the Surrender of Persons Convicted or Suspected of Having Infringed Criminal Law

The crisis in mutual recognition has been caused not only by the weakening of mutual trust between the Member States, but also by the lack of equivalence of institutional arrangements. This lack of equivalence is one of the obstacles to the implementation of mutual recognition, which is well illustrated by the case law of the CJEU concerning the interpretation of the term "judicial authority" within the meaning of Article 6(1) of the Framework Decision 2002/584/JHA.

Any comments in this regard should note that 13 Member States have designated the public prosecutor's office as the competent authority for issuing arrest warrants.[51] The Member States have adopted diverse practices in the designation of the authorities accountable for issuing European arrest warrants. Designating the public prosecutor's office for this role could have been considered unobjectionable in light of the tacit position of the EU's institutions.[52] The turning point turned out to be the judgement of the CJEU of 1 June 2016 under the *Bob-Dogi* Case.[53] In respect of that case, the Court pointed out that:

> where the European arrest warrant has been issued with a view to the arrest and surrender by another Member State of a requested person for the purposes of conducting a criminal prosecution, that person should have already had the benefit, at the first stage of the proceedings, of procedural safeguards and fundamental rights, the protection of which it is the task of the judicial

50 CJEU Judgement of 31 January 2023, Lluís Puig Gordi and Others, Case C-158/21, ECLI:EU:C:2023:57, point 117.

51 This information results from an analysis of the list of notifications posted on the website of the European Judicial Network, https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=14, accessed February 2, 2023.

52 Tomasz Ostropolski, „Pojęcie organu sądowego w ramach współpracy wymiarów sprawiedliwości w sprawach karnych [The Notion of 'Judicial Authority' in Judicial Cooperation in Criminal Matters]," *Europejski Przegląd Sądowy*, no. 9 (2019): 25.

53 CJEU Judgement of 1 June 2016, Bob-Dogi, Case C-241/15, ECLI:EU:C:2016:385.

> authority of the issuing Member State to ensure, in accordance with the applicable provisions of national law, for the purpose, inter alia, of adopting a national arrest warrant.[54] The CJEU went on to note that a dual level of protection for procedural rights and fundamental rights which must be enjoyed by the requested person is built into the European arrest warrant system, since, in addition to the judicial protection provided at the first level, at which a national judicial decision, such as a national arrest warrant, is adopted, is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision.[55]

A decision that meets the requirements related to an effective judicial protection of a prosecuted person should be implemented at least at one of the two levels of that protection. Where the law of the issuing Member State grants the power to issue a European arrest warrant to an authority that is neither a judge nor a court, then the national judicial decision, such as a national arrest warrant, on which the European arrest warrant is based, should satisfy the requirement of effective judicial protection of the right to liberty of the requested person.[56] Such a requirement is self-evident. The execution of a European arrest warrant may violate the freedom of the prosecuted person, as it leads to the detention of the requested person in order to hand him or her over to the issuing judicial authority for the purpose of criminal proceedings or the execution of a sentence of imprisonment.

In its subsequent judgements, the CJEU stated that the concept of judicial authority (Article 6(1) of the Framework Decision 2002/584/JHA) was an autonomous concept of the European Union's law that did not include non-judicial authorities, such as: (a) the police, as it did not give the executing authority confidence that the order was subject to judicial review[57]; (b) the Ministry of Justice (the case involved the Lithuanian Ministry of Justice designated as the issuing authority), which was an executive body[58]; and (c)

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54 CJEU Judgement of 1 June 2016, Bob-Dogi, Case C-241/15, ECLI:EU:C:2016:385, point 55.

55 CJEU Judgement of 1 June 2016, Bob-Dogi, Case C-241/15, ECLI:EU:C:2016:385, point 56.

56 CJEU Judgement of 27 May 2019, PF, Case C-509/18, ECLI:EU:C:2019:457, point 47.

57 CJEU Judgement of 10 November 2016, Poltorak, Case C-452/16 PPU, EU:C:2016:858, point 45.

58 CJEU Judgement of 10 November 2016, Kovalkovas, Case C-477/16 PPU, EU:C:2016:861, point 39–47.

the public prosecutor's office of a Member State, which was at risk of being subject, directly or indirectly, to respective orders or instructions from an executive authority, such as the Minister of Justice, in deciding whether to issue a European arrest warrant (the case involved the status of a public prosecutor in Germany).[59] Last but not least, according to the judgement of the CJEU of November 24, 2020, in light of Article 6(2) as well as Article 27(3)(g) and 27(4) of the Framework Decision 2002/584/JHA, a public prosecutor of a Member State who may, in the exercise of his or her decision-making powers, receive individual instructions from the executing authority does not constitute an "executing judicial authority" within the meaning of those provisions.[60] The latter judgement concerned the status of a Dutch prosecutor who agreed to prosecute a requested person for crimes other than those that formed the basis of the surrender.

At the same time, the CJEU has recognised the public prosecutor of a Member State as a judicial authority, if his or her status provides a guarantee of independence, in particular in relation to the executing authority. The CJEU has had no doubt that such a status is enjoyed by prosecutors in France,[61] Sweden,[62] Belgium,[63] and Austria,[64] and by the Prosecutor General of Lithuania, who is independent of both the judiciary and the executing authority, including the Ministry of Justice.[65]

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59 CJEU Judgement of 27 May 2019, OG and PI, Case C-508/18 et C-82/19 PPU, EU:C:2019:456, point 85–88.

60 CJEU Judgement of 24 November 2020, AZ, Case C-510/19, ECLI:EU:C:2020:953, point 70.

61 CJEU Judgement of 12 December 2019, JR and YC, Case C-566/19 PPU et C-626/19 PPU, EU:C:2019:1077, point 54–58.

62 CJEU Judgement of 12 December 2019, *XD*, Case C-625/19 PPU, ECLI:EU:C:2019:1078, point 46–56.

63 CJEU Judgement of 12 December 2019, ZB, Case C627/19 PPU, ECLI:EU:C:2019:1079, point 31–39.

64 CJEU Judgement of 9 October 2019, CJ, Case C-489/19 PPU, ECLI:EU:C:2019:849, point 40–49. It should be added that Austrian prosecutors' offices do not issue European arrest warrants on their own, as Article 29(1) of the Law on judicial cooperation in criminal matters with the Member States of the European Union provides for court endorsement of the warrants. The endorsement procedure includes an examination of the legality and proportionality of the European arrest warrant concerned and is subject to judicial review.

65 CJEU Judgement of 27 May 2019, PF, Case C-509/18, ECLI:EU:C:2019:457, point 51–52.

The series of judgements discussed herein show that the Court is paying more and more attention to the equivalence of legal systems in the context of the European arrest warrant. While the acceptance of dissimilarities between different legal systems is an essential element of mutual recognition of judgements, this does not mean that it is unlimited. Although the concept of judicial authority is conventional in the European Union and its actual scope depends on the instrument of the cooperation in criminal matters, it has a special nature in the European arrest warrant procedure. It should not be overlooked that the European arrest warrant procedure has an impact on the freedom of the person being prosecuted. No specific requirements arise from the case law of the CJEU presented herein for the form of the judicial authority other than the requirement that the judicial authority of the issuing Member State or the judicial authority of the executing state "should not receive individual instructions from the executive branch that would affect its decision-making powers." This is a minimum standard that is genetically embedded in the system for the protection of human rights established by the ECHR and the Charter of Fundamental Rights. One could also add – following the opinion of Advocate General M. Campos Sánchez-Bordona – the requirement that the entity issuing an EAW must not be subject to directions or instructions, which stems from the de-politicisation of the EAW procedure as compared to the classic extradition procedure.[66] Certainly, cases such as *Kovalkovasi*, *Özçelik*, *Poltorak*, as well as judgements in which the CJEU examined the public prosecution's position in Austria, Belgium, Germany, Lithuania, France and Sweden, have had harmonising effects on the criminal procedure.[67]

4. The Rule of Law Crisis (Apparent) Imposing Limitation on the European Arrest Warrant

Formal membership of countries in the EU is not sufficient to secure the proper implementation of the EU's instruments for the cooperation in criminal matters. The Member States must respect the common values set

66 The Opinion of Advocate General Campos Sánchez-Bordona delivered on 30 April 2019 under the Joined Cases C 508/18 and C 82/19 PPU, ECLI:EU:C:2019:337, Minister for Justice and Equality v O.G. and P.I., point 89.

67 Similarly, Bloks and van den Brink, "The Impact on National Sovereignty," 60.

forth in Article 2 of the TEU both at the stage of accession to the EU and while participating in the "project" called the European Union. The respect for those values serves the basis for mutual trust, which, as indicated earlier, is a prerequisite for the effective mutual recognition.[68] This is aptly emphasised by N. Cambien who stated that "it would not make sense to require a Member State to systematically recognise the decisions and rules of another Member State if it did not have trust in the adequacy of the legal system of that other Member State."[69] The CJEU also reached a similar conclusion under the joined Cases *Aranyosi* and *Căldăraru* indicating that:

> [T]he principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter.[70]

It is impossible to ensure "equivalent and effective levels of protection of fundamental rights" when the rule of law has not been respected. The rule of law is a *sine qua non* condition of the respect for procedural guarantees, the implementation of the principle of equality, the effectiveness of the EU law, and mutual trust and recognition of judgements. Any adverse impact on the rule of law, in particular a violation of judicial independence, causes the mutual trust between the Member States to be

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68 Others have argued that mutual trust is rather a consequence of mutual recognition. For example, Advocate General Bot stated: „The intention of the EU legislature, in adopting the principle of mutual recognition, was to overcome the almost insurmountable difficulties which had been encountered, due in particular to the failure of efforts to approximate national laws in advance. (…) The phrase used must therefore be understood as meaning that mutual trust is not a prerequisite for the operation of mutual recognition, but a consequence which is imposed on Member States by the application of that principle. (14) In other words, the application of the principle of mutual recognition requires the Member States to place trust in each other regardless of the differences in their respective national laws", the Opinion of Advocate General Yves'a Bota delivered on 15 December 2015 under the Case C- 486/14, ECLI:EU:C:2015:812, Kossowski Case, point 89.

69 Nathan Cambien, "Mutual Recognition and Mutual Trust in the Internal Market," *European Papers* 2, no. 1 (2017): 9.

70 A similar opinion was expressed in the CJEU Judgement of 30 May 2013, Jeremy F. v. Prime Minister, Case C-168/13 PPU, EU:C:2013:358.

diminished and threatens all fundamental rights.[71] A conservative position in this regard was adopted by the Court under the *LM* Case (also referred to as the *Celmer* Case),[72] despite serious allegations by the referring court pointing to profound legislative reforms in the Polish system of justice, as a result of which the rule of law had been breached.[73] The CJEU, despite its initial assumption that: (a) the Member States are required to presume that fundamental rights have been observed by the other Member States,

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71 The Court aptly pointed out in the *Associação Sindical dos Juízes Portugueses* Case that: The very existence of effective judicial review designed to ensure compliance with the EU law is of the essence of the rule of law (CJEU Judgement of 27 February 2018, Associação Sindical dos Juízes Portugueses, Case C64/16, EU:C:2018:117, point 36 and the case-law cited.

72 CJEU Judgement of 25 July 2018, LM, Case C-216/18 PPU, ECLI:EU:C:2018:586. It must be noted that in respect of the LM case, the CJEU delegated its assessment of the Polish system to the national courts implementing the EAW. In the case of the ASJP, on the contrary, the Court reaffirmed its mandate under Article 19(1)(2) of the TEU to autonomously review national measures affecting judicial independence, even if those measures did not implement the specific EU rules, see Michał Krajewski, "Who Is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges," *European Constitutional Law Review* 14, no. 4 (2018): 794; Agnieszka Grzelak, „Wzajemne zaufanie jako podstawa współpracy sądów państw członkowskich UE w sprawach karnych (uwagi na marginesie odesłania prejudycjalnego w sprawie C-216/18 PPU Celmer) [Mutual trust as the basis for judicial cooperation in criminal matters in the EU (reference for a preliminary ruling in case C-216/18 PPU Celmer)], *Państwo i Prawo* 10, (2018): 50–66.

73 The referring court based the above statement on the basis of the changes that were considered particularly significant, such as: the changes to the constitutional role of the National Council for the Judiciary in safeguarding independence of the judiciary, in combination with the Polish Government's invalid appointments to the Constitutional Tribunal and its refusal to publish certain judgements; the fact that the Minister for Justice is now the Public Prosecutor, that he is entitled to play an active role in prosecutions and that he has a disciplinary role in respect of presidents of courts, which has the potential for a chilling effect on those presidents, with consequential impact on the administration of justice; the fact that the Supreme Court is affected by compulsory retirement and future appointments, and that the new composition of the National Council for the Judiciary will be largely dominated by political appointees; and |the fact that the integrity and effectiveness of the Constitutional Court have been greatly interfered with in that there is no guarantee that laws in Poland will comply with the Polish Constitution, which is sufficient in itself to have effects throughout the criminal justice system; CJEU Judgement of 25 July 2018, LM, Case C-216/18 PPU, ECLI:EU:C:2018:586, point 21.

(b) the possibility of checking whether the other Member State has actually observed the fundamental rights guaranteed by the European Union is excluded in principle,[74] and (c) emphasising the precise grounds for mandatory non-execution (Article 3) and optional non-execution (Articles 4 and 4a) of a European arrest warrant as well as the guarantees to be given by the issuing Member State in particular cases (Article 5), stated that limitations could be imposed on the principles of mutual recognition and mutual trust between Member States only in "in exceptional circumstances".[75] Thus, the Court accepted for the first time the exceptional possibility of the executing judicial authority to bring the surrender procedure established by the Framework Decision 2002/584 to an end where the person to be surrendered was exposed to the real risks of violations of the fundamental right to a fair trial connected with a lack of independence of the courts of that Member State.

The Court, referring to the *Aranyosi and Căldăraru* Case, reconstructed a two-tiered test without which it was not possible to bring the surrender procedure established by the Framework Decision 2002/584 to an end. The first stage of the assessment involves determining whether,

> on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State, whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached.[76]

Performing a positive verification in this regard, i.e. establishing that there is a threat to the fundamental rights of the individual *in abstracto* guaranteed by the second Paragraph of Article 47 of the Charter, allows to proceed to the second stage of the assessment. At that stage, the executing judicial authority is obliged to determine, specifically and precisely,

> whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information

74 CJEU Judgement of 25 July 2018, LM, Case C-216/18 PPU, ECLI:EU:C:2018:586, point 37.
75 CJEU Judgement of 25 July 2018, LM, Case C-216/18 PPU, ECLI:EU:C:2018:586, point 43.
76 CJEU Judgement of 25 July 2018, LM, Case C-216/18 PPU, ECLI:EU:C:2018:586, point 61.

> provided by the issuing Member State pursuant to Article 15 (2) of the framework decision, there are substantial grounds for believing that that person will run a risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter if he is surrendered to that State.[77]

The adoption of a two-stage, interrelated assessment of violations of the right to a fair trial, due to systemic inadequacies in the independence of the judiciary of the issuing Member State, calls into question what the CJEU has really wanted to protect. It is clear from the reasoning of the judgement under the *LM* case that the Court's concern for the effective prosecution of the perpetrators of the crime and the unwavering presumption that fundamental rights had been observed by the other Member States were more important to the CJEU than ensuring the right of a prosecuted person to a fair trial in a situation of systemic violations of the rule of law in one of the Member States. This is evidenced by the Court's reference to recital 10 of the Framework Decision 2002/584 that implementation of the European arrest warrant mechanism may be suspended only in the event of a serious and persistent breach of the principles set out in Article 2 of the TEU by one of the Member States, as determined by the European Council pursuant to Article 7(2) of the TEU, with the consequences set out in Article 7(3) of the TEU).[78] Referring to the political procedure, as that is what is specified in Article 7 of the TEU, the CJEU actually closed the possibility to refuse to surrender a prosecuted person to a Member State where there are systemic or general deficiencies in the independence of the judiciary. Meanwhile, the political procedure set forth in Article 7 of the TEU aims to generally suspend the application of a legal instrument such as the mechanism of the European arrest warrant and is applied to a state, while the refusal to execute a European arrest warrant undertaken by a judicial authority of a Member State concerns a specific warrant and is a manifestation of the cooperation between the judicial authorities of the Member States. Every executing court is obliged not only to take into account the optional and mandatory grounds for the refusal to execute a European arrest warrant, but also to respect fundamental

[77] CJEU Judgement of 25 July 2018, LM, Case C-216/18 PPU, ECLI:EU:C:2018:586, point 79.
[78] CJEU Judgement of 25 July 2018, LM, Case C-216/18 PPU, ECLI:EU:C:2018:586, point 70.

rights and fundamental legal principles as enshrined in Articles 2 and 6 of the TEU. The obligation in this regard in relation to the cooperating judicial authorities derives from Article 1 (3) of the Framework Decision 2002/584 and the above provisions of the TEU.

In respect of the *LM* case, the CJEU allowed for the refusal to execute a warrant only in exceptional circumstances, where a real risk of violation of the fundamental right to a fair trial (*in abstracto*) was demonstrated and it was established that the person subject to the European arrest warrant would be exposed, upon surrender to the issuing judicial authority, to a real risk of violation of his or her fundamental right to an independent tribunal. While the first stage of the assessment is provable in a straightforward manner, the second stage of the assessment, which involves translating the systemic deficiencies to the future situation of the requested person, is difficult to implement.[79] The CJEU indicates that the executing authority should take into account, among other things, the personal situation as well as the nature of the offence for which he or she is being prosecuted and the factual context that serves the basis for the European arrest warrant.[80] In addition, it is the duty of the court executing the warrant to turn to the issuing authority for additional information to determine whether there is a risk to a due process. The question is: What is the point of starting a dialogue between the executing judicial authorities and the issuing judicial authorities each time?

Doubts are also raised about the dialogue itself and the content of the answers given, e.g.

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79 As T. Wahl points out, using the example of the analysis of the case law of the European courts on the European arrest warrant, the refusal to execute the warrant is not justified if only: "a) the requested persons referred to changes at the ordinary courts, which were brought about by the judicial reforms, and to disciplinary power of the Polish Minister of Justice over the Presidents of the Courts as well as the chilling effect it has had on the administration of justice; b) the requested persons referred to statements made by Polish justice officials in the media against them, thus leaving doubts as to the presumption of innocence; c) evidence given by witnesses (even by Polish judges) was in the defendants' favor in voicing serious concerns over the independence of Polish judges, because the statements at the same time pointed out that judges try to perform their obligations to the best of their abilities to administer justice impartially and free from pressure"; see: Thomas Wahl, "Refusal of European Arrest Warrants Due to Fair Trial Infringements," *Eucrim*, vol. 4 (2020): 325.

80 CJEU Judgement of 25 July 2018, LM, C-216/18 PPU, ECLI:EU:C:2018:586, point 75.

> will such information meet the standard set by the Court of Justice? Will such information be objective and adequate? Will the assessment be fully reliable? Does a judge (court) who does not recognise any threats to the independence of the judiciary, contrary to the widely expressed and well-documented concerns, remain fully independent? How about a judge whose answers comply with the expectations of political decision-makers, bearing in mind that their voice could have an impact on the judge's career? Would a judge admit receiving explicit or implicit instructions, suggestions or perhaps 'friendly advice' from the executive or other political actors? Answers to these questions can be challenging. On the other hand, how about a judge who provides critical comments on fair trial guarantees?[81]

In this context, it should be recognised that it is difficult to assess the independence of specific courts competent to conduct criminal proceedings against a requested person. The executing judicial authority is not able to predict the further development of the case after the surrender of the requested person and cannot, for example, exclude a personnel change in the composition of the court or a transfer of the case to another court. Therefore, one-step assessment should be advocated, since the lack of judicial independence always leads to a real risk of violation of fundamental rights, including the right to a fair trial.[82]

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81 Stanisław Biernat and Paweł Filipek, "The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM," in Defending Checks and Balances in EU Member State, eds. by Armin von Bogdandy, et al. (Berlin: Springer, 2021), 424.

82 See also: Petra Bárd and Wouter van Ballegooij, "The AG Opinion in the Celmer Case: Why Lack of Judicial Independence Should Have Been Framed as a Rule of Law Issue," *Verfassungsblog*, July 7, 2018, https://verfassungsblog.de/the-ag-opinion-in-the-celmer-case-why-lack-of-judicial-independence-should-have-been-framed-as-a-rule-of-law-issue, accessed February 23, 2023; Petra Bárd and Wouter van Ballegooij, "Judicial Independence as a Precondition for Mutual Trust," *Verfassungsblog*, April 10, https://verfassungsblog.de/judicial-independence-as-a-precondition-for-mutual-trust/, accessed February 23, 2023. See also Biernat and Filipek, "The Assessment of Judicial Independence," 805. Some even argue that a breach of the obligation to ensure independence of the courts should result in suspending the participation of a given Member State in the EU policy area at stake; Agnieszka Frąckowiak-Adamska, "Drawing Red Lines with No (Significant) Bites: Why an Individual Test Is Not Appropriate in the *LM* Case," in *Defending Checks and Balances in EU Member State*, eds. Armin von Bogdandy, et al. (Berlin: Springer, 2021), 443–454.

The above concerns are not eliminated by the most recent judgement of the CJEU issued under the joined Cases C-562/21 PPU and C-563/21 PPU.[83] On the contrary, the judgement narrowed the scope of the "exceptional circumstances", the occurrence of which gives grounds for the refusal to execute a warrant. In a situation where the issuance of a warrant concerns the surrender of a person for the purpose of executing a sentence of imprisonment, it is the duty of the person whose surrender is sought to rely on specific factors on the basis of which he or she considers that the systemic or generalised deficiencies of the judicial system in the issuing Member State have had a tangible influence on the criminal proceedings in his or her respect, in particular on the composition of the panel of judges who had been called upon to hear the criminal case in question, with the result that one or more judges in that panel had not offered the guarantees of independence and impartiality required under the EU law).[84] If the warrant is issued for the purpose of conducting criminal proceedings, it is the duty of the requested person to present his or her personal situation, the nature of the offence in respect of which criminal proceedings are pending against him or her, the factual context in which the European arrest warrant fits or any other circumstances relevant to the assessment of the independence and impartiality of the adjudicating panel. At the same time, the CJEU also stipulated that "information concerning the fact that one or more of the judges who participated in the proceedings that led to the conviction of the person whose surrender is sought were appointed on application of a body made up, for the most part, of members representing or chosen by the legislature or the executive" was not sufficient for the refusal to surrender the requested person.[85] The main arguments for the position of the CJEU included the need to avoid the risk of impunity for persons who attempted to flee from justice after having been convicted of or suspected of committing a crime, the protection of the rights of the victims of the offences, and non-interference in the political procedure under Article 7 of

[83] Judgement of 22 February 2022, X and Y, Case C-562/21 PPU et C-563/21 PPU, ECLI:EU:C:2022:100.

[84] CJEU Judgement of 22 February 2022, X and Y, Case C-562/21 PPU et C-563/21 PPU, ECLI:EU:C:2022:100, point 86.

[85] CJEU Judgement of 22 February 2022, X and Y, Case C-562/21 PPU et C-563/21 PPU, ECLI:EU:C:2022:100, point 87.

the TEU. That judgement ignores the fact that a lack of independence of the courts precludes the possibility of achieving justice for the accused and the victim.[86]

5. Conclusion

The analysis presented herein has proven that the case law of the CJEU that concerns the European arrest warrant has changed the approach to mutual trust and the operation of the principle of mutual recognition in criminal matters. The fact that the new grounds for the refusal to execute a European arrest warrant are now based on fundamental rights supports the argument that the relative automaticity of this mechanism for the cooperation in criminal matters has been reduced. The doctrine established in the *Aranyosi* and *Căldăraru* case, which consists in assessing the risk of inhuman or degrading treatment or punishment, and later – in the *Celmer* case – reconstructed for the purpose of assessing the demonstration of a real risk of violation of the right to a fair trial when there are systemic deficiencies in the independence of the judiciary, has introduced a narrow mechanism for monitoring the observance of fundamental rights. The refusal to execute a European arrest warrant on the basis of the indicated rights has become possible only in exceptional circumstances. The cases *Aranyosi* and *Căldăraru* as well as *Celmera* indicate that the Court attaches more importance to the protection of the principle of mutual recognition, the prosecution of perpetrators of crime, and the unwavering presumption of respect for fundamental rights by the Member states than to the effective protection of fundamental rights. Such a distribution of emphasis means the subordination of the European Union's standard for the protection of fundamental rights to the effective cooperation in criminal matters. However, it should be noted that each Member State is obliged to guarantee the respect for the fundamental rights set forth in Article 6 of the TEU and the respect for the values set forth in Article 2 of the TEU. This obligation results not only from

[86] As aptly pointed out by Advocate General Sharpston, "(…) a trial that is only partly fair cannot be guaranteed to ensure that justice is done," the Opinion of Advocate General Sharpston delivered on 18 October 2012 under the Case C-396/11, *Ministerul Public – Parchetul de pe lângă Curtea de Apel ConstanțaMinisterul v. Ciprian Vasile* Radu, ECLI:EU:C:2012:648, point 83.

mutual trust, but also from the principle of the loyal cooperation. There must be a balance in this regard, as the judicial authorities of the Member States are more inclined to recognise and execute judgements issued in other Member States if the fundamental rights of the requested persons are adequately protected throughout the EU. This thought is perfectly reflected in recital 8 of the Directive 2013/28, which states that: "common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust and to the promotion of a fundamental rights culture in the Union."[87]

The view of the CJEU that the lack of judicial independence can ultimately lead to the refusal to execute a European arrest warrant should be received with satisfaction. However, in respect of the *LM* Case, the Court allowed for the possibility to refuse to execute an arrest warrant only in exceptional circumstances, after a two-step test and after the executing judicial authority had obtained additional information from the issuing judicial authority. The second stage of the test, which involves the assessment whether a person subject to a European arrest warrant will be exposed to a real risk of violation of his or her fundamental right to an independent tribunal after his or her surrender, is based on the narrow criteria that are difficult for an individual to demonstrate in the executing state. Many a time will it be simply unrealistic. That calls into question the real intention of the CJEU regarding the respect for fundamental rights. All the more so because any deficit in judicial independence leads to a real risk of violation of fundamental rights, including the right to a fair trial and the guarantees deriving from it.

In conclusion, one must agree with the statement that the procedure for the execution of a European arrest warrant cannot effectively account for harmonising the level of protection against inhuman treatment in

[87] The Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; The Official Journal of the EU L 294, 6.11.2013, pp. 1–12.

penitentiary units in the EU countries,[88] cannot serve the purpose of accurately assessing the shape of "the judicial authority", and cannot lead to the elimination of violations of the rule of law and deficiencies in judicial independence in the Member States. Nevertheless, the very fact that the judicial authorities of another country are examining the indicated elements may provide an impetus for normative changes in the state issuing the European arrest warrant.

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[88] André Klip, *European Criminal Law. An Integrative Approach* (Cambridge–Antwerp–Chicago: Intersentia, 2021), 651–653.

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A Bottom-up Look at Mutual Trust and the Legal Practice of the *Aranyosi* Test

Christina Peristeridou
Dr., Assistant Professor, Faculty of Law, Maastricht University, correspondence address: Bouillonstraat 1–3, 6211LH, Maastricht, the Netherlands, e-mail: c.peristeridou@maastrichtuniversity.nl
https://orcid.org/0000-0002-6607-7583

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Abstract: This contribution offers an insight into the legal practice of the *Aranyosi* test during the EAW proceedings in seven Member States, an outcome of the research conducted during the *ImprovEAW* Project. Only the executing judicial authorities of some Member States do trigger the test. Member States are roughly differentiated between those having facilities with usually bad or usually good detention conditions, promoting antagonistic relationships instead of equal partnership. The lack of streamlining of the communication when supplementary information is requested, the lack of common standards and approach towards guarantees lead to further misunderstandings and frustration. The findings of this research have revealed the importance of departing from a pure legal understanding of mutual trust and follow a more empirical, experiential or bottom-up concept. Mutual trust is not only a legal concept, but it underpins the legal culture of the cooperation and collegial attitudes of authorities towards one another. This expression of mutual trust remains quite undiscovered: how is miscommunication affecting mutual trust? Do judicial authorities of legal systems express collegiality to one another? How do cultural aspects and preconceived ideas regarding the quality of other legal systems influence mutual trust? Accordingly, some suggestions have been made to improve the cooperation and the establishment of rapport when supplementary information is requested. Finally, I advocate for a more neutral view towards

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the *Aranyosi* test. As opposed to considering it as a supervisory mechanism, I have explored the idea of approaching it as a risk management tool: it tackles risks created by mutual trust. Such approach helps both sides to take responsibility to avert ad hoc risks, instead of experiencing *Aranyosi* as a testing moment. Such approach centres the real problem, i.e. the risks created by mutual trust for individuals and it can stimulate more proactive policy-making in this regard.

1. Introduction

Seven years have passed since the judgement by the Court of Justice of the European Union (CJEU) on *Aranyosi and Căldăraru*, in which, for the first time, it introduced exceptions to the unyielding concept of mutual recognition in European Arrest Warrant (EAW) cases.[1] With this judgement and those ensuing, the CJEU established a test where the executing judicial authority may postpone and eventually block surrender if there are serious suspicions that the issuing Member State (MS) will not respect the rights stemming from Article 4 of the Charter of Fundamental Rights of the European Union (Charter) and Article 3 of the European Convention on Human Rights (ECHR).[2] One particular aspect of the test is that the executing judicial authorities should engage into a dialogue with the issuing judicial authorities and request further information.

Yet only recently has scholarship focused on the actual national practice of the MS in applying the *Aranyosi* test.[3] For instance, it is unclear

1 CJEU Judgement of 5 April 2016, Aranyosi and Căldăraru, Case C-404/15 et C-659/15 PPU, ECLI:EU:C:2016:198.

2 CJEU Judgement of 15 October 2019, Dorobantu, Case C-128/18, ECLI:EU:C:2019; CJEU Judgement of 25 July 2018, Generalstaatsanwaltschaft, Case C-220/18 PPU, EU:C:2018:589.

3 Anne Weyembergh and Lucas Pinelli, "Detention Conditions in the Issuing Member State as a Ground for Non-Execution of the European Arrest Warrant: State of Play and Challenges Ahead," *European Criminal Law Review* 12, no. 1 (2022): 35; Wouter van Ballegooij, *European Arrest Warrant – European Implementation Assessment*. Study PE 642.839, European Parliamentary Research Service: 2020, 54; Julia Burchett, Anne Weyembergh, and Mart Ramat, *Prisons and detention conditions in the EU*. Study PE 741.374, Policy Department for Citisens' Rights and Constitutional Affairs Directorate-General for Internal Policies: 2023, 42–47; Adam Łazowski, "Aranyosi and Căldăraru through the Eyes of National Judges," in *The Court of Justice and European Criminal law: leading cases in a contextual analysis*, eds. Valsamis Mitsilegas, Albert di Martino, and Leandro Mancano (Chicago: Hart

whether executing judicial authorities are obliged to trigger it and whether they actually do. It is not self-evident why judicial authorities would suddenly and gladly accept obstacles to a legal procedure that has run more or less smoothly for years if it were not for *Aranyosi*. Legal practice might differ regarding the actual tactics in requesting supplementary information, the content, the style of the responses and their evaluation by executing judicial authorities.

More generally, the executing judicial authority casts doubt upon the legal system of another MS. That arguably creates an uneven dynamic between the issuing and executing authorities: the executing judicial authority is empowered to review the standards in the executing MS; the issuing judicial authority on the other hand is interested in being taken seriously as an equal, trusted partner, but also aims at having the EAW executed swiftly without any delay. This dynamic might lead to a climate of mistrust and disappointment that goes both ways. The adverse impact of the *Aranyosi* test on mutual trust has been frequently addressed in prior scholarship and has been the source of much criticism.[4] It has been particularly troubling to reconcile it with the previously supported strong concept of mutual trust.

In this contribution, my aim is twofold. Firstly, I present key observations from the practice in selected MS of how the *Aranyosi* test is used. My research is not exhaustive but it is based largely on the results of the EU-funded Project *ImprovEAW*, concluded in July 2022, where, *inter alia*, the application of the *Aranyosi* test had been assessed in seven MS, namely Belgium, Greece, Hungary, Ireland, the Netherlands, Poland and Romania.[5] The research in those systems originates from the work output of the Project's partners arising from case files, interviews with judicial authorities and personal expertise.

Publishing, 2019), 437–454; Adriano Martufi and Daila Gigengack, "Exploring Mutual Trust through the Lens of an Executing Judicial Authority. The Practice of the Court of Amsterdam in EAW Proceedings," *New Journal of European Criminal Law* 11, no. 3 (2020): 282–298.

4 Weyembergh and Pinelli, "Detention Conditions," 35–37.

5 Renata Barbosa et al., *Improving the European Arrest Warrant* (Den Haag: Eleven, 2023); Barbosa et al., *European Arrest Warrant: Practice in Greece, the Netherlands and Poland* (Den Haag: Eleven, 2022). See also: ImprovEAW Research Project, accessed April 2, 2023, https://www.improveaw.eu/.

Secondly, I shall use the lessons from the practice as a steppingstone to rethink the concept of mutual trust within the context of the *Aranyosi* test and the newly established dynamic in the relationship of authorities. One important takeaway is that mutual trust is a true sentiment and expectation amongst national judicial authorities. A vote of non-confidence could be potentially felt negatively. I will argue that one must approach mutual trust also as empirical and experiential concept (not only legal) and design measures that are bottom-up, targeting the judicial culture and improving the sentiments of collegiality and communication between authorities. Next to this, I will explore the idea to interpret the *Aranyosi* test as a risk management tool. In that respect, executing and issuing authorities are tasked with assessing and redressing possible risks generated by mutual trust. *Inter alia*, this approach could alleviate – to some degree at least – sensations of a broken relationship or inferiority on the part of the issuing MS and could promote a more focused and proactive attitude towards the challenges that individuals face.

2. The Design of the *Aranyosi* Test

The *Aranyosi* test is not meant as an automatic, casual part of surrender proceedings.[6] Once the national court decides to commence it, there are two steps to be followed. First, the court must investigate whether detainees in the issuing MS run a real *in-abstracto* risk of being subjected to inhuman or degrading detention conditions. Such a general risk would exist in the case of "deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention,"[7] not incidental or occasional violations. To assess such an abstract risk, the court may rely only on objective, reliable, specific and properly updated information.

If a general risk is established, the second step focuses on the *ad hoc* case and the existence of an *in concreto* risk for the specific requested person. To that end, the executing judicial authority engages in a dialogue with

6 CJEU Judgement of 5 April 2016, Aranyosi and Căldăraru, Case C-404/15 et C-659/15 PPU, ECLI:EU:C:2016:198.

7 CJEU Judgement of 5 April 2016, Aranyosi and Căldăraru, Case C-404/15 et C-659/15 PPU, ECLI:EU:C:2016:198, para. 89.

the issuing judicial authority.[8] Supplementary information (Article 15(2) FD EAW)[9] must be requested from the issuing MS to inquire into the conditions of the facilities where the specific individual will be held. Both requesting for information and responding to such a request are obligations of the competent authorities. Once a response is received, the executing judicial authority must rely on the information acquired from the issuing MS but it may also rely on any other information available.[10] Should that assessment result in finding a real *in concreto* risk for the requested person, the executing judicial authority must postpone the execution of the EAW until it receives information to mitigate the established risk within reasonable time, and if not, the procedure should be brought to an end.

Two observations can be made at this stage. First, the CJEU leaves large discretion to the executing authority in triggering and evaluating the potential risks.[11] To be fair, the CJEU has contextualised the use of the test in subsequent jurisprudence and recently the EU has provided more guidelines on the standards of detention conditions, being points that I will refer to later. But the function of the test relies heavily on diverse factors: the national EAW procedure (e.g. how elaborate the procedure is, how much space for presenting evidence there is); the quality and expertise of the defence attorney required in convincing the court to trigger the test; whether national judges are well aware of the CJEU jurisprudence; how a national court perceives its role within the EAW procedure and the attention it puts on efficiency and mutual trust or, conversely, fundamental rights.[12]

Second, the procedure, especially the second part of the test, incorporates a dialogical aspect that is embedded in mutual trust. An obligation to engage in a dialogue echoes the most basic expectation in any relationship between equal partners. Accordingly, the procedure and content of

8 Martufi and Gigengack, "Exploring," 283.

9 Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002).

10 CJEU Judgement of 5 April 2016, Aranyosi and Căldăraru, Case C-404/15 et C-659/15 PPU, ECLI:EU:C:2016:198, para. 98.

11 Weyembergh and Pinelli, "Detention Conditions," 31.

12 In principle national courts should not balance Article 4 of the Charter with efficiency and impunity, see CJEU Judgement of 15 October 2019, Dorobantu, Case C-128/18, ECLI:EU:C:2019, para. 85.

the information exchanged but also the overall quality of such communication are all elements demonstrating the effectiveness of the *Aranyosi* test as well as the impact that such interaction could have on the day-to-day practice of the EAW.

3. Practical Application: Experience from Seven MS

In the EU-funded Project *ImprovEAW*, the application of *Aranyosi* was investigated by looking at the practice and empirical evidence stemming from case files and interviews with practitioners. The aim of the project was broader, namely to improve the use of the EAW form, but the research was partly focused on the application of *Aranyosi*. In the following pages, I will share a few prominent observations.

3.1. The *Aranyosi* Test Is Triggered Mainly by Courts of *Specific* MS

Perhaps the most direct observation from this Project is the inconsistency in the application of this test. There is a variable geometry: some MS perform the test frequently when executing EAWs (the Netherlands, Ireland and Belgium), and some MS do not (Greece, Poland, Hungary and Romania).[13]

Indeed, from 2016 to September 2019, Dutch courts established an *in abstracto* real risk in 94 cases concerning Bulgaria, France, Hungary, Portugal, Romania and the UK. In 56 out of those cases, the surrender procedure continued since no *in concreto* risk had been established. In 38 out of those cases, a concrete risk was established and in 8 cases the person was surrendered after sufficient guarantees had been given.[14] The Netherlands applied the *Aranyosi* with respect to: Belgium, Bulgaria, France, Greece, Hungary, Italy, Lithuania, Sweden, Poland, Portugal, Romania and the United Kingdom.[15]

The Irish executing authority had been busy with detention conditions and applying a test similar to the *Aranyosi* test already before *Aranyosi*.[16] Irish courts provided a series of cases in a similar vein to *Aranyosi*

13 Barbosa et al., "Improving," 208–211.
14 Barbosa et al., "European," 192–197.
15 Barbosa et al., "European," 192–193.
16 Minister for Justice, Equality and Law Reform v. McGuigan [2013] IEHC 216.

developing even further the application of this test.[17] The detention conditions of several legal systems have troubled the Irish courts, e.g. Romania, Lithuania, the UK, Poland.[18]

Surprisingly, no cases were reported for this Project when Greece, Poland, Hungary and Romania acted as executing judicial authorities, even when dealing with the EAWs stemming from the MS with known challenging prison conditions.[19] Whereas it cannot be said that the judicial authorities of those MS have never triggered the test, this result is puzzling.

3.1.1. Reasons for Inconsistent Application of *Aranyosi*

Why such an uneven trigger of the *Aranyosi* test? For once, the *Aranyosi*-jurisprudence, being relatively new, might not have dwelled in all systems. It could be that executing judicial authorities might not be familiar with the CJEU jurisprudence in this regard, especially in those systems where more national courts can act as executing judicial authorities.[20] That could be even more true for defence attorneys: the defence carries the load to at least prompt the court to launch the test. From a European Parliament study, the question has emerged whether the executing authorities should perform the first part of the test *ex officio*.[21] Similarly, the Dutch courts had considered briefly the possibility of introducing a step 0, namely to investigate preliminary evidence that is insufficient to trigger the test but somewhat intriguing; eventually it has been abandoned as idea, because insufficient

17 Minister for Justice, Equality and Law Reform v. Rettinger [2010] IESC 45; Minister for Justice and Equality v. Pal [2020] IEHC 143; Minister for Justice and Equality v. Campbell [2020] IEHC 344.

18 ImprovEAW Research Project, *Irish Report on Improving Mutual Recognition of European Arrest Warrants through Common Practical Guidelines (ImprovEAW)*, 2021, https://www.improveaw.eu/files/irelandpdf, 99.

19 However, Greece reported one case where two joined EAWs issued from Malta were refused, due to concerns regarding the impartiality of the judicial system; also in Poland in one case, the court rejected the request to trigger *Aranyosi* and cited the case, Barbosa et al., "European," 80–81, 298.

20 The argument to be made is that with a specialised court as executing judicial authority, expertise in EAW can be attained better than having several national courts, Barbosa et al., "European," 22, 35.

21 Ballegooij, "European Arrest Warrant," 54.

evidence means just that and nothing more.[22] Nevertheless, the role of executing authorities within the national concept of criminal procedure can be tricky given the burden left to the defence, a concern raised by the Irish and Dutch authorities: sometimes the Dutch courts will help the defence by gathering information *ex officio*.[23]

Another explanation could stem from the purpose of the *Aranyosi* test all together: MS with known challenging detention conditions (such as Greece, Romania and Hungary) cannot commonsensically complain about detention conditions elsewhere.[24] It sounds illogical and hypocritical to complain when you have your finger in the pie.[25] Such explanation could result into a limited application of the *Aranyosi* test: is it meant *de facto* to be triggered only by those MS with usually good detention conditions? The detention conditions at the executing MS are irrelevant for triggering the test, but in practice this hesitation could be real.

There is the possibility that, in some MS, the attitude of courts might be leaning more towards the side of an unconditional mutual trust or simply prioritise the effectiveness of the EAW over fundamental rights in some cases, especially if seen from the point of managerialism and efficiency. EAW procedures have been running for years relatively successfully. Why change a winning horse? Naturally, the EAW proceedings at the national level have gained their own pace and automatism. Some courts might be reluctant since the *Aranyosi* test is a taxing judicial exercise, workload is high and there are tough time-limits.

All of those are educated assumptions and more research is needed into the actual practice. Still, those findings are awkward. *Aranyosi* relates to an absolute fundamental right. There is something inherently wrong with the fact that being arrested in some MS might lead to higher protection of this absolute right than being arrested in others.

Importantly, the *Aranyosi* test is a purely judicial exercise without a proper legal basis: the FD EAW does not include a ground for refusal

22 Barbosa et al., "European," 198.

23 Barbosa et al., "European," 199.

24 Weyembergh and Pinelli, "Detention Conditions," 35.

25 TP Marguery, "Towards the End of Mutual Trust? Prison Conditions in the Context of the European Arrest Warrant and the Transfer of Prisoners Framework Decisions," *Maastricht Journal of European and Comparative Law* 25, no. 6 (2018): 712–713.

concerning fundamental rights. This is reported to already cause confusion to national courts as to how to phrase their refusals to execute.[26] The amendment of the FD EAW to include such formal refusal ground has been put forward and debated.[27] Yet, the whole point with introducing mutual recognition is to move away from the older extradition model. Already it is argued that those recent developments in the CJEU jurisprudence create a regime far more stringent than the previous extradition framework.[28]

3.2. The *Aranyosi* Test Can Damage the Trust between the Judicial Authorities

This uneven legal practice gives rise to a division between some MS that usually invoke *Aranyosi* (the Netherlands and Ireland) and MS usually at the receivers' end of requests because of poor detention conditions (Greece, Poland, Hungary and Romania).[29] This polarity is not absolute as some MS belong to both categories (e.g. Belgium).[30] But grouping MS into the good and bad students of the class is the opposite of what you want in the Area of Freedom Security and Justice where mutual trust reigns.

More specifically, such picture was observed when looking at how those judicial authorities receiving plenty requests outlined their experience. Several of those prosecutors and judges in the aforementioned MS reported feeling mistrusted and they assessed some requests as exaggerated, pedantic (e.g. whether the defendant will be allowed to smoke tobacco) or as an expression of superiority.[31] In two remarkable cases considering

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26 Łazowski, "Aranyosi and Căldăraru," 439.

27 Frank Zimmermann, "Concerns Regarding the Rule of Law as a Ground for Nonexecution of the European Arrest Warrant: Suggestions for a Reform," *European Criminal Law Review* 12, no. 1 (2022): 21; European Parliament Resolution of 20 January 2021 (P9TA(2021)0006), para. 9; Weyembergh and Pinelli, "Detention Conditions," 48–49.

28 André Klip, "Eroding Mutual Trust in an European Criminal Justice Area without Added Value," *European Journal of Crime, Criminal Law and Criminal Justice* 28, no. 2 (2020): 109–119.

29 Barbosa et al., "Improving," 208–211.

30 ImprovEAW Research Project, *Belgian Report on Improving Mutual Recognition of European Arrest Warrants through Common Practical Guidelines (ImprovEAW)*, 2021, https://www.improveaw.eu/files/belgiumpdf, 66.

31 Barbosa et al., "European," 77–79; ImprovEAW Research Project, *Romanian Report on Improving Mutual Recognition of European Arrest Warrants through Common Practical Guidelines (ImprovEAW)*, 2021, https://www.improveaw.eu/files/romaniapdf, 64.

impartiality of courts (and not detention conditions but they particularly exemplify the situation), Poland refused to execute EAWs from the Netherlands arguing a lack of impartiality of the Dutch authorities, meaning as impartiality towards Polish cases.[32] On the other hand, the executing authorities are also brought into the difficult position to judge the facilities and standards of other legal systems.[33]

3.2.1. Problematic Dialogue

The way in which the MS request and provide supplementary information – being unstandardised and left for the MS to figure out – does not help improve communication. For example, the Greek issuing authorities reported that questions often arrived one-by-one prolonging the procedure.[34] Frustration with supplementary information is also witnessed outside the field of *Aranyosi* as other supplementary information requested is often irrelevant or exists already in the EAW form.[35]

Whether or not excessive questions are asked depends on the standards of detention conditions, a topic without current EU harmonisation. Misunderstandings may occur as to which questions are (ir)relevant. The CJEU has made a consistent reference to the case law of the ECtHR: all physical aspects are relevant (e.g. personal space, sanitary conditions, freedom to move, $3m^2$ minimum with certain exemptions).[36] A few other established guidelines are as follows: the executing judicial authority may not use higher national standards as a benchmark;[37] the executing judicial authority must not request supplementary information on all prisons of the issuing MS, only on the actual and precise facilities where the requested person will likely be detained, including on a temporary basis;[38] to establish a real

32 Barbosa et al., "European," 299.

33 Weyembergh and Pinelli, "Detention Conditions," 31.

34 Barbosa et al., "European," 77.

35 Barbosa et al., "Improving," 199–201.

36 CJEU Judgement of 15 October 2019, Dorobantu, Case C-128/18, ECLI:EU:C:2019; CJEU Judgement of 25 July 2018, Generalstaatsanwaltschaft, Case C-220/18 PPU, EU:C:2018:589, para. 97–98.

37 CJEU Judgement of 15 October 2019, Dorobantu, Case C-128/18, ECLI:EU:C:2019, para. 79.

38 CJEU Judgement of 25 July 2018, Generalstaatsanwaltschaft, Case C-220/18 PPU, EU:C:2018:589, para. 78.

risk *in concreto*, the review must be comprehensive and not limited to only manifest inadequacies, meaning that supplementary information should allow gathering information for such comprehensive review; questions regarding a legal remedy are not necessarily irrelevant but a legal remedy in the issuing MS to challenge detention conditions does not suffice to exclude a real risk of violation.[39]

Even if useful, those guidelines are insufficient to direct judicial discretion and ensure proper communication, which is also criticised in scholarship.[40] When supplementary information is requested, several issuing authorities choose to offer a type of guarantee that the requested person will be kept in appropriate facilities. Offering such a guarantee expedites surrender. But with no clear and common detention standards it becomes unpredictable for the issuing authority which guarantee would be satisfactory. The following case perfectly exemplifies this problem: two concurrently pending Greek EAWs were put under consideration before two different German courts and exactly the same supplementary information was provided by the Greek authorities regarding the same prison (exactly the same numbers, capacity and conditions), yet one German court found the prison satisfactory but the other did not.[41]

In a similar vein, sometimes even after offering a guarantee the request was refused, leaving the issuing authorities puzzled.[42] Such a situation could either result from an inadequate guarantee given by the issuing judicial authority or because the executing judicial authority did not rely on it. Several factors could influence the reliability of the guarantee: too abstract or laconic or subject to conditional terms or provided by a non-judicial authority which casts doubt regarding its reliability, given the recent case law on this matter.[43] Additionally, there are various types of guarantees given, apparently: depending on the national circumstances some issuing authorities might promise (not) to use a specific prison or give a general promise to use

39 CJEU Judgement of 25 July 2018, Generalstaatsanwaltschaft, Case C-220/18 PPU, EU:C:2018:589.

40 Łazowski, " Aranyosi and Căldăraru," 441–442.

41 Barbosa et al., "European," 78–79.

42 Barbosa et al., "European," 78–79.

43 Barbosa et al., "Improving," 219.

a facility with adequate requirements.[44] Without any common standards, its reliability depends fully on the executing authority, causing uncertainty.

Such unpredictability could foster a culture of gambling on the part of the issuing authority. From the Greek practice, for example, two attitudes emerge when answering supplementary information requests, depending on whether it is possible to comply with the requests and how important the *ad hoc* case is. If so, then the attitude is to take full responsibility to comply with fundamental rights and take all necessary measures to ensure appropriate facilities, picking prison facilities that are "*Aranyosi*-proof". If, on the other hand, there is simply no space in such facilities that are deemed undoubtedly appropriate, and/or if the case is not too pressing, the Greek issuing authorities will simply communicate the conditions of the prison allocated for this case. And then the burden to decide whether those detention conditions are (in)sufficient rests with the executing authority. That latter approach has been referred to by some Greek practitioner as a "gamble" that sometimes "works",[45] meaning that borderline cases could sometimes pass the test because the executing judicial authorities might give way to the pressure of mutual trust, the need to bring cases to justice and execute requests. One has to wonder: can the EAW procedure regain its credibility and reliability as mechanism of cooperation?

4. A Bottom-up Approach to Mutual Trust

All in all, one observes that communication and perception of the relationship between authorities play a significant role for mutual trust. Bilateral communication between authorities could be less or more prolific depending on the MS involved. The research conducted within the framework of the *ImprovEAW* Project, while not exhaustive as far as the application of the *Aranyosi* test is concerned, indicates that mutual trust is not only a normative legal concept. It is also something that judicial authorities experience, an experiential concept that informs their decisions in more subtle ways and underpins the attitude that authorities have when cooperating: asking too many irrelevant questions, casting doubts on the quality of legal systems, not responding, not taking into account responses, are examples of

44 Barbosa et al., "Improving," 220–221.

45 Barbosa et al., "European," 79.

attitudes that might weaken mutual trust. But is this a part of the definition of mutual trust?

4.1. From a Static to a Dynamic Mutual Trust

The predominant view towards mutual trust in criminal matters approaches it as a legal and normative concept. It is a postulate governing the Area of Freedom Security and Justice enabling authorities to cooperate despite their differences. Mutual trust has been used as a tool for the purpose of achieving pluralism of legal systems and forming the basis on which mutual recognition of judicial decisions can exist.[46]

Concomitantly, mutual trust has had an ambivalent, paradoxical nature: it is an existing postulate based on common values but also an objective to be reached in itself, and an obligation arising for achieving another purpose, i.e. mutual recognition. For example, in the Preamble of the FD EAW mutual trust is presented as a pre-existing postulate based on common values: "The mechanism of the European arrest warrant is based on a high level of confidence between Member States."[47] But in the Hague Programme, mutual trust is featured as a goal in itself, something to be created by means of legal measures.[48] For AG Bot in *Kossowski*, though, mutual trust is none of the above but a consequence of mutual recognition:

> The intention of the EU legislature, in adopting the principle of mutual recognition, was to overcome the almost insurmountable difficulties which had been encountered, due in particular to the failure of efforts to approximate national laws in advance. The Court followed the legislature by giving due effect to the principle in its case-law. The phrase used must therefore be understood as meaning that mutual trust is not a prerequisite for the operation of mutual recognition, but a consequence which is imposed on MS by the application of that principle. In other words, the application of the principle of mutual

46 Valsamis Mitsilegas, "Conceptualising Mutual Trust in European Criminal Law: the Evolving Relationship between Legal Pluralism and Rights-Based Justice in the European Union," in *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*, eds. Evelien Brouwer and Damian Gerard (EUI Working Paper: 2016), 25.

47 Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002), recital 10.

48 The Hague Programme: strengthening freedom, security and justice in the European Union (OJ C 53, 3.3.2005).

recognition requires the MS to place trust in each other regardless of the differences in their respective national laws.[49]

All three narratives have coexisted all along creating a confusing picture but also showing that mutual trust has heterogenous nature and cannot be exhaustively explained by means of a single narrative.[50]

As a presumption it has been almost irrebuttable for years.[51] Until *Aranyosi*, the CJEU had been reluctant to allow discretional powers to executing authorities in assessing the compatibility of the EAW with fundamental rights;[52] although some discretion was afforded in the areas of law lacking EU harmonisation.[53] This uncritical view of the presumption of mutual trust (which has received criticism over the years) has persevered.[54] This has been the case even if in modern instruments (post-EAW), such as the European Investigation Order, grounds for refusal on fundamental rights were in fact introduced.[55] To be fair, such strict application of mutual trust was accompanied by a series of Directives on procedural rights. Yet there is no harmonisation on the measures of detention *per se*, such as the requirements for arrest and pre-trial detention.[56]

Anyhow, trust has been superimposed as a given. In that sense, it has also been a static concept, it exists no matter what the reality is. However, national constitutional courts on many occasions sang a different tune,

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49 Opinion of AG Bot of 15 December 2015, Kossowski, Case C-486/14 ECLI:EU:C:2015:812, p. 43.

50 Cecilia Rizcallah, *Le principe de confiance mutuelle en droit de l'Union européenne. Un principe essentiel à l'épreuve d'une crise de valeurs* (Bruxelles: BruyLant, 2020), 262–270.

51 Opinion of the CJEU of 18 December 2014, 2/13, ECLI:EU:C:2014:2454, para. 191–192.

52 E.g. CJEU Judgement of 26 February 2013, Melloni, Case C-399/11, ECLI:EU:C:2013:107.

53 CJEU Judgement of 30 May 2013, Jeremy F., Case C-168/13 PPU, ECLI:EU:C:2013:358, para. 35.

54 Wouter Ballegooij, *The Nature of Mutual Recognition in European Law. Re-Examining the Notion from an Individual Rights Perspective with a View to Its Further Development in the Criminal Justice Area* (Antwerp: Intersentia, 2015), 356.

55 Directive of the European Parliament and of the Council 2014/41/EU regarding the European Investigation Order in criminal matters (OJ L 130/1, 3.42014).

56 Adriano Martufi and Christina Peristeridou, "Pre-trial Detention and EU Law: Collecting Fragments of Harmonisation Within the Existing Legal Framework," *European Papers: A Journal on Law and Integration* 5, no. 3 (2020): 1477–1472.

opposing to such static understanding of trust; in some of the MS even grounds for refusal related to fundamental rights were introduced in national law, contrary to EU law.[57]

With *Aranyosi* (and the ensuing case law), the CJEU relativised the presumption of mutual trust and introduced this test as a form of control, a decentralised fundamental rights mechanism. This signalises a paradigm shift from an automated, presumed, uncritical trust to a dialogical process between authorities, where trust is checked and earned when doubts exist. From a static conception of "trust is there" we have moved to a dynamic conception of "trust is being built in a continuous feedback loop".

Looking at mutual trust as a dynamic concept has two advantages: it allows for the open exploration of what constitutes mutual trust and what influences it. Maybe *Aranyosi* has harmed mutual trust, but perhaps in the long run, such dialectic process will strengthen mutual trust: systems will understand one another better or the peer-review and pressure mechanism will perhaps encourage MS to raise the standards of human rights protection or reduce the use of EAWs. *Mitsilegas*, for example, examines the versatile and complicated nature of mutual trust by exploring its relation to fundamental rights: mutual trust has strengthened fundamental rights but it can also be strengthened by the harmonisation of fundamental rights or it can also be an obstacle for the protection of fundamental rights.[58]

The second advantage is that, in *ad hoc* EAW proceedings, attention is paid to the legal practice. Whether or not there is mutual trust depends on the MS in question and their communication and cooperation. Mutual trust could be strengthened if this communication is fluent, with clear mutual expectations of engagement. Trust is also built in a bottom-up way.

More bottom-up empirical research is required to investigate the use of *Aranyosi*. After all, mutual trust is a concept known to socio-political science, anthropology, economy, and psychology as an important trait that

57 BVerfG, Order of the Second Senate of 15 December 2015 – 2BvR 2735/14.

58 Valsamis Mitsilegas, "The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice," *New Journal of European Criminal Law* 6, no. 4 (2015): 458–479.

underpins human relations.[59] It transcends law. It would be very interesting to gain overview into the actual dynamics of relationships of judicial authorities: their perception of collegiality, the judicial culture of their cooperation and how to foster it and their culture for professional work ethics. Additionally, while we know something regarding the responses of the issuing authorities, we know very little of what executing judicial authorities do with the received information, how they make decisions and which factors they put attention to. For example, the Belgian executing authorities sometimes request information regarding the ways the executing MS has responded to ECtHR judgements, implying that this is a factor to consider in their decision. *Rogan*'s research reveals a possibly pivotal role for national and supranational bodies tasked with the monitoring and supervision of prisons, as the existence of such bodies might play an invisible but important role in the decision-making process.[60]

To be clear, my claim is not that top-down measures have no place. The lack of common standards in detention conditions has been a problem-maker.[61] Establishing EU common standards of detention conditions would improve mutual trust. In December 2022, the European Commission published a Recommendation on the rights of suspects in pre-trial detention including material detention conditions.[62] It proposes standards for pre-trial detention but also material conditions with extensive reference to several aspects of the life in prison including vulnerable detainees such as women and those with vulnerable health conditions. The Recommendation is certainty a large step towards the right direction.

But would harmonisation be enough to improve mutual trust and the proper applicability of *Aranyosi*? One would require more bottom-up measures that address the judicial culture of the "coal face" practice.

59 Eveline Brouwer and Damian Gerard, "Mapping Mutual Trust – an Introduction," in *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law*, eds. Evelien Brouwer and Damian Gerard (EUI Working Paper: 2016), 1.

60 Mary Rogan, "What Constitutes Evidence of Poor Prison Conditions after Aranyosi and Căldăraru? Examining the Role of Inspection and Monitoring Bodies in European Arrest Warrant Decision-Making," *New Journal of European Criminal Law* 10, no. 3 (2019): 209–226.

61 Barbosa et al., "Improving," 315.

62 Commission Recommendation on the procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions. Brussels, 8.12.2022 C(2022) 8987 final.

Measures directly engaging the judicial authorities and serving the basis for mutual recognition. Evidence of such bottom-up measures was suggested within the framework of the *ImprovEAW* Project. One recommendation for example was the adoption of a template when requesting supplementary information in the context of *Aranyosi*; such template should offer the possibility to request a specific guarantee in advance (e.g. that the requested person will (not) be held in a specific prison). It has been reported that such template is being developed by the Commission.[63] Additionally, another good practice would be to establish a standardised text of a guarantee – as a clear, unambiguous and unconditional promise; a judicial authority should endorse such a guarantee to increase its reliability.[64] Another example of bottom-up measures strengthening mutual trust is setting a deadline for requesting supplementary information as this helps preventing frustration.

4.2. The *Aranyosi* Test: From Supervision to Risk Management

The broadened powers of the executing authority can be experienced by both sides as awkward. Such sentiment could damage mutual trust. From "judges asking judges" we have moved to "judges monitoring judges".[65] Mutual trust receives the connotation of a supervision mechanism.[66]

However, there is another way to approach the function of the *Aranyosi* test: a form of risk management tool. *Rizcallah* has developed in her work the concept of mutual trust from the point of view of risk management. It starts from the assumption that, despite the common values, mutual trust creates certain risks due to the uncontrolled passage of one legal solution

63 ImprovEAW Research Project, *Belgian Report on Improving Mutual Recognition of European Arrest Warrants through Common Practical Guidelines (ImprovEAW)*, 2021, https://www.improveaw.eu/files/belgiumpdf, 65.

64 Barbosa et al., "Improving," 220–221.

65 Tomasz Tadeusz Koncewicz, "The Consensus Fights Back: European First Principles Against the Rule of Law Crisis," *Verfassungsblog*, 5 April 2018, https://verfassungsblog.de/the-consensus-fights-back-european-first-principles-against-the-rule-of-law-crisis-part-1/; see in general Petra Bárd and Wouter van Ballegooij, "Judicial Independence as a Precondition for Mutual Trust? The CJEU in Minister for Justice and Equality v. LM," *New Journal of European Criminal Law* 9, no. 3 (2018): 353–365. https://doi.org/10.1177/2032284418801569.

66 André Klip, "The European Arrest Warrant, from Mutual Recognition to Mutual Supervision," *European Criminal Law Review* 12, no. 1 (2022): 83–87.

to the legal order of the other. When there is a presumption of compatibility not corresponding to the reality, there are potential risks generated: violations of individual rights, inconsistencies/inefficiency of instruments, tensions with legal principles of national orders, and other disadvantages either affecting the state or individuals. Eliminating those risks becomes a necessary part of a dynamic concept of mutual trust. And the *Aranyosi* test does exactly that.[67]

One advantage with that view is its accurate depiction of the test. *Rizcallah* explains how such a test already fits into the overall outlook of generic risk assessment tools.[68] The *Aranyosi* test can then become more methodical and transparent in its function. Take for instance the first step of a generic risk analysis which is to identify the risk and whether it is worthy of action. When identifying risks in the field of mutual recognition, it would be important to first illustrate whether the risk is pertinent to an important foundational value (or human right) and whether such risk is actually serious.[69] In fact, *Aranyosi* has been expanded to aspects of fair trial and the lingering question is whether its scope could be expanded to other fundamental rights as well.[70] In *EDL*, the CJEU held that when the requested person suffered from a chronic and serious illness, the executing authority could request supplementary information and assurances that the detention conditions would accommodate the health condition of the requested person.[71] In the pending case of *GN*, the AG has opined that the executing authority could refuse the surrender of a mother of minor children when the executing authority is not absolutely certain, after requesting supplementary information and assurances, that the issuing state will respect the rights of the child during detention.[72] Those are all generated risks created by mutual trust. But should those risks be mitigated?

A second advantage arising from *Aranyosi* as a risk management exercise is that it changes the narrative of the relationship of the authorities. Instead of monitoring and supervising the detention conditions in the issuing

67 Rizcallah, "Le principe," 539.
68 Rizcallah, "Le principe," 515–526.
69 For a complete graph on how to characterise risk Rizcallah, "Le principe," 567.
70 CJEU Judgement of 25 July 2018, LM, Case C-216/18, ECLI:EU:C:2018:586.
71 CJEU Judgement of 18 April 2023, EDL, Case C-699/21, ECLI:EU:C:2023:295.
72 Opinion of AG Ćapeta of 13 July 2023, GN, Case C-261/22, ECLI:EU:C:2023:592.

state, both authorities address and minimise some risks created during the EAW proceedings. When *Aranyosi* is triggered, the modality is not one of control and supervision but of division of labour in addressing a risky situation for individuals. Both authorities in their role should accordingly make all efforts possible to mitigate that risk. This approach could help those MS with already problematic detention conditions to trigger the test themselves when executing EAWs. This is echoed also in AG Bot's Opinion: "(…) We must also not forget that the issue here is to prevent a risk, not to find and penalise an infringement (...)."[73]

More generally the risk management approach promotes a more proactive policy for the potential risks of mutual recognition and the position of individuals in general. Perhaps a part of the process in producing legislation in the field of mutual recognition should be to conduct a risk assessment of the potential risks that mutual trust would create for the individuals subjected to new instruments and how to best offset them. One example is the post-effect of the EAW: it is unclear whether those surrendered with an EAW tend to have worse treatment as far as pre-trial detention is concerned in the issuing MS, or they stand a similar chance to be granted bail. Additionally, it is not clear whether the *Aranyosi* test itself creates two-class citisens within the same MS: those surrendered under the EAW and after assurances, who are consequently kept in better facilities, and the rest of the detainees.[74]

5. Conclusion

In this contribution, I have presented key observations regarding the practice of *Aranyosi* arising from the *ImprovEAW* Project. There is inconsistency in triggering the test and the division between MS, which promotes antagonistic relationships instead of equal partnership. The lack of streamlining of the communication when supplementary information is requested, the lack of common standards and approach towards guarantees lead to frustration.

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73 Opinion of AG Bot of 3 March 2016, Aranyosi and Căldăraru, Case C-404/15 et C-659/15 PPU, ECLI:EU:C:2016:140, para. 3 and 127.

74 Petra Bárd and Wouter van Ballegooij, "The Effect of CJEU Case Law Concerning the Rule of Law and Mutual Trust on National Systems," in *The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis*, eds. Valsamis Mitsilegas, Albert di Martino, and Leandro Mancano (Chicago: Hart Publishing, 2019), 459.

The findings of this research have revealed the importance of abandoning a purely legal conceptual framework of mutual trust and focusing on a more empirical, experiential or bottom-up concept. Mutual trust creates a legal culture of judicial cooperation during EAW proceedings, which remains quite undiscovered: how is miscommunication affecting mutual trust? Do judicial authorities of different legal systems express collegiality to one another? How do cultural aspects and preconceived ideas regarding the quality of legal systems influence mutual trust and the decisions of national authorities? If mutual trust is not always a given anymore and courts are allowed to debate it, those are good questions to be addressed. There should be more research conducted in order to reveal the perspective of judges and prosecutors who operate the EAW proceedings. Accordingly, some suggestions have been made to improve the cooperation and the establishment of rapport when supplementary information is requested. Finally, I have supported a more neutral view towards the *Aranyosi* test. As opposed to looking at it as a supervisory mechanism, I have explored the idea to approach it as a risk management tool. In my view, such approach helps both sides to take responsibility to avert *ad hoc* risks, instead of experiencing *Aranyosi* as a one-sided testing moment. Such approach puts the real problem in the centre: the risks created by mutual trust for individuals.

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Translating and Interpreting the Letter of Rights

André Klip
Professor, Faculty of Law, Maastricht University, correspondence address: P.O. Box 616, 6200 MD Maastricht, The Netherlands, e-mail: andre.klip@maastrichtuniversity.nl
https://orcid.org/0000-0001-7668-1939

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Abstract: This article focuses on the implementation of Directive 2012/13 on the Right to Information with reference to foreigners arrested in the Member State of the EU. In particular, the Author analyses whether foreigners provided with a Letter of Rights receive the same information despite their handicap of not understanding the language. Special attention is given to how the Netherlands and Poland deal with the Letter of Rights for foreigners. The picture that emerges concerning foreigners is that providing them with a Letter of Rights in their language is seriously handicapped in almost all aspects: the timing (availability), the linguistic quality, the accessibility and simplicity. This situation creates severe risks concerning the right to a fair trial for foreigners. They may not invoke rights because they do not know them. They may not come to their own trial because they did not understand.

1. Introduction

With the advent of Directive 2012/13 on the Right to Information, the Union legislature has introduced an obligation to inform suspects and accused of their rights by making use of a Letter of Rights. In this contribution I focus on what that means for suspects and accused who do not understand the local language. How can it be safeguarded that foreigners will receive the same information despite their handicap of not understanding the language? Whereas ideally a study would be conducted in all relevant Member States, this has not been possible due to the fact that the translations are not made publicly available. I will therefore limit myself the two states of which

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I have sufficient information for a first impression: the Netherlands and Poland. Article 2, paragraph 1 Directive 2012/13 on the Right to Information states that the right to information about rights entails:

(a) the right of access to a lawyer;
(b) any entitlement to free legal advice and the conditions for obtaining such advice;
(c) the right to be informed of the accusation, in accordance with Article 6;
(d) the right to interpretation and translation;
(e) the right to remain silent.

The right to information can be regarded as the key to all other rights. If you do not know what your rights are, how can you then claim these rights? Article 3 stipulates that this information must be provided promptly and in a manner that allows those entitled to exercise their right effectively. On this urgency, the Court held:

> persons suspected of having committed a criminal offence must be informed as soon as possible of their rights, from the moment when they are subject to suspicions which justify, in circumstances other than an emergency, the restriction of their liberty by the competent authorities by means of coercive measures and, at the latest, before they are first officially questioned by the police.[1]

The obligation to give information may be fulfilled when Member States give the information orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.[2] This highlights immediately one of the weaker elements of the right as envisaged in the Directive. Can we expect all accused that have been told about their rights to understand? This has been compensated for by the introduction of the Letter of Rights in Article 4. This Letter must be given in a written form and the accused shall be allowed to keep it in possession.

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1 CJEU Judgement of 19 September 2019, Rayonna prokuratura Lom, KM, HO v. EP, Case C-467/18, ECLI:EU:C:2019:765, para. 53.

2 See also: Preambular, para. 38.

Paragraph 3 of Article 4 adds that the Letter of Rights must also give basic information about any possibility of challenging the lawfulness of the arrest; obtaining a review of the detention or making a request for provisional release. Paragraphs 4 and 5 of Article 4 address the language in which the letter must be drafted:

> The Letter of Rights shall be drafted in simple and accessible language. An indicative model Letter of Rights is set out in Annex I. Member States shall ensure that suspects or accused persons receive the Letter of Rights written in a language that they understand. Where a Letter of Rights is not available in the appropriate language, suspects or accused persons shall be informed of their rights orally in a language that they understand. A Letter of Rights in a language that they understand shall then be given to them without undue delay.

In an annex to Directive 2012/13 on the Right to Information, published in the Official Journal, the suggested model Letter of Rights has been published.[3]

As far as I can see, there has not yet been a single case decided by the Court on the interpretation of Article 4(5) and translation of the Letter of Rights, other than that the Court held that Article 4 does not apply to persons subject to an European Arrest Warrant their Letter of Rights.[4] However, there is case law in which the Court has underlined the importance of informing the suspect of his rights, especially in view of the larger context of the right to a fair trial.

The Court has stated that the Letter of Rights must be provided as soon as possible:

> Recital 19 of Directive 2012/13 also makes clear that the right to be informed of one's rights must be observed 'at the latest before the first official interview of the suspect or accused person by the police'. Furthermore, under recital 22 of Directive 2012/13, 'where suspects or accused persons are arrested or detained, information about applicable procedural rights should be given by

3 OJ 2012, L 142/8. See further: André Klip, *European Criminal Law. An Integrative Approach*, 4th ed. (Cambridge: Intersentia, 2021), 312–314 and 325–327.

4 CJEU Judgement of 28 January 2021, Criminal proceedings against IR, Case C-649/19, ECLI:EU:C:2021:75.

> means of a written Letter of Rights drafted in an easily comprehensible manner so as to assist those persons in understanding their rights. Such a Letter of Rights should be provided promptly to each arrested person when deprived of liberty by the intervention of law enforcement authorities in the context of criminal proceedings'. It follows from the above that persons suspected of having committed a criminal offence must be informed as soon as possible of their rights, from the moment when they are subject to suspicions which justify, in circumstances other than an emergency, the restriction of their liberty by the competent authorities by means of coercive measures and, at the latest, before they are first officially questioned by the police.[5]

More than 3,5 years later than prescribed in Article 12 Directive, the Commission reported on the implementation in the Member States.[6] It established that Member States still need to make an effort on compliance. The Commission did not see a need to revise the Directive.

2. The Quality of the Translation of the Letter of Rights in the Netherlands

In dealing with translation of the Letter of Rights, it is relevant to see that both Directives 2012/13 and 2010/64 apply. The Court has interpreted Article 5(1) of Directive 2010/64 that:

> [it] provides that Member States must take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) of that directive, with that latter provision specifying that interpretation must be 'of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.'[7]

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5 CJEU Judgement of 19 September 2019, Rayonna prokuratura Lom, KM, HO v. EP, Case C-467/18, ECLI:EU:C:2019:765, para. 51–53.

6 Report of the Commission to the European Parliament and the Council on the implementation of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, Brussels, 18.12.2018, COM(2018) 858 final.

7 CJEU Judgement of 23 November 2021, Criminal proceedings against IS, Case C-564/19, ECLI:EU:C:2021:949, para. 109.

The Court further stated that:

> in order to ensure that the suspect or accused person who does not speak and understand the language of the criminal proceedings has nevertheless been properly informed of the allegations against him or her, the national courts must review whether he or she has been provided with interpretation of a 'sufficient quality' in order to understand the accusation against him or her, so that the fairness of the proceedings is safeguarded. In order to enable national courts to carry out that verification, those courts must, inter alia, have access to information relating to the selection and appointment procedure for independent translators and interpreters.[8]

These judgements emphasise the importance of a perfect translation that is available almost as fast as the text in the national language.

Good translations are especially important as non-understanding of Letter of Rights or summons may lead to the accused not attending his own trial, so the Court held:

> Article 2(5) of Directive 2010/64 and Article 4(5) and Article 6(1) of Directive 2012/13, read in the light of Article 48(2) of the Charter, must be interpreted as precluding a person from being tried in absentia when, on account of inadequate interpretation, he or she has not been informed, in a language which he or she understands, of the accusation against him or her or where it is impossible to ascertain the quality of the interpretation provided and therefore to establish that he or she has been informed, in a language which he or she understands, of the accusation against him or her.[9]

It is this link with the right to a fair trial as a whole that emphasises the importance of conveying the information on rights to the accused in a language he can understand.[10] It is therefore relevant to investigate to

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8 CJEU Judgement of 23 November 2021, Criminal proceedings against IS, Case C-564/19, ECLI:EU:C:2021:949, para. 115.

9 CJEU Judgement of 23 November 2021, Criminal proceedings against IS, Case C-564/19, ECLI:EU:C:2021:949, para. 137.

10 Unfortunately, two references from the Okresný súd Bratislava concerning the question what the consequences are of providing an accused with an incomplete Letter of Rights was struck from the Court's list, see: Order of the President of the Court of 12 June 2019, R.B. v Krajská prokuratúra v. Bratislave, Case C-149/19, ECLI:EU:C:2019:532; and

what extent Member States can deliver good translation to foreigners arrested in their country.

In the course of the preparation of a report on the role of language and translations for the Dutch-Flemish Association of Criminal Law, the Nederlands-Vlaamse Vereniging voor Strafrecht,[11] I came across various difficulties concerning translations and interpretations in different stages of the criminal proceedings. As most of these relate to conduct at the hearing or to interpretations and translations in a specific criminal proceeding, it is hard to have direct access to the documents and thus it is also hard to make an analysis of the quality of the translation or interpretation. However, this is different concerning the Letter of Rights which must be provided in writing. I decided to reach out to my students at Maastricht University,[12] and asked them to look at the language version of the Letter of Rights in their native language that is provided by the Dutch Ministry of Justice and Security as the model to be used.[13]

The Dutch Ministry provides translations for 30 languages, 20 of which were analysed by my students. This resulted in a picture of the quality of the translations which I will sketch below. Most of my students had no command of Dutch, so the question put was not whether it was a correct translation, but whether the text was understandable, whether there were any errors and whether you could detect whether the translation was made by a native speaker. The reason to ask them to look at it as a stand-alone document lies in the fact that it puts the student in the same position as the just arrested accused who receives the written text in his/her own language (or a language s/he understands) in a completely Dutch environment. In other words, neither the quality of translating from the Dutch original[14] nor

Order of the President of the Second Chamber of the Court of 24 January 2019, Okresná prokuratúra Bratislava II v ML, Case C-510/17, ECLI:EU:C:2019:128.

11 André Klip, *Taal, tolken en vertalen in de strafprocedure, preadvies voor de Nederlands-Vlaamse Vereniging voor Strafrecht* (Nijmegen: Wolf Legal Publishers, 2021).

12 I wish to thank the many students who provided me with their comments on the native language versions.

13 The text can be found at: "Mededelingen van rechten aan de verdachte," Rijksoverheid, accessed October 12, 2023 2023 , https://www.rijksoverheid.nl/documenten/brochures/2014/10/20/mededelingen-van-rechten-aan-de-verdachte.

14 There is no information whether the translator used the Dutch version or another text as original.

the question of whether the end result legally complies with the demands of Directive 2012/13 has been tested in this small research project. Another reservation is that most languages had just one native speaker assessing the text. In that sense, the research project gives a mere impression and cannot be taken as producing representative empirical test results yet.

On the basis of the comments received, I have grouped the translations into three categories. One with little to no complaints. An intermediate category with minor errors, however with some odd sentences and doubts as to whether the translator is a native speaker. The last group consists of translations with severe errors, several incomprehensible or weird sentences and the commentator is convinced that the translator is not a native speaker. Some of the translations were on the edge of two categories.

a. Translations not leading to complaints
Arabic, French,[15] Russian, Surinamese,[16] Ukrainian

b. Minor errors/few odd sentences/doubts on native speaker
Bulgarian, Chinese, Croatian, Estonian, Latvian, Papiamentu,[17] Polish, Portuguese, Romanian
If the Croatian text is used for a Bosnian/Serbian native speaker s/he may not understand some words which are typical Croatian. The Bulgarian text uses words that read as "punishable fact" which looks very similar to "strafbaar feit" which is a term of art in Dutch criminal law, but apparently makes little sense in Bulgarian as a translation for "criminal offence". In this group, quite some spelling mistakes are reported.

c. Severe errors/incomprehensible or weird sentences/not a native speaker
Albanian, English, German, Hungarian, Italian, Spanish

One native speaker gave the comment that "the person writing this document was very lazy and s/he just straight up used google translate to translate it from Dutch." Another wrote: "The way the text is formulated

15 Except for one sentence that does not make sense.

16 The sentence construction leads the commentator to conclude that it was probably written by somebody with Surinamese roots born in the Netherlands or who came to the Netherlands at a young age.

17 The comment was made that the text corresponds to the papiementu spoken on the island of Curaçao, which slightly differs from the papiemento spoken on the island of Aruba.

simply sound "not Hungarian" and this is easy to spot already from the very beginning." Google translate was mentioned several times as a likely source of several translations.

The comment on the Italian version read as follows:

> The document has not been translated by someone who is a mother-tongue speaker for several reasons: There are copious grammatical mistakes which regard: the capitalisation of words, the use of pronouns (at points necessary pronouns are omitted, where instead there is an excessive repetition of pronouns which should be absent), the choice of the prepositions, the order of the words in the sentence and the use of commas.

The Spanish comment is:

> The first sentence makes no sense since "incorpora" means to incorporate. It seems like the police is incorporating a lawyer in its police station rather than providing a lawyer to the accused concerning the second sentence: by saying "hacerle observaciones", it seems that the lawyer will make observations to the accused rather than to the police that has interviewed the accused. Again, the last sentence is wrongly formulated and it is just really difficult to understand the sentence. "Perseguir" means to go after someone as in follow someone. "Si es posible" means if it is possible, and in this case they rather meant "it is possible." It does not become clear at all that the fact that he will not be prosecuted might be subject to some conditions that the accused will have to follow.

The German version apparently was also not double checked when headers were made. Contrary to the German grammar rules nouns were not capitalised. As a result of which it looks rather clumsy. In the context of German in numbers of accused that will read this text, it raises the question why the translation has not been double checked.

This is even more the case with the language used most in the world: English. The issues with that version can be divided into the following categories: word meaning; idiom; punctuation and grammar as well as non-translation. An example in this context is the word "interrogation". The commentator states: "In English interrogation can have two meanings. The first is to question formally, systematically, or closely someone.

The second is to question someone aggressively. As such, it is not a good word to use in this context."

Another example relates to the following sentence in the English handout: "In principle, the lawyer must be present within two hours after the notification was given by the police." The native speaker found this sentence rather confusing: "On the one hand if something is 'in principle' then it is guaranteed in theory but not in practice. On the other, 'must' implies it is something that has to happen. As such, it's unclear if this a concrete right or a right with reservations or just something you can usually expect but might not happen."

3. Findings on the Translations in the Netherlands: the Text Is Too Legal, Too Extensive and Too Difficult for Ordinary People

Quite a number of comments related to the fact that text missed out on being comprehensible for non-lawyers (Croatian). From the Italian comment: "The document adopts an exceptionally formal language since it capitalises the pronouns (such as Lei) and the possessive adjectives (such as Suoi). This kind of language is usually only used in formal letters to someone who covers an official role (for example the prime minister or the rector of a university) or in an academic setting."

Legal terminology is very difficult to translate, especially if the translator is not a lawyer and has no knowledge of the legal concept. Whilst most of my commentators are lawyers/law students, their comments were in many cases that the translator certainly lacked legal knowledge. Evidence of this was found for instance in the case of the German/Italian/Latvian version that translates the Dutch "transactie" with "Transaktion"/"transazione"/"transakcija" which does not make sense in German/Italian/Latvian. Similarly, "strafbeschikking" becomes "Strafbescheid" in the German version. Had the translator had legal knowledge s/he would have translated the latter with "Strafbefehl". The latter does exist under Germany law and even gave inspiration to the later developed Dutch strafbeschikking.

One commentator noted a cultural disconnect:

> The references to serious and less serious offences aren't entirely clear to someone who is not familiar with the Dutch criminal justice system. In particular,

> a person's understanding of a serious offence as one that you can 'be detained before trial for' will depend on the rules they are familiar with (and rules on pre-trial detention vary substantially by country).

Another native speaker stated: "As a reader who does not know the Dutch legal system, the functioning of this mechanism is not clear from the information that is provided." What also might be a cultural problem is that many commentators criticised the question-style of the document. Of course this is what the original Dutch document did and in a Dutch context it is certainly intended to make things user friendly. However, the question is whether that also meets the expectations of individuals who may not be used to the state approaching them in such a way.

Spronken wrote in 2010, in a study that preceded the drafting of Directive 2012/13 and strongly influenced the legal instrument, that the purpose of the Letter of Rights can be understood by lay persons and even by those with poor reading ability or a low IQ. She noted at the time that most of the existing Letters formal and legal language is used with references to legal provisions that will be difficult to read and understand by most lay people.[18]

What is simple and accessible? Spronken stated that the Letter should not be too long and written in a style that would not discourage to make use of their rights.[19] She also refers to the dilemma that some level of detail is inevitable.[20] The model Spronken presented was inspired by what was in use in England and Wales. It has five pages and most sentences have not more than 25 words.[21]

In Spronken's study dating from 2010, information was gathered on the number of languages in which the Letter of Rights is available in several

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18 Taru Spronken, *An EU-Wide Letter of Rights. Towards Best-Practice* (Antwerp-Cambridge-Portland: Intersentia, 2010), 32 and 40.

19 On Croatia it is reported that the letter is not drafted in simple and accessible language. See: Zlata Đurđević, Elizabeta Ivičević Karas, Marin Bonačić and Zoran Burić, Croatia, "Implementation of Directives on Procedural Rights for Suspects and Accused Persons: State of Play and Critical Profiles," in *Effective Protection of the Rights of the Accused in the EU Directives. A Computable Approach to Criminal Procedure Law*, eds. Giuseppe Contissa, Giulia Lasagni, Michele Caianiello and Giovanni Sartor (Leiden: Brill, 2022), 84.

20 Spronken, *An EU-Wide Letter of Rights*, 70.

21 With the exception of one of 46 words. See: Spronken, *An EU-Wide Letter of Rights*, 74–78.

Member States. The numbers differ quite a lot: Greece in 2007: 13;[22] England and Wales in 2010: 44; Finland in 2016: 15;[23] Germany in 2010: 48; Sweden in 2010: 42; Belgium in 2010: 46;[24] Netherlands in 2022: 30. On the basis of the reports of my students I conclude that this picture of a wide variety of numbers of languages in which the Letter of Rights is available continues to exist in 2023. The result is that some Member States have more language versions on stock than other. We have no information on what authorities do when the suspect only understands a language for which no translation was made yet. Some Member States have a central point at which translation are available, whereas for the most Member States it appears that they do not have that and if translations need to made, they may ask a translator to do so every time again. This may not always be the same translator.

4. The Polish Letter of Rights and Its Translations

The Polish Letter of Rights states that it is based on a Regulation of the Minister of Justice of 14 September 2020 (item 1618). I have analysed the Dutch (my mother tongue), German (a language I understand) and English (a language I understand) versions that are used in Poland. There are several things that can be noted that the three have in common. It is striking that rather formal language, with references to the Code of Criminal Procedure, is used. The information given relates to things that may happen right after arrest, such as questioning, as well as to matters that may come up years later, such as sentencing. The three versions have obviously used the same source document, however none refers to it. Of all three, its translator obviously has no legal knowledge.

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22 Zinovia Dellidou, "The Investigative of the Criminal Process in Greece," in *Suspects in Europe. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union*, eds. Ed Cape, Jacqueline Hodgson, Ties Prakken and Taru Spronken (Antwerp–Oxford: Intersentia, 2007), 112.

23 Council of Bars and Law Societies of Europe (ECCB), "TRAINAC Assessment, good practices and recommendations on the right to interpretation and translation, the right to information and the right of access to a lawyer in criminal proceedings," published in 2016, accessed October 12, 2023, https://europeanlawyersfoundation.eu/wp-content/uploads/2015/04/TRAINAC-study.pdf, p. 209.

24 Spronken, *An EU-Wide Letter of Rights*, 15.

The title of the English version deals with rights for the accused only. The Dutch and German version titles also give instructions on *obligations* for the accused. Under point 11 it is stated: "If you are a suspect in penal proceedings, you have the following obligations: You are under no obligation to prove your innocence or to provide evidence against yourself." It is rather confusing to present a right under the title of an obligation. There are numerous little differences between the three versions, such as the German version referring to Article 175 of the Code of Criminal Procedure that does include the right to give explanations in writing, whereas the English and Dutch version do not do that.

A serious legal issue is that the Letter of Rights states that there might be circumstances that require the prosecutor to be present at the consultation of the accused with his lawyer. I consider this a clear violation of Articles 3 and 4 Directive 2013/48 on the Right of Access to a Lawyer.[25]

On the language as such I did not spot any errors in the English version. I noted quite some grammatical mistakes in the German version,[26] that as such do not undermine the understanding, but raise serious questions about the expertise of the translator. The Dutch version must be regarded as a drama. The person having "translated" this cannot have been a native speaker, places words in a non-native order and makes countless mistakes. There are typos, inconsistent and numerous incomprehensible parts. The text contains non-existent words (bewijsaanbiedingen/-onbekwaamheidsmaatregelen/gemarkeerde postbus). It addresses the accused sometimes with the formal Dutch version of you (u) and then continues in the same sentence with the informal you (je/ jij/ jou). In sum, those suspects and accused in Poland who are informed by this Dutch

[25] The provisions of the Code of Criminal Procedure allow the prosecutor or investigating authority to deny access to some documents. Apparently this relates to the existing legislation, see: Karolina Kremens, Wojciech Jasiński, Dorota Czerwińska, and Dominika Czerniak, "Poland. There and Back Again, A struggle with Transposition of EU Directives," in *Effective Protection of the Rights of the Accused in the EU Directives*, eds. Giuseppe Contissa, Giulia Lasagni, Michele Caianiello and Giovanni Sartor (Leiden: Brill, 2022), 156.

[26] The text reads "Bei Ihrer Ladung zum persönlichen Erscheinen bedarf eine Entschuldigung" missing of „es"; "der Empfängerin" this should have the article "die"; Wenn Sie im Ausland aufhalten, „sich" is missing.

version of their rights will be quite confused and the document cannot be regarded as meeting the standards of Article 4(5) Directive 2012/13.

5. Concerns, Recommendations and Directions for Further Research

What is striking to see is that Member States do not use the model letter that has been published together with the Directive in OJ 2012, L 142/10. All Member States of which I was able to obtain Letters of Rights have made their own ones. As a result, the length of the Letters is quite different. Germany uses a one pager, France 2 pages, the Netherlands 3 pages, Belgium 4 pages, Poland 5 pages.

In its report, the Commission stated various shortcomings:

> One Member State's law does not provide for a Letter of Rights as such. Although it refers to a written declaration of rights, its purpose is not only informative. The declaration is handed over to a person when they are formally charged and is presented with a decree of accusation and an interview record to sign. This document mentions certain of the accused person's rights but does not correspond to the list set out in the Directive.
>
> Another Member State also does not have a uniform Letter of Rights. Different templates are used by courts and the police and it is unclear whether these different templates contain all the rights required under the Directive. Moreover, it is not ensured that the person is allowed to keep the letter. There is no evidence that Member States used the original format attached to Directive 2012/13. They apparently have made their own Letters. (…)
>
> Not all Member States explicitly transposed the obligation to give suspects and the accused the opportunity to read and to keep the Letter of Rights. Moreover, one Member State allows for a deviation from the obligation to provide the person with written information (even at a later stage) in cases where providing written information can reasonably not be done and providing oral information is deemed sufficient.[27]

In a 2009 study, it was established that in many Member States the Letter of Rights does not mention the right to remain silent or the right to translation or interpretation and sometimes there is no Letter of Rights available

[27] See: Commission Report COM(2018) 858 final, para. 3.4.1.

in the language the suspects understands. [28] This situation raises several concerns and questions for further research. Especially in view of the fact that two major studies on defence rights and interpretation and translation do not address the translation of the Letter of Rights.[29] The impression is that Member States since the implementation of Directive 2012/13 on the Right to Information now more or less have a Letter of Rights available in their national language(s). However, there is no guarantee for an immediate availability in other languages.

There are serious concerns on the quality. There is no information on how were interpreters selected.[30] The translations give the clear impression that the translators do not have legal knowledge as well. There is no evidence that the translation was subjected to a review by a colleague or by lawyers understanding the language.[31] Although most Member States seem to have developed a practice in which the version in their own national language is the original, none mentions that fact. This should be known in order to evade double translation. It was found that quite a number of problems are already caused by the original, which have been copied into the translations, such as legalistic and complicated language.

The question comes up what the standards for quality should be. Is the quality to be determined by the professional standards of translators or by legal standards or by both?[32] Is it necessary that a native speaker makes

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28 See: Taru Spronken, Gert Vermeulen, Dorris de Vocht, and Laurens Van Puijenbroeck, *EU Procedural Rights In Criminal Proceedings* (Antwerp: Maklu, 2009), 108.

29 "Rights of suspected and accused persons across the EU: translation, interpretation and information," November 2016, European Union Agency for Fundamental Rights (FRA), accessed October 12, 2023, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-right-to-information-translation_en.pdf; Council of Bars and Law Societies of Europe, "TRAINAC."

30 Whilst this study has predominantly analysed the ordinary Letter of Rights, the first impression in comparing with the two other Letters of Rights: the one for requested persons under an EAW, and the one for children as a suspect, indications were found that the three texts were not made by the same translator. This also raises the question whether the standard for the information for children is appropriate for their needs and understanding.

31 The FRA (p. 11) and ECCB (p. 6) studies do mention a general lack of assessing the quality of translators.

32 It appears that only very few Member States have an established procedure for ascertaining whether there is a need for translation. See: Spronken, Vermeulen, de Vocht, and Van Puijenbroeck, *EU Procedural Rights*, 84.

the translation? Is it necessary that somebody specialised in written communication with foreigners make the translation? Things start with an original that must be in simple and accessible language. However, that is not all. It is my understanding of Article 4(5) that it does not require a word for word translation of the original (even if this meets the requirement of being *simple*) text, but that it takes into consideration that a foreigner may miss the context of wording, because he may not be familiar with the local or language environment. It is desirable that translations are made in a team of translators and lawyers that have in mind how the message is perceived by the foreign suspect.

In sum, the picture that emerges for foreigners arrested is that providing them with a Letter of Rights in their language is seriously handicapped in almost all aspects: the timing (availability), the linguistic quality, the accessibility and simplicity. This situation creates severe risks concerning the right to a fair trial for foreigners. They may not invoke rights because they do not know. They may not come to their own trial because they did not understand.

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Detention Pending Execution of the European Arrest Warrant – Dutch and Polish Experience. Some Reflection from the Human Rights Perspective

Vincent Glerum
Dr., Professor of International and European Criminal Law, Faculty of Law, University of Groningen, correspondence address: Postbus 716, 9700 AS Groningen, the Netherlands, e-mail: v.h.glerum@rug.nl
https://orcid.org/0000-0001-7668-1939

Małgorzata Wąsek-Wiaderek
Dr. habil., Professor at the John Paul II Catholic University of Lublin, Faculty of Law, Canon Law and Administration, The John Paul II Catholic University of Lublin, correspondence address: Al. Racławickie 14, 20–950 Lublin, Poland, e-mail: malgorzata.wasek-wiaderek@kul.pl
https://orcid/org/0000-0001-9761-3177

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Abstract: This article focuses on detention pending surrender, i.e. detention of the requested person in the executing Member State on the basis of the European Arrest Warrant (EAW). It defines the scope of application of Article 5 of the European Convention on Human Rights to such detention and analyses the case-law of the Court of Justice of the European Union on time limits of keeping the requested person in detention in the executing MS as well as on the notion of "the executing judicial authority" entitled to decide on detention pending surrender. Both issues are explored with reference to national law and practice of the Netherlands and Poland. The article provides the answer to the question whether national provisions which limit the duration of detention pending surrender properly reflect the normative content of the framework decision on the EAW. The answer to this question is given with due regard to the standard of protection of the requested person stemming from Article 5 § 1 ECHR and Article 6 of the Charter of Fundamental Rights. Furthermore, the analyses focus on Dutch and Polish provisions concerning the authority entitled to decide on detention pending surrender and their compliance with

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the CJEU's jurisprudence on the notion of "the executing judicial authority." Recognising that detention is the basic measure for ensuring the effectiveness of surrender, we try to define the limits of its use in the EAW procedure, stemming from the requirements of protection of human rights.

1. Introduction

Pursuant to Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States,[1] the executing judicial authorities applying detention pending surrender rely on a detention order issued by the judicial authority of another Member State (MS). Unlike in an ordinary extradition procedure, a core issue in this case is mutual trust and mutual recognition of a foreign decision. The FD EAW is primarily conceived as a tool regulating a speedy, informal procedure of surrender of suspects and convicts between Member States of the European Union. At the same time, it does not pretend to harmonise time limits or the procedure for detention of a requested person in the executing MS in order to safeguard effective surrender. The FD EAW contains only fragmentary rules on detention pending surrender and, for this reason, detention of a requested person is (mostly) governed by the law of the executing MS. In general, no harmonisation of detention rules at the EU level is provided in the framework of mutual recognition of judicial decisions.[2]

The aim of this article is to analyse whether in the absence of comprehensive regulation concerning these issues in the FD EAW, the right to liberty of the requested person is sufficiently protected within the EAW procedure, which is primarily focused on the efficiency of mutual recognition. The problem must be approached with due regard to the limited application to detention pending surrender of Article 5 of the European Convention

1 OJ L 190, 18.7.2002, p. 1–20, as amended by FD 2009/299/JHA, OJ L 81, 27.3.2009, p. 24–36. Hereafter referred to as "FD EAW".

2 See: Adriano Martufi and Christina Peristeridou, "Pre-trial Detention and EU Law: Collecting Fragments of Harmonisation within the Existing Legal Framework," *European Papers* 5, no. 3 (2020): 1489–1490.

on Human Rights[3] in the MS executing an EAW. In this article, we look at this problem from the national perspective of two Member States, the Netherlands and Poland, and we intend to answer the question of whether national provisions which limit the time of detention pending surrender properly reflect the normative content of FD EAW and its focus on effective and speedy surrender of suspects and convicts within the European Union (EU). The answer to this question is given with due regard to the standard of protection of the requested person stemming from Article 5 § 1 ECHR and Article 6 of the Charter of Fundamental Rights. Furthermore, we analyse Dutch and Polish provisions concerning the authority entitled to decide on detention pending surrender from the perspective of the Court of Justice of the European Union's (CJEU) jurisprudence on the notion of "executing judicial authority" and the standard of Article 5 ECHR. Recognising that detention is the basic measure for ensuring the effectiveness of surrender, we try to define the limits of its use in the EAW procedure stemming from the requirements of protection of human rights, taking due account of the differences between the standards of the ECHR and the Charter of Fundamental Rights concerning detention pending surrender.

The indicated issues determine the structure of the article. First, we focus on protection of a requested person stemming from Article 5 of the ECHR and Article 6 of the Charter on Fundamental Rights. The second part of the article provides insight into the FD EAW provisions concerning detention pending surrender and their interpretation by the CJEU. Two subsequent parts are devoted to the law and practice of detention pending surrender in the Netherlands and in Poland. In the last, concluding chapter, we present the outcomes of our analyses and the answers to the questions we have raised.

[3] Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Rome 4 November 1950, as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1,2,6,7,12, 13 and 16, ETS No. 5: ETS No. 009, 4: ETS No. 046, 6: ETS No. 114, 7: ETS No. 117, 12: ETS No. 177; hereafter referred to as "ECHR".

2. Article 5 ECHR/Article 6 Charter and Detention Pending Execution of an EAW

As was mentioned in the *Introduction*, the FD EAW replaces extradition between the Member States of the European Union with surrender on the basis of an EAW transmitted between judicial authorities of the MS. The system of the EAW inherently entails the possibility of arrest and detention of the requested person in the executing MS. If the requested person is found in the territory of the executing MS, the person must in principle be arrested on the basis of the EAW. Pursuant to Article 12 FD EAW, the executing judicial authority (JA) must then decide whether to keep the arrested person in detention. If the executing JA decides to execute the EAW, the requested person will be surrendered to the issuing MS. The person's arrest and subsequent detention in that MS are based not on the EAW but either on the national arrest warrant (NAW) or on the Judgement of conviction on which the EAW was based (see Article 8(1)(c) FD EAW).[4]

In short, the requested person's right to liberty is at stake both in the executing and issuing MS. This article focusses on detention pending surrender, that is, detention in the executing MS on the basis of an EAW.

The requested person's right to liberty is guaranteed by, *inter alia*, Article 5 of the European Convention on Human Rights. Article 5 § 1 ECHR contains an exhaustive list of cases in which a person can be deprived of his or her liberty in accordance with a procedure prescribed by law. In order to determine whether arrest and detention in the executing MS on the basis of an EAW are lawful, one must first establish which of those listed cases, if any, is applicable. Given that the EAW replaces extradition between the MS of the EU, it seems logical to turn to Article 5 § 1 (f) ECHR. That provision contains an explicit ground "for the lawful arrest or detention of a person (…) against whom action is being taken with a view to (…) extradition." Does "extradition" also encompass "surrender on the basis of an EAW"? Although the move from extradition to the EAW has been described as "a complete change of direction"[5], it is clear that both instruments serve

4 CJEU Judgement of 6 December 2018, IK (Enforcement of an additional sentence), Case 551/18 PPU, ECLI:EU:C:2018:991, para. 56.

5 Opinion of Advocate General Ruiz-Jarabo Colomer, delivered on 12 September 2006 in the Case 303/05 *Advocaten voor de Wereld*, ECLI:EU:C:2007:552, para. 41.

the same purpose of transferring a person from one state to another for prosecution or to enforce a sentence that has been imposed. Furthermore, the provisions of the ECHR contain autonomous concepts, that is, concepts with an interpretation that is not determined by the interpretation of the same or similar terms in domestic legal orders. All of this militates against interpreting the concept of "extradition" as only referring to extradition in its technical legal sense. Apparently, this is also the opinion of the European Court of Human Rights (ECtHR). In its case-law on Article 5 § 1 (f) ECHR, it does not distinguish between extradition in the technical legal sense and surrender on the basis of an EAW. Rather, it deals with complaints about detention pending surrender under the heading of Article 5 § 1 (f) ECHR, without devoting any attention to the applicability of this provision.[6]

Because the ECtHR regards detention with a view to surrender as coming within the ambit of Article 5 § 1 (f) ECHR, it follows that in case of a *prosecution* EAW, Article 5 § 1 (c) ECHR – which allows for "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence (…)" – is not applicable to arrest and detention on the basis of an EAW in the executing MS.[7] As a consequence, Article 5 § 1 (f) ECHR does not require that information about a reasonable suspicion is provided to the requested State or that there is a *prima facie* case before a requested person can be arrested and detained with a view to "extradition,"[8]

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6 See, e.g., ECtHR Decision of 7 October 2008, Case Monedero Angora v. Spain, application no. 41138/05; ECtHR Judgement of 17 April 2018, Case Pirozzi v. Belgium, application no. 21055/11, para. 45; ECtHR Decision of 25 June 2019, Case West v. Hungary, application no 5380/12, para. 42; ECtHR Decision of 7 December 2021, Case De Sousa v. Portugal, application no. 28/17, para. 69.

7 See, e.g., ECtHR Decision of 16 November 2004, Case McDonald and Others v. Slovakia, application no. 72812/01; ECtHR Decision of 3 May 2005, Case Gordyeyev v. Poland, application nos. 43369/98 and 51777/99; ECtHR Decision of 26 May 2005, Case Parlanti v. Germany, application no. 45097/04; ECtHR Judgement of 24 July 2014, Case Čalovskis v. Latvia, application no. 22205/13, para. 180.

8 ECtHR Judgement of 6 July 2010, Case Babar Ahmad and Others v. United Kingdom, application nos. 24027/07, 11949/08 and 36742/08, par., 180.

unless domestic law states otherwise.[9] After all, any detention must be "lawful" and must comply with a "procedure prescribed by law," which means that in the first place, any detention must comply with domestic law. In this context, domestic law comprises not only national law but also international or EU law.[10]

Nevertheless, it has been suggested that detention on the basis of an EAW should be dealt with under Article 5 § 1 (c) rather than under Article 5 § 1 (f) ECHR.[11] According to this line of reasoning, in an area of freedom, security and justice without internal borders, the proceedings in the executing MS must be regarded as forming a part of the prosecution being conducted in the issuing MS. Therefore, arrest and detention in the executing MS are to be considered as pre-trial arrest and detention in the sense of Article 5 § 1 (c) ECHR. This argument is at odds with the principle of mutual recognition that is at the heart of the entire EAW system. If Article 5 § 1 (c) ECHR were to apply to detention pending surrender, then the courts of the executing MS would have to check whether there is a reasonable suspicion against the requested person. However, that check was already performed by the authorities of the issuing MS at the time of issuance of the NAW, and it is not up to the authorities of the executing MS to take any decision on the merits of the case against the requested person.[12] Moreover, the regulatory scheme of the EAW proves that the courts in the executing MS are not meant to assess whether there is a reasonable suspicion against the requested person. The "minimum official information" that the EAW must contain to enable the executing JA to take a swift decision

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9 ECtHR Judgement of 24 July 2014, Case Čalovskis v. Latvia, application no. 22205/13, para. 190.

10 See, e.g., ECtHR Judgement of 17 April 2018, Case Paci v. Belgium, application no. 45597/09, para. 64; ECtHR Judgement of 25 June 2019, Case West v. Hungary, application no. 5380/12, para. 47.

11 Theodor Schilling, „Europäischer Haftbefehl und europäisches Verfassungsrecht," in *Probleme des Rahmenbeschlusses am Beispiel des Europäischen Haftbefehls. Ein neues Instrument der europäischen Integration aus Sicht von Europarecht, Strafrecht, Verfassungsrecht und Völkerrecht*, eds. Otto Lagodny, Ewald Wiederin, and Roland Winkler (Neue Wissenschaftlicher: Verlag, 2007), 97–123.

12 Compare opinion of AG Ruiz-Jarabo Colomer delivered on 12 September 2006, ECLI:EU:C:2006:552, para 105; CJEU Judgement of 31 January 2023, Puig Gordi and Others, Case 158/21, ECLI:EU:C:2023:57, para 88.

on the execution of the EAW[13] does not include information about whether there is a reasonable suspicion against the requested person. What is required is that the EAW describe the offence for which surrender is sought by detailing the pertinent factual and legal elements of that offence (Article 8(1)(e) FD EAW).

Because Article 5 § 1 (c) ECHR is not applicable to detention pending surrender, Article 5 § 3 ECHR – which states that "(e)veryone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power (…)" – is not applicable either. Of course, under Article 5 § 4 ECHR, the requested person does have the right to have the lawfulness of the detention pending surrender reviewed by a court of the executing MS.

Article 5 § 1 (f) ECHR requires that "action is being taken with a view to (…) extradition," which means that extradition proceedings must be in progress. Regarding the length of detention pending "extradition," the ECtHR has repeatedly held that fixed time limits for detention are not a requirement of Article 5 § 1 (f) ECHR and that it will decide whether detention has become unlawful on a case-by-case basis.[14] However, the ECtHR distinguishes between extradition for the purpose of enforcing a sentence and extradition for the purpose of conducting a prosecution. When a request for extradition is for the purpose of prosecution, the authorities of the requested state must act "with particular expedition" because the requested person must be presumed innocent and cannot exercise any defence rights pending extradition since the requested State is not entitled to consider the merits of the case against the requested person.[15] It should be noted that neither Article 5 ECHR nor any other provision of the ECHR creates a general obligation for the requesting State to take into account

13 CJEU Judgement of 23 January 2018, Piotrowski, Case 367/16, ECLI:EU:C:2018:27, para. 59.

14 See, e.g., ECtHR Judgement of 2 February 2022, Case Kommissarov v. the Czech Republic, application no. 20611/17, para. 47.

15 ECtHR Judgement of 24 March 2015, Case Gallardo Sanchez v. Italy, application no. 11620/07, para. 42.

time served in the requested State.[16] In this respect, EU law offers more protection. After all, the issuing MS must deduct "all periods of detention arising from the execution of [an EAW] from the total period of detention to be served in the issuing [MS] as a result of a custodial sentence or detention order being passed" (Article 26(1) FD EAW). This provision is designed to meet the objective of preserving the right to liberty of the requested person and to ensure the effect of the principle of proportionality of penalties (Article 49(3) of the Charter).[17]

In accordance with its distinction between Article 5 § 1 (c) and Article 5 § 1 (f) ECHR, the ECtHR distinguishes between the responsibility of the requesting State and that of the requested State. Only the requesting state is responsible for the lawfulness of detention in the requested State as it relates to the validity as a matter of national law of the NAW and the extradition request. This is because in the context of extradition proceedings, the requested State should be able to presume the validity of the NAW and the extradition request.[18]

The distinction between Article 5 § 1(c) ECHR and Article 5 § 1(f) ECHR is mirrored in the case law on Article 5 § 2 ECHR.[19] The requirement to inform an arrested person of the reasons for arrest and the charges that have been brought is meant to enable the person to challenge the lawfulness of detention in accordance with Article 5 § 4 ECHR. As to the information to be provided, Article 5 § 2 "neither requires that the necessary information be given in a particular form, nor that it consists of a complete list of the charges held against the arrested person (…). *When a person is arrested with a view to extradition, the information given may be even less*

16 ECtHR Judgement of 20 December 2011, Case Zandbergs v. Latvia, application no. 71092/01, paras. 61–63.

17 CJEU Judgement of 28 July 2016, JZ, Case 294/16 PPU, ECLI:EU:C:2016:610, para. 42.

18 ECtHR Judgement of 21 April 2009, Case Stephens v. Malta (nr. 1), application no. 11956/07, para. 52. See also ECtHR Judgement of 26 June 2012, Case Toniolo v. San Marino and Italy, application no. 44853/10, para. 56; ECtHR Judgement of 2 May 2017, Case Vasiliciuc v. the Republic of Moldova, application no. 15944/11, para. 37; ECtHR Judgement of 26 March 2019, Case B.A.A. v. Romania, application no. 70621/16, para. 19.

19 This provision states that once the requested person is arrested with a view to "extradition" he must be "informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

complete" [emphasis added].[20] Although insufficiency of the information about the charges could be relevant to the right to a fair trial under Article 6 ECHR for persons arrested *pursuant to Art. 5 § 1(c)*, "extradition" proceedings do not concern the determination of a criminal charge,[21] and, consequently, Article 6 does not apply to those proceedings.[22] The bare minimum seems to be that the requested person is told that he or she is wanted for "extradition" by another state.[23] Nevertheless, the ECtHR suggests that providing the requested person with a copy – if need be, a translation of a copy – of the arrest warrant issued by the authorities of the requesting State, even though not required under Article 5 § 2 ECHR, is a more adequate way of complying with that provision.[24]

Having established the scope of Article 5 of the ECHR as regards detention pending surrender, it is now time to turn to Article 6 of the Charter, which reads as follows: "Everyone has the right to liberty and security of person." Like Article 5 ECHR, this provision guarantees the right to liberty. Indeed, according to the *Explanations relating to the Charter of Fundamental Rights*, Article 6 of the Charter corresponds to Article 5 of the ECHR.[25] Consequently, the former provision has the same meaning and scope as the latter (Article 52(3) of the Charter), which means that the Court of Justice has to take into account (the case law of the ECtHR on) Article 5 for the purpose of interpreting Article 6 of the Charter, "as the minimum

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20 ECtHR Judgement of 8 February 2005, Case Bordovskiy v. Russia, application no. 49491/99, para. 56; see also ECtHR Judgement of 23 July 2013, Case Suso Musa v. Malta, application no. 42337/12, para. 113: "(…) less detailed reasons are required to be given than in Article 5 § 1 (c) cases (…)."

21 ECtHR Judgement of 8 February 2005, Case Bordovskiy v. Russia, application no. 49491/99, para. 55.

22 Specifically with regard to surrender: Case Monedero Angora v. Spain; ECtHR Decision of 24 March 2015, Case Martuzevičius v. the United Kingdom, application no. 13566/13, paras. 32–33; Case West v. Hungary, para. 65.

23 ECtHR Judgement of 8 February 2005, Case Bordovskiy v. Russia, application no. 49491/99, para. 57; ECtHR Judgement of 26 February 2009, Case Eminbeyli v. Russia, application no. 42443/02, para. 57.

24 Case Eminbeyli v. Russia, para. 57.

25 OJ C 30, 14 December 2007, p. 33.

threshold of protection."[26] In the context of surrender, the Court of Justice has held that Article 5 § 1(f) of the ECHR applies to detention pending surrender (not Article 5(1)(c)).[27] In interpreting FD 2002/584/JHA in the light of Article 6 Charter, it has aligned its interpretation with the case law of the ECtHR.[28]

3. EU Law on Detention Applied Prior to Decision on Execution of an EAW and Pending Actual Surrender

The FD EAW does not contain comprehensive regulations concerning detention pending surrender proceedings in the executing MS. The only express provisions on this issue may be found in Articles 12, 23(5) and 26 FD EAW. It is clear from the wording of Article 12 FD EAW that keeping a requested person in detention in the executing MS is not mandatory and that a decision on whether the requested person should remain in detention should be taken by "the executing judicial authority," which, in accordance with standing CJEU jurisprudence, should be independent *vis-à-vis* the executive.[29] Additionally, and not surprisingly, the application of detention pending surrender as well as the release of a requested person shall be governed by the law of the executing MS. Pursuant to Article 12 FD EAW, a requested person may be provisionally released at any time provided that the competent authority of the executing MS takes all the measures it deems necessary to prevent the person from absconding. Since detention pending surrender proceedings is applied in accordance with the law of

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26 CJEU Judgement of 12 February 2019, TC, Case 492/18 PPU, ECLI:EU:C:2019:108, para 57. Of course, EU law may afford *more* protection (Article 52(3) *in fine* of the Charter).

27 See: CJEU Judgement of 16 July 2015, Lanigan, Case 237/15 PPU, ECLI:EU:C:2015:474, paras. 56–57; CJEU Judgement of 28 January 2021, Spetsializirana prokuratura (Letter of rights), Case C-649/19, ECLI:EU:C:2021:75, para 55; CJEU Judgement of 30 June 2022, Spetsializirana prokuratura (Information on the national arrest decision), Case 105/21, ECLI:EU:C:2022:511, para 56.

28 CJEU Judgement of 16 July 2015, Lanigan, Case 237/15 PPU, ECLI:EU:C:2015:474, paras. 57–58; CJEU Judgement of 12 February 2019, TC, Case 492/18 PPU, ECLI:EU:C:2019:108, paras. 58–60; Spetsializirana prokuratura (Information on the national arrest decision), paras. 56–60.

29 On autonomous concept of "executing judicial authority": CJEU Judgement of 24 November 2020, Openbaar Ministerie, criminal proceedings against AZ, C-510/19, ECLI:EU:C:2020:953.

the executing MS, the protection of the right to liberty of a requested person depends in principle on the classification of such deprivation of liberty under national law of that MS.

Article 12 FD EAW differs from Article 5 § 4 ECHR in two respects. First, under the former provision, the executing JA must take a decision *ex officio* on whether the arrested requested person should remain in detention, whereas under the latter, the proceedings must be initiated by the requested person. Second, Article 12 FD EAW requires a decision by an "executing judicial authority," whereas Article 5 § 4 ECHR requires a decision by a "court." However, even if the executing MS has designated public prosecutors as executing JAs, their decisions must be capable of being subject to an effective judicial remedy in that MS, that is, a remedy before a court.[30]

The detention of the requested person in the executing MS is no doubt applied to secure effective surrender. Thus, its duration is closely connected with the time limits for taking a decision on the execution of the EAW, as provided in Article 17(3) and (4) FD EAW (altogether 90 days for adopting a final decision) and, subsequently, with the time limit of 10 days stipulated in Article 23(2) FD EAW for surrender of a requested person. As transpires from the CJEU's jurisprudence, the executing JAs are required to adopt the decision on the execution of the EAW even after expiry of the time limits indicated in Article 17 FD EAW. They are also allowed to keep a requested person in detention after expiry of the aforementioned time limits (60 and an additional 30 days, if applicable). The CJEU underlines that unlike Article 23(5) FD EAW, Article 17 FD EAW does not provide for mandatory release of a requested person due to expiry of the time limits for taking the decision on the execution of an EAW. If necessary to secure effective execution of an EAW, detention may still be applied after expiry of the time limit of 90 days provided that its duration "is not excessive in the light of the characteristics of the procedure followed in the case in the main proceedings, which is a matter to be ascertained by the national court."[31] The Court of Justice also underlines that in such a case, a decision

30 CJEU Judgement of 24 November 2020, Openbaar Ministerie (Forgery of documents), Case 510/19, ECLI:EU:C:2020:953, para. 54.

31 CJEU Judgement of 16 July 2015, Lanigan, Case 237/15 PPU, ECLI:EU:C:2015:474, para. 63.

on release of a requested person shall be accompanied by the application of measures necessary to prevent absconding and to ensure that the material conditions necessary for effective surrender remain fulfilled until a final decision on the execution of the EAW has been taken.[32] Moreover, in the *TC* case, the CJEU stated that if there is a very serious risk of that person absconding and that risk cannot be reduced to an acceptable level by the imposition of appropriate measures, then a national provision imposing an obligation to release a requested person as soon as a period of 90 days from that person's arrest has elapsed is contrary to the FD EAW.[33]

A different view was expressed by the CJEU with reference to "detention pending surrender" *sensu stricto*, that is, detention applied after taking a final decision on the execution of an EAW. In accordance with Article 23(2) FD EAW, surrender shall take place within 10 days after the final decision on the execution of the EAW. Although surrender may be adjourned due to *force majeure* (Article 23(3) FD EAW) or postponed for serious humanitarian reasons mentioned in Article 23(4) FD EAW, it shall take place within 10 days of the new date agreed upon by the judicial authorities. Article 23(5) FD EAW clearly states that upon expiry of the time limits referred to in its paragraphs 2 to 4, a person who is still being held in custody shall be released. In the *Vilkas* case, the CJEU ruled that under Article 23(3) FD EAW, the executing and issuing JAs may agree on a new surrender date (the third one) when the surrender of the requested person within 10 days of a first new surrender date agreed on pursuant to that provision proved impossible due to exceptional circumstances not foreseeable for these authorities (*force majeure*). In setting the new date of surrender in the circumstances just described, the executing JA can decide to hold the requested person in custody despite expiry of the time limit of 10 days agreed upon in accordance with Article 23(3) FD EAW. In such a case, detention pending surrender shall be applied "only in so far as the surrender procedure has been carried out in a sufficiently diligent manner and in so

[32] Ibid.; see also Marta Bargis, "Personal Freedom and Surrender," in *Handbook of European Criminal Procedure*, ed. Roberto Kostoris (Springer, 2018), 323.

[33] CJEU Judgement of 12 February 2019, TC, Case 492/18 PPU, ECLI:EU:C:2019:108, paras. 63, 77.

far as, consequently, the duration of the custody is not excessive."[34] It is also for the executing JA to carry out a concrete review of the need to keep a requested person in detention, taking into account all the relevant factors indicated by the CJEU.[35]

As confirmed by recent jurisprudence, *force majeure* does not extend to legal obstacles to surrender which arise from legal actions brought by the requested person based on the law of the executing MS, such as a request for asylum. Article 23(3) FD EAW requires intervention of an "executing judicial authority" that meets the requirements of independence *vis-à-vis* the executive. Thus, the assessment of the existence of *force majeure* and the verification of whether the necessary conditions for the continued detention of the requested person are satisfied cannot be left within the competence of police services. As indicated by the CJEU, the time limits referred to in Article 23(2) to (4) must be regarded as having expired, with the result that the person must be released when the requirement of intervention on the part of independent judicial authority has not been met.[36] Article 23(5) of the FD EAW is also applicable in case of postponement of surrender for the reasons indicated in Article 23(4) FD EAW.

Another position was adopted by the CJEU with reference to the postponement of surrender based on Article 24(1) FD EAW, that is, with regard to the requested person prosecuted in the executing MS for an act other than that referred to in the EAW or serving a sentence imposed in the executing MS for such an act. Pursuant to the CJEU jurisprudence, such a postponement of surrender constitutes a decision on the execution of the EAW. This entails two consequences: first, such a decision must be taken by an "executing judicial authority" within the meaning of Article 6(2) FD EAW. If a decision on postponement was taken by an independent executing JA, the obligation to release the requested person stipulated in Article 23(5) FD EAW does not apply. Hence, detention once surrender is postponed under Article 24(1) FD EAW is governed by the rules provided

34 CJEU Judgement of 25 January 2017, Vilkas, Case of C-640/15, ECLI:EU:C:2017:39, para. 43.

35 Ibid.

36 CJEU Judgement of 28 April 2022, C and CD, Case of C-804/21 PPU, ECLI:EU:C:2022:307, paras. 58, 76.

in Article 12 FD EAW.[37] However, if such a decision has not been taken by an "executing judicial authority," the time limits referred to in Article 23(2) to (4) FD EAW must be considered to have expired, and the requested person must be released in accordance with Article 23(5) FD EAW. The decision taken by an authority that does not fulfil the requirements of independence *vis-à-vis* the executive is treated by the CJEU as unlawful.

In case of the postponement of surrender due to prosecution of a requested person in another case in the executing MS, the question arises whether the EAW itself forms a sufficient legal basis for keeping a requested person in detention even if the prosecution does not require application of such a severe preventive measure. In the *CJ* case, the CJEU ruled that the EAW may constitute a sufficient legal basis for keeping a person in detention for the whole period of postponed surrender applied under Article 24(1) FD EAW. Article 6 of the Charter is seen as not precluding a requested person whose surrender has been postponed for the purposes of a criminal prosecution instituted against him in the executing MS from being kept in detention on the basis of the EAW whilst the criminal prosecution is being conducted (but only in so far as the surrender procedure has been conducted in a sufficiently diligent manner and the duration of detention is accordingly not excessive). Moreover, postponement of surrender and accompanying detention may be justified "solely on the ground that that person has not waived their right to appear in person before the courts seised in connection with that prosecution."[38] The executing JA deciding on postponed surrender and accompanying detention of the requested person shall take into consideration all relevant factors, in particular, the interest of the executing MS in completing the criminal proceedings against that person, the interest of the issuing MS in obtaining that person's surrender without delay and the seriousness of the offences committed in those MSs.[39]

Summarising, despite the firm and definite wording of Article 23(5) of the FD EAW, it does not provide maximum time limits for detention pending surrender. The time limit fixed in Article 23(5) FD EAW is closely connected with the possibility of extending the date of surrender. Keeping

37 CJEU Judgement of 8 December 2022, CJ, C-492/22 PPU, ECLI:EU:C:2022:964, para. 73.
38 Ibid., para. 94.
39 Ibid., para. 92.

a person in detention is permissible under certain conditions as long as the surrender procedure is carried out in a diligent manner under Article 23(3) or (4) FD EAW.

4. The Law and Practice on Detention in Surrender Proceedings in the Netherlands[40]

4.1. Time Limit of 90 Days

Until 1 April 2021, Article 22(4) of the Law on Surrender (*Overleveringswet*, [LoS])[41] directed the District Court of Amsterdam (DCA)[42] to release the requested person and to attach conditions to that release to prevent absconding if the court was unable to reach a final decision on the execution of the EAW within 90 days of the requested person's arrest. The legislature had assumed that FD EAW did not allow keeping the requested person in detention beyond that limit.[43] Article 22(4) did not allow for any exceptions, not even if the requested person presented a very serious risk of flight that could not be contained adequately by setting conditions to prevent absconding.

From *Lanigan* on, it was clear that this provision – which seemed to impose a "general and unconditional obligation to release the requested person provisionally"[44] – was, to say the least, at odds with the FD EAW. Indeed, the provision proved particularly problematic if the court was acting in accordance with a duty imposed by *primary* EU law. Two such situations could occur. The first situation relates to the fact that there is no ordinary remedy against a Judgement of the DCA on the execution of an EAW (Article 29(2) LoS), which means that in principle, the DCA is under a duty

40 This paragraph presents only a selection of problems concerning detention pending surrender in Dutch law. For further examples see: Vincent Glerum, "Commentaar op Overleveringswet," in *T&C Internationaal strafrecht*, eds. Jannemieke Ouwerkerk, Vincent Glerum, and Lachezar Yanev (Deventer: Wolters Kluwer, 2021; online updated to 1 July 2023).

41 On the implementation of the FD EAW in the Netherlands see: Vincent Glerum and Hans Kijlstra, "The Practice in the Netherlands," in *European Arrest Warrant. Practice in Greece, the Netherlands, and Poland*, Maastricht Law Series 23 (The Hague: Eleven, 2022), 93–236; Jaap Van der Hulst, "Extradition and the European Arrest Warrant in the Netherlands," *Eucrim*, no. 2 (2014): 64–68.

42 The DCA is the Dutch executing JA.

43 *Kamerstukken II* 2002/03, 29042, 3, p. 22.

44 CJEU Judgement of 16 July 2015, Lanigan, Case 237/15 PPU, ECLI:EU:C:2015:474, para. 50.

to request the CJEU to give a preliminary ruling on the interpretation of the FD EAW when that interpretation is at issue (Article 267(3) of the Treaty on the functioning of the European Union).[45] As the CJEU has held, the decision to request a preliminary ruling justifies exceeding the time limit of 90 days.[46] The second situation concerns the duty of the DCA to examine whether there is a real risk that the requested person, if surrendered, would suffer a violation of his or her fundamental rights. The CJEU has recognised that complying with that duty can also result in exceeding the 90-day time limit.[47]

In the circumstances described, the DCA gave a conforming interpretation to the LoS: if the flight risk was so serious that it could not be adequately managed by setting conditions to prevent absconding and if the court could not reach a final decision in those two situations within 90 days, that time limit was *interrupted*, thereby preventing the time limit from reaching the 90-day mark and, consequently, pre-empting the duty to conditionally release the requested person.[48] According to the DCA, its bold and creative interpretation was not *contra legem* because nothing in the wording of the applicable provision explicitly excluded interruption of the time limit. The Court of Appeal of Amsterdam (CAA) disagreed: the interpretation given by the lower court was *contra legem*.[49] However, the CAA did agree that the duty to conditionally release the requested person was not in accordance with EU law. On the basis of balancing legal certainty and the interests of the requested person, on the one hand, against the duty to comply with EU law, on the other hand, the CAA concluded that EU law had to prevail over the national legal order and that the provision should be interpreted in such a way that the time limit was interrupted in the two situations

45 CJEU Judgement of 6 October 2021, Consorzio Italian Management en Catania Multiservizi, Case 561/19 ECLI:EU:C:2021:799, paras. 32–33.

46 CJEU Judgement of 30 May 2013, Jeremy F., Case 168/13 PPU, ECLI:EU:C:2013:358, para. 65; CJEU Judgement of 12 December 2019, TC, Case 492/18 PPU, ECLI:EU:C:2019:108, para. 43.

47 CJEU Judgement of 12 December 2019, TC, Case 492/18 PPU, ECLI:EU:C:2019:108, para. 43.

48 DCA Judgement of 5 April 2016, ECLI:NL:RBAMS:2016:1995; DCA Judgement of 28 April 2016, ECLI:NL:RBAMS:2016:2630.

49 On *contra legem* see also footnote 93.

that could occur.[50] A battle between the courts ensued: the DCA repeatedly refused to follow the reasoning of the CAA, which it did not find convincing, and stuck to its own reasoning, and the CAA acted *vice versa*. Meanwhile, defence counsel argued that both courts' interpretations of Article 22(4) were contrary to Article 6 of the Charter, in particular, the principle of legal certainty.

Against this background, the DCA decided to make a reference to the CJEU for a preliminary ruling. The CJEU's Judgement in the *TC* case yielded two important points.[51] First, the CJEU confirmed that a national provision such as Article 22(4) LoS is incompatible with the FD EAW,[52] as was to be expected in light of *Lanigan*. The importance of the second point transcends the particular case at hand. It concerns the relationship between the requirement of legal certainty, which is inherent in the right to liberty, and the duty of national courts to interpret national law in conformity with EU law, particularly with regard to the role of national case law as a sufficiently accessible, precise and predictable legal basis for detention.

The CJEU established that EU law and national law laid down clear and predictable rules but pointed out that the national rule was not in accordance with the FD EAW. For that reason, it was clear and predictable "long before the main proceedings were initiated" – that is, at least from *Lanigan* on – that national courts were "required to do whatever lay within their jurisdiction with a view to ensuring that [FD EAW] is fully effective" by giving a conforming interpretation to Article 22(4) LoS.[53] However, there were two problems with the national case law. First, the conforming interpretation did not resolve the incompatibility with the FD EAW in *all* circumstances. In other words, national courts had not *fully* done "whatever

50 CAA, Judgement of 3 May 2016, ECLI:NL:GHAMS:2016:1838; CAA, Judgement of 4 July 2016, ECLI:NL:GHAMS:2016:4900; CAA, Judgement of 30 January 2017, ECLI:NL:GHAMS:2017:220.

51 See on this Judgement Vincent Glerum, "Dura lex, sed lex? Divergerende nationale rechtspraak, de verplichting tot kaderbesluitconforme uitleg en de eis van een duidelijke en voorzienbare wettelijke grondslag voor vrijheidsbeneming," *SEW* 67, no. 12 (December 2019): 562–567.

52 CJEU Judgement of 12 December 2019, TC, Case 492/18 PPU, ECLI:EU:C:2019:108, para 50.

53 CJEU Judgement of 12 December 2019, TC, Case 492/18 PPU, ECLI:EU:C:2019:108, para 69.

[lay] within their jurisdiction" to remedy the situation. Second, the reasoning of both courts diverged, particularly with regard to the calculation of the period of suspension, potentially resulting in varying outcomes as to expiry of the 90-day period. Consequently, it was not possible "to determine with the clarity and predictability required (…) the period for which the requested person (…) is to be kept in detention in the Netherlands."[54]

The *TC* Judgement makes clear what the ECtHR had already recognised,[55] which is that case law can satisfy the requirement of an accessible, precise and predictable legal basis for detention but only in so far as that case-law is *consistent*.[56] *TC* also clarifies how to apply the requirement of a clear and predictable legal basis if national law is not in accordance with EU law. If it is clear that national law is not in conformity with EU law – for example, the CJEU has already given an interpretation to an EU norm that clearly precludes the relevant national norm (as it did in *Lanigan*) – the discrepancy between national law and EU law is not, in itself, enough to conclude that there is no clear and predictable legal basis for detention. In the multi-layered legal order of the EU, the requirement of a clear and predictable legal basis is intertwined with the duty of national authorities to give a conforming interpretation to national law: an interpretation by a national court that does not *fully* ensure that national law is interpreted in conformity with FD EAW does not meet the requirement of a clear and predictable legal basis (or at least contributes to the conclusion that such a basis is absent). As a result, the person concerned – if need be, after taking appropriate legal advice – should expect national courts to do all they can to give a conforming interpretation to national law. Thus, the requirement of a clear and predictable legal basis that is intended to afford

54 CJEU Judgement of 12 December 2019, TC, Case 492/18 PPU, ECLI:EU:C:2019:108, para 76.

55 See, e.g., ECtHR Judgement of 28 March 2000, Case Baranowski v. Poland, application no. 28358/95, para. 54 ("The Court observes that the domestic practice of keeping a person in detention under a bill of indictment was not based on any specific legislative provision or case-law (…)"); ECtHR Judgement of 21 March 2017, Case Porowski v. Poland, application no. 34458/03, para. 112 ("(…) In sum, the "law" is the provision in force as the competent courts have interpreted it (…)"). See also ECtHR Judgement of 8 November 2011, Case Laumont v. France, application no. 43626/98, paras. 50–51.

56 See, e.g., ECtHR Judgement of 11 October 2007, Case Nasrulloyev v. Russia, application no. 656/06, para. 77.

protection against detention seems to be employed as an argument to deny the requested person's entitlement under national law to conditional release. But it must be remembered that this entitlement is not in accordance with EU law, as was clear to the person concerned. The fact that a conforming interpretation of national law does not benefit the person concerned does not preclude that interpretation,[57] at least when substantive criminal law is not concerned.[58]

The CJEU's answer in *TC*[59] exhorted the national courts to get on the same page. And that is what they did. The CAA made a complete U-turn in holding that a conforming interpretation of Article 22(4) LoS was "by no means" *contra legem*. That interpretation entailed that when there is a very serious risk of absconding that cannot be reduced to an acceptable level by the imposition of appropriate measures, there is no duty to conditionally release the requested person if the 90-day limit is exceeded.[60] The DCA followed suit.[61] Thus, the conditions for a clear and predictable legal basis that resolved the incompatibility with EU law in all circumstances had now been met, and the "battle between the courts" was over.[62] Unfortunately, it took the legislature another two years to amend Article 22(4) LoS.

However, the legislature introduced a new problem when it abolished the fixed time limit because it introduced *exhaustively* listed possibilities for extending the time limit for deciding on the execution of the EAW

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57 See, e.g., CJEU Judgement of 5 July 2007, Kofoed, Case 321/05, ECLI:EU:C:2007:408, para. 45 (concerning taxation).

58 See, e.g., CJEU Judgement of 29 June 2017, Popławski, Case 579/15 ECLI:EU:C:2017:503, paras. 32 and 37.

59 "Article 6 of the [Charter] must be interpreted as precluding national case-law which allows the requested person to be kept in detention beyond that 90-day period (…) in so far as that case-law does not ensure that that national provision is interpreted in conformity with Framework Decision 2002/584 and entails variations that could result in different periods of continued detention"; CJEU Judgement of 12 December 2019, TC, Case 492/18 PPU, ECLI:EU:C:2019:108, para 77.

60 CAA, 5 March 2019, ECLI:NL:GHAMS:2019:729.

61 DCA Judgement of 7 May 2019, ECLI:NL:RBAMS:2019:3221.

62 TC had lodged a complaint with the ECtHR concerning his detention beyond the 90-days limit. After a friendly settlement was reached, the ECtHR decided to strike the case out of the list: ECtHR Decision of 20 January 2022, B.T. v. the Netherlands, application no. 45257/19.

– and thus, on detention pending surrender – beyond 90 days. According to the new provisions, the time limits may only be extended if the DCA, *within the time of limit of 90 days*, has requested the Court of Justice to give a preliminary ruling (Article 22(4) new LoS), if the DCA is in the process of examining an *in abstracto* real risk of a violation of the requested person's Charter rights (Article 22(5) new) or if the DCA has established that there is an *in concreto* real risk of such a violation (Article 22(6) new). The *TC* Judgement designates such cases as "exceptional circumstances" that justify exceeding the time limit of 90 days (Article 17(7) FD EAW), but it does not *limit* those "exceptional circumstances" to those three cases. The limitation of the possibilities for extending the time limits can in effect force the DCA to take a decision on the execution of an EAW even if it does not yet have the necessary information to do so, which can lead to a refusal of surrender that could have been avoided. Moreover, limiting the right and the duty of the DCA to request preliminary rulings seems at odds with EU law.[63]

4.2. Conditional Release

Pursuant to Article 64(1) LoS, the competent authority can conditionally suspend detention whenever it may or must take a decision on the requested person's detention. A suspension is only valid "until the moment when the court pronounces its Judgement ordering the execution of the EAW." The rationale of this provision is that once surrender has been ordered, the risk of absconding significantly increases and conditional suspension of detention would, therefore, be contrary to the objective of surrendering the requested person.[64]

The exclusion of conditional suspension of detention *post sententiam* is incompatible with Article 12 FD EAW interpreted in conformity with Article 6 of the Charter. The executing JA's duty to carry out a concrete review in order to ensure that the duration of the detention is not excessive[65] does not end once it has ordered the execution of an EAW but applies as

63 See further Glerum and Kijlstra, "The Practice in the Netherlands," 178–181.

64 Cf. *Kamerstukken II* 1998/99, 26697, nr. 3, p. 23.

65 CJEU Judgement of 16 July 2015, Lanigan, Case 237/15 PPU, ECLI:EU:C:2015:474, paras. 58–59.

long as the requested person is held in detention on the basis of that EAW, for example, if surrender could not be effected on account of *force majeure* (Article 23(2) FD EAW)[66] or because surrender was postponed in order to conduct a prosecution against the requested person in the executing MS (Article 24(1) FD EAW).[67] If the executing JA finds that the duration of detention has indeed become excessive, it must provisionally release the requested person and take "*any measures it deems necessary so as to prevent him from absconding and to ensure that the material conditions necessary for his effective surrender remain fulfilled*" [emphasis added].[68] In Dutch law, such measures can only be taken in the context of a conditional suspension of detention: the court can set conditions to prevent the requested person from absconding. Inasmuch as Article 64(1) LoS limits the possibility of conditional release to detention *prior* to the Judgement on the execution of the EAW, it is not in conformity with Article 6 of the Charter in cases in which *after* that decision, the duration of detention is found to be excessive. As Article 6 of the Charter has direct effect, the DCA has recognised that in those cases, it would have to disapply the "offending" part of Article 64(1) LoS and to conditionally release the requested person.[69] In any case, if the risk of flight can adequately be managed by setting conditions to prevent absconding, keeping the requested person in detention would not be "necessary" (Article 52(1) of the Charter) and would, therefore, constitute an unjustified limitation on the exercise of the right to liberty.[70]

Incidentally, the exclusion of the possibility of conditional suspension *post sententiam* is also incompatible with Article 23(5) FD EAW. Release under that provision must be accompanied by "*any measures (…) necessary to prevent that person from absconding, with the exception of measures*

66 CJEU Judgement of 25 January 2017, Vilkas, Case 640/15 ECLI:EU:C:2017:39, para. 43.

67 CJEU Judgement of 8 December 2022, CJ (Décision de remise différée en raison de poursuites pénales), Case 492/22 PPU, ECLI:EU:C:2022:964, para. 82.

68 CJEU Judgement of 16 July 2015, Lanigan, Case 237/15 PPU, ECLI:EU:C:2015:474, para. 61; CJ (Décision de remise différée en raison de poursuites pénales), para. 60.

69 DCA Judgement of 3 September 2020, ECLI:NL:RBAMS:2020:4332; DCA Judgement of 22 July 2021, ECLI:NL:RBAMS:2021:3873.

70 DCA Judgement of 11 January 2019, ECLI:NL:RBAMS:2019:207.

involving deprivation of liberty"[71] [emphasis added]; but as said before, Article 64(1) LoS excludes taking such measures *post sententiam*. Disapplying the incompatible part of Article 64(1) is not an option in this case. In contrast to Article 6 of the Charter, the provisions of FD EAW do not have direct effect.[72] A conforming interpretation would probably be *contra legem*, given the clear and precise wording of Article 64(1) LoS.

In the context of infringement proceedings against the Netherlands for non-conformity of the Dutch measures transposing FD EAW,[73] the Ministry of Justice and Security is preparing a bill to amend Article 64(1) LoS.

4.3. Role of the Prosecutor

The national legislature assumed that a Dutch prosecutor would qualify as an "executing judicial authority" within the meaning of Article 6(2) FD EAW.[74] That assumption was wrong: Dutch prosecutors do not satisfy the necessary conditions to be characterised as executing JAs because they may be subject to instructions in specific cases from the Ministry of Justice and Security.[75] This makes their role concerning detention pending surrender problematic.

In the early stages of surrender proceedings, the (assistant)[76] prosecutor of the region in which the requested person was arrested can order that the person remain in police custody for three days, counting from the time of arrest. Within that period, the Amsterdam prosecutor can order that the requested person remain in police custody until the DCA takes a decision on the detention (Article 21(8) LoS) at the hearing on the execution of the EAW (Article 27(1)–(2) LoS). That hearing is usually held within 60

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71 CJEU Judgement of 28 April 2022, C and CD (Legal obstacles to the execution of a decision on surrender), Case 804/21 PPU, ECLI:EU:C:2022:307, para. 75.

72 CJEU Judgement of 29 June 2017, Popławski, Case 579/15 ECLI:EU:C:2017:503, paras. 26–28. On direct effect see also footnote 91.

73 (INFR(2021)2004).

74 On the Dutch prosecution service in general: Peter Tak, "The Dutch Prosecution Service," in *Task and Powers of the Prosecution Services in the EU Member States*, ed. Peter Tak (Nijmegen: Wolf Legal Publishers, 2004), 16 ff.

75 CJEU Judgement of 24 November 2020, Openbaar Ministerie (Forgery of documents), Case 510/19, ECLI:EU:C:2020:953, para. 67; CJ (Décision de remise différée en raison de poursuites pénales), para. 55.

76 An assistant prosecutor is not a member of the Public Prosecutor's Office but a ranking police officer.

days after the arrest. All in all, the duration of police custody can be quite significant.

Pursuant to Article 12 FD EAW, "the executing judicial authority shall take a decision on whether the requested person should remain in detention." Therefore, the role of (assistant) prosecutors is at odds with the FD EAW. Under Article 6 of the Charter and Article 5(4) of the ECHR the requested person is entitled to take proceedings to have the lawfulness of his or her detention reviewed by a court. Article 21(9) LoS implements those provisions: the court may end police custody at any time, either *ex officio* or at the request of the requested person. However, Article 12 FD EAW goes beyond the Charter and the ECHR in requiring that the executing JA take a decision on continuation of detention *whether or not the requested person requested a review of the lawfulness of his detention*. To remedy the situation, the DCA gave a conforming interpretation to Article 21(9) LoS: under EU law, the court is *obliged* to review *ex officio* each decision of the Amsterdam prosecutor that orders the requested person to remain in police custody. This ensures that soon after the arrest of the requested person, the executing JA takes a decision after all on whether he or she is to remain in detention.[77]

In the final stages of surrender proceedings, the Amsterdam prosecutor is tasked with enforcing the Judgement of the DCA ordering the execution of the EAW. In that context, the Amsterdam prosecutor decides whether actual surrender should be deferred on account of *force majeure* (Article 35(3) LoS) or serious humanitarian reasons (Article 35(4) LoS) and whether to postpone actual surrender so that the requested person may be prosecuted in the Netherlands or may serve a sentence there (Article 36(1) LoS). However, Article 23(3)(4) and 24(1) FD EAW clearly allocate the competence to take such decisions to the executing JA. Pursuant to the CJEU's case law, the time limits for actual surrender cannot be validly extended absent any intervention on the part of the executing JA. As a result, those time limits must be regarded as expired, which triggers the duty to release the requested person under Article 23(5).[78] The same applies, *mutatis mutandis*,

77 DCA Judgement of 25 November 2020, ECLI:NL:RBAMS:2020:5778.

78 *C and CD (Legal obstacles to the execution of a decision on surrender)*, para. 69.

to decisions on postponement of actual surrender absent any intervention by the executing JA.[79]

The DCA gave a conforming interpretation to the relevant national provisions, which ensures intervention on the part of the executing JA.[80] When deciding on a request by the Amsterdam prosecutor to extend the requested person's detention in cases in which actual surrender cannot take place (Article 34(2)(b) LoS), the court will review whether *force majeure* or serious humanitarian reasons exist or whether or not to postpone actual surrender. The prosecutor's (unlawful) decision on these issues is then replaced by the court's own decision.[81]

The bill to amend Article 64(1) LoS (supra, para. 4.2 in fine) will also remedy the defects mentioned in this paragraph. Pursuant to this bill, the DCA will decide within three days from the arrest of the requested person whether he or she is to remain in police custody until the DCA takes a decision on the detention at the hearing on the execution of the EAW. And the DCA will decide, upon motion by the public prosecutor, whether to defer or to postpone actual surrender.

5. The Law and Practice on Detention in Surrender Proceedings in Poland

5.1. Exclusive Competence of Courts to Act as "Executing Judicial Authorities"

In Poland, the FD EAW was implemented in Chapters 65a and 65b of the Code of Criminal Procedure. Since the law on EAW forms part of the Code of Criminal Procedure, all general provisions concerning a suspect and a defendant in criminal proceedings are applicable *mutatis mutandis* to the requested person in proceedings concerning the execution of an EAW. The procedural status of the requested person is similar to a suspect or a defendant in criminal proceedings, both with regard to a right of defence and other procedural guarantees.[82]

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79 *CJ (Décision de remise différée en raison de poursuites pénales)*, para. 60.

80 Suggested by AG Kokott: opinion delivered on 27 October 2022, ECLI:EU:C:2022:845, paras. 40–41.

81 See, e.g., DCA Judgement of 9 December 2022, ECLI:NL:RBAMS:2022:7460; DCA Judgement of 20 December 2022, ECLI:NL:RBAMS:2022:7855.

82 See: Małgorzata Wąsek-Wiaderek, "»Dual Legal Representation« of a Requested Person in European Arrest Warrant Proceedings – Remarks from the Polish Perspective," *Review of*

With regard to requirements concerning the notion of "executing judicial authority" enshrined in the CJEU jurisprudence, only courts have competences to decide on issuing and executing an EAW as well as applying detention pending surrender.[83] As transpires from Article 607k § 2 CCP, a decision on the execution of an EAW is taken by the competent regional court and may be subject to appeal to the competent appellate court (Article 607l § 3 CCP). Furthermore, also a decision to postpone surrender due to prosecution pending in another case or execution of the sentence imposed in Poland for an act other than the one covered by an EAW is taken by a competent regional court (Article 607o §§ 1 and 2 CCP). Certain doubts could be voiced with reference to a procedural organ competent to decide on a new date of surrender in the circumstances described in Article 23 (3) and (4) FD EAW. Article 607n CCP does not mention "a court" as an organ responsible for agreeing upon the new date of surrender with procedural authorities of the issuing MS. However, as long as surrender proceedings are pending, they are within the competence of the regional court acting as the executing JA. The court should act in cooperation with the police services with reference to all technical aspects of transfer of the requested person to the issuing MS.[84] Moreover, as rightly argued by a majority of commentators,[85] a decision on a new date of surrender should have the form of an order of a competent court (postanowienie) acting as

European and Comparative Law 41, no. 2 (June 2020): 37–38, https://doi.org/10.31743/recl.8673. The Ordinance of the Minister of Justice of 11 June 2015, regulating the form of instruction on the rights of a person arrested upon the European Arrest Warrant (Journal of Laws of 2015, item 874), clearly states that the requested person has a right to be represented by "a defense counsel," including the right to apply for defence counsel appointed by a court in the framework of legal aid.

83 On implementation of FD EAW in Poland, see: Małgorzata Wąsek-Wiaderek and Adrian Zbiciak, "The Practice of Poland on the European Arrest Warrant," in *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, Maastricht Law Series 23 (Hague: Eleven, 2022), 237–321.

84 Barbara Augustyniak, „Komentarz do art. 607n kodeksu postępowania karnego," in *Kodeks postępowania karnego. Komentarz, tom II*, ed. Dariusz Świecki (Warsaw: Wolters Kluwer Polska 2022), 1202.

85 See: Andrzej Sakowicz and Adam Górski, „Komentarz do art. 607n kodeksu postępowania karnego," in *Kodeks postępowania karnego. Komentarz*, ed. Andrzej Sakowicz (Warsaw: C.H. Beck, 2023), 1772.

the executing JA. This court is also obliged to release a requested person if the issuing MS does not receive him within the time limits indicated in Article 607n § 2 and 3 CCP.

As already pointed out, only regional courts have jurisdiction to apply detention pending surrender. As terms of procedural requirements, such detention is treated similarly to ordinary pre-trial detention of a suspect for the purpose of being brought to trial. The procedural guarantees of Article 5 § 3 ECHR are applied *mutatis mutandis* to detention of the requested person as a result of that classification. If the requested person is found in the territory of Poland, a public prosecutor may request the regional court that has territorial jurisdiction in the case to decide on detention of the requested person for the period necessary to issue a decision on the execution of an EAW and subsequent surrender. The requested person who is arrested on the basis of an EAW or an alert in SIS must be promptly brought, that is, within 48 hours, before the competent regional court, which should decide on his/her detention within the subsequent 24 hours.[86] Despite the fact that arrest of the requested person is based on the EAW, he or she is treated in the same manner as a suspected person arrested in the framework of Polish criminal proceedings, which is to be "brought promptly before a judge" within the meaning of Article 5 § 3 ECHR. A different approach is taken with reference to substantive grounds for detention pending surrender. It is assumed that these grounds do not have to be checked by the executing JA since they were already verified at the stage of issuing the EAW.[87] Such an interpretation is supported by the wording of Article 607k § 3 CCP (its third sentence) providing that a final conviction or another decision on deprivation of liberty of the requested person issued in another MS should be an independent basis for the application of detention pending surrender.

The decision on detention of the requested person is subject to appeal to the competent appellate court. Thus, the Code of Criminal Procedure provides for exclusive competence of judicial organs (regional courts,

86 Sławomir Steinborn, „Komentarz do art. 607k kodeksu postępowania karnego," in *Kodeks postępowania karnego. Komentarz, tom III*, ed. Lech Krzysztof Paprzycki (Warsaw: Wolters Kluwer Polska, 2013), 871–872.

87 Resolution of the Supreme Court of 26 June 2014, I KZP 9/14, OSNKW 2014, no. 8, item, 60.

appellate courts) to take any decision on detention of the requested person in the course of the proceedings aimed at deciding on the execution of the EAW and subsequent surrender.

5.2. Time Limit for Detention Pending Execution of an Eaw and Surrender

Pursuant to Article 607k § 3 CCP, the entire period of detention applied in the EAW proceedings should not exceed 100 days.[88] This provision reflects the time limits indicated in Article 17 and 23 FD EAW and is conceived as a sum of maximum time limits of 60 and a further 30 days for deciding on execution of an EAW plus an additional 10 days for surrender *sensu stricto*. The time limit of 100 days provided in Article 607k § 3 CCP is not linked to the particular stage of surrender proceedings. If the final decision on execution of an EAW is taken within 60 days, the requested person may be kept in detention for a subsequent 40 days pending surrender *sensu stricto*, provided the time limits for arranging surrender indicated in Article 607n § 2 CCP (reflecting the wording of Article 23(3) and (4) FD EAW) have not expired. On the other hand, if the proceedings concerning execution of an EAW are prolonged beyond 90 days for whatever reasons, the requested person may be kept in detention only for the remaining days, that is, no longer than 10 days.

Unfortunately, while implementing Article 23(3) and (4) FD EAW in Article 607n § 2 CCP, the Polish legislature completely disregarded that surrender adjourned due to *force majeure* or "danger to the life or health of the requested person" may require keeping the requested person in detention beyond the time limit of 100 days. Article 607n § 2 CCP stipulates that in case of exceptional obstacles classified as *force majeure,* surrender shall take place within 10 days from the new date agreed upon by the judicial organs of the issuing and executing MSs. With regard to the CJEU jurisprudence referred to in the previous sections of this article, attempts to surrender the requested person – if necessary, secured by detention

[88] The original text of the Act implementing FD EAW did not provide for such time-limit. It was introduced by the Act of 5 November 2009, in force since 8 June 2010 (Journal of Laws 2009, No. 206, item 1589). No specific reasons supporting this time-limit were provided in the written reasons to the draft law. It was approved by experts evaluating the draft law (see: Andrzej Sakowicz, *Opinion on the Draft Law*, 34, https://orka.sejm.gov.pl/rexdomk6.nsf/Opdodr?OpenPage&nr=1394).

– shall continue after expiry of the second date of surrender agreed upon by the competent judicial authorities. Under Polish law, application of detention in the course of such prolonged surrender proceedings is possible only if the entire time limit of 100 days has not yet expired.

The discussed time limit of 100 days is surprising and exceptional when seen in the context of the general rules governing application of detention in Poland. The CCP does not limit the time of detention applied in criminal proceedings. The only time limits are linked to particular stages of criminal proceedings (12 months at the pre-trial stage; two years of detention applied prior to issuing a first instance Judgement for the first time) and may be prolonged.[89]

In its *TC* Judgement, the CJEU ruled that an obligation to release the requested person once a certain period of detention has elapsed (90 days in that case) if there is a very serious risk of that person absconding and that risk cannot be reduced to an acceptable level by the imposition of appropriate measures, is contrary to the FD EAW.[90] This ruling is no doubt fully applicable to the Polish law. Since provisions of the FD EAW do not have direct effect, the principle of supremacy of EU law cannot be understood as requiring disapplication of Article 607k § 3 CCP even if the latter provision is contrary to the FD EAW.[91] The only possible way of solving this contravention is to interpret domestic law to the greatest extent possible as in conformity with EU law in order to ensure an outcome that is compatible with the objective pursued by the FD EAW.[92] However, as is constantly

89 Jerzy Skorupka, "The Limits of Interference with the Personal Liberty of an Individual and with the Privilege against Self-Incrimination in Criminal Proceedings," in *The Model of Acceptable Interference with the Rights and Freedoms of an Individual in the Criminal Process*, ed. Jerzy Skorupka (Warsaw: C.H. Beck, 2019), 509–512.

90 CJEU Judgement of 12 December 2019, TC, Case 492/18 PPU, ECLI:EU:C:2019:108, paras. 63 and 77.

91 CJEU Judgement of 24 June 2019, Popławski, C-573/17, ECLI:EU:C:2019:530, para. 109; CJEU Judgement of 8 December 2022, CJ, C-492/22 PPU, ECLI:EU:C:2022:964, para. 62. See also: Dawid Miąsik and Monika Szwarc, "Primacy and Direct Effect – Still Together: Popławski II," *Common Market Law Review* 58, no. 2 (April 2021): 578–589.

92 See, *inter alia*, CJEU Judgement of 8 November 2016, Ognyanov, C-554/14, ECLI:EU:C:2016:835, para. 71.

stressed by the CJEU, no *contra legem* interpretation of domestic law is required to reach full implementation of the framework decision.[93]

For this reason, it is important to analyse whether Article 607k § 3 CCP may be interpreted in conformity with the relevant provisions of the FD EAW concerning detention pending surrender. In accordance with the prevailing opinion of commentators and the case law of Polish courts, the firm wording of Article 607k § 3 CCP does not leave any space for flexible interpretation. This means that the time limit of 100 days of detention cannot be extended in any circumstances,[94] not even if surrender is postponed because of a pending prosecution of the requested person in another case.[95] It is difficult to argue that another interpretation is permissible and acceptable in not only this situation but also with reference to cases in which detention is applied in the circumstances described in Articles 23(3) and (4) FD EAW. Article 607k § 3 CCP firmly states that "upon the motion of a public prosecutor, the regional court may impose detention on the requested person for the time indispensable for surrender of this person. The entire duration of detention cannot exceed 100 days." Thus, the CCP clearly indicates that this time limit applies to the proceedings concerning taking a final decision on the execution of an EAW as well as to the subsequent surrender proceedings *sensu stricto*.[96]

Sławomir Steinborn argues that there is some space for flexible interpretation of this provision but only in one specific situation: if surrender is

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93 Nothing has changed with regard to this issue since famous CJEU Judgement of 16 June 2005, Pupino, C105/03, EU:C:2005:386, para. 47. See also: CJEU Judgement of 5 September 2012, Lopes Da Silva Jorge, C42/11, EU:C:2012:517, paras. 55 and 56. On the limits of interpretation of national law in conformity with EU law – see also: André Klip, *European Criminal Law. An Integrative Approach* (Cambridge–Antwerp–Chicago: Intersentia, 2021), 173–178.

94 See, *inter alia*, Steinborn, „Komentarz do art. 607k kodeksu postępowania karnego," 880; Sakowicz and Górski, „Komentarz do art. 607k kodeksu postępowania karnego," 1637; Augustyniak, „Komentarz do at. 607k kodeksu postępowania karnego," 1191.

95 Appellate Court in Katowice, Decision of 30 June 2010, AKz 408/10, Ref. No. 1017306; Appellate Court in Wrocław, Decision of 5 January 2012, II AKz 3/12, Ref. No. 1110777; Appellate Court in Rzeszów, Decision of 4 March 2014, II AKz 26/14, Ref. No. 1444806.

96 See: Bartosz Baran, „Ograniczenia temporalne tymczasowego aresztowania w toku postępowania w przedmiocie wykonania ENA – glosa do postanowienia Sądu Apelacyjnego w Katowicach z 30.06.2010 r.," *Europejski Przegląd Sądowy*, no. 6 (June 2011): 48.

postponed due to pending prosecution of the requested person for another criminal act in Poland or execution in Poland of a sentence imposed in other proceedings (Article 24(1) FD EAW, implemented in Article 607o § 1 CCP[97]). He maintains that the time limit indicated in Article 607k § 3 CCP does not apply to postponed surrender since the aim of the latter provision is to speed up proceedings concerning execution of an EAW. Once the decision to surrender the requested person is final, the reasons for limiting the time of detention lose their importance. According to this author, when surrender is postponed, the date of future transfer of the requested person to the issuing MS is no longer dependent on a decision of the executing JA. For this reason, strict time limits for detention should not apply.[98]

While S. Steinborn's reasoning should be fully endorsed, it is in contravention of the precise wording of Article 607k § 3 CCP. What he proposes is in line with recent jurisprudence of the CJEU, but regarding the current regulations of the CCP, this may only be considered as a *de lege ferenda* postulate. The legal basis for prolonged detention must be unambiguous and precise. Otherwise the requested person could reasonably argue that such detention is contrary to Article 5 § 1 of the ECHR. This provision requires that detention justified under Article 5 § 1(f) ECHR must also be applied "in accordance with a procedure prescribed by law." Moreover, the detention pending extradition (i.e., also pending surrender) must be "lawful."[99] It has been emphasised many times by the ECtHR that, in general, reference is made in this provision to national law and the basis for deprivation of liberty regulated in national law.[100] Since Polish law firmly states that the time limit of 100 days for detention applies until surrender, no

97 This provision reads as follows: "If criminal proceedings are conducted in Poland against a requested person for an offence other than that indicated in the EAW or this person is to serve the penalty of imprisonment for such an offence in Poland, the court, while issuing a decision on surrender, may postpone its execution until criminal proceedings in Poland are concluded or penalty of imprisonment is served."

98 See: Steinborn, „Komentarz do art. 607o kodeksu postępowania karnego," 910, and the case-law referred therein.

99 Stefan Trechsel with the assistance of Sarah J. Summers, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2009), 420–421.

100 ECtHR Judgement of 6 October 2022, Case Liu v. Poland, application no. 37610/18, para. 97.

extensive interpretation of this provision to the detriment of the requested person is possible.

Summarising, if detention pending surrender (also postponed surrender) exceeds 100 days, its application is contrary to Article 607k § 3 CCP. As a rule, such detention cannot be considered as "lawful" and applied "in accordance with the law" within the meaning of Article 5 § 1 of the Convention. It would also be contrary to Article 6 of the Charter of Fundamental Rights understood in accordance with the interpretation provided by the CJEU in its *TC* Judgement. Unlike in the Netherlands, there is no extensive and constant interpretation by the courts of Article 607k § 3 CCP in Poland that would allow keeping the requested person in detention beyond the 100-day period in the circumstances indicated in this Judgement. As rightly argued in section 4.1. of this article, the CJEU admitted in the *TC* Judgement that domestic case law could form the appropriate legal basis for detention prolonged beyond the 90-day period provided by the law of the Netherlands at that time, in so far as that case-law does ensure that the national provision is interpreted in conformity with FD EAW and is stable and consistent. Moreover, Dutch courts applied suspension of detention, and, consequently, its prolongation only in two well-defined situations: 1) referring questions for a preliminary ruling to the CJEU in the course of the execution of an EAW or awaiting the reply to a request for a preliminary ruling made in another case; 2) assessing whether there is a real risk of inhuman or degrading treatment of the requested person or of a violation of the right to a fair trial in the issuing MS in case of surrender. None of these circumstances were subject to in-depth analysis by Polish courts in the context of time limits of detention pending surrender. Up until now, Polish courts have only once referred to the CJEU for a preliminary ruling seeking interpretation of the FD EAW.[101] Recent research has also proved that as a rule, the EAWs are executed by Polish judicial authorities within the time limits provided in FD EAW.[102] Furthermore, unlike in the Netherlands, no constant practice was revealed proving systematic verification by Polish courts of the risk of fundamental rights violations in

[101] Case C294/16 PPU, JZ.

[102] Wąsek-Wiaderek and Zbiciak, "The Practice of Poland on the European Arrest Warrant," 291.

the issuing MS in case of surrender.[103] In any case, it cannot be concluded that such verification caused prolongation of execution of EAWs and, consequently, influenced the application of detention pending surrender in Poland.

Returning to the interpretation of Article 607k § 3 CCP, it cannot convincingly be argued that the requested person is able to foresee the possibility of being kept in detention pending surrender for longer than 100 days even with the assistance of defence counsel and even if the requested person takes into consideration all provisions of the Polish law and its interpretation provided by the courts. For this reason, detention pending surrender exceeding 100 days must be assessed as lacking any legal basis under Polish law and, consequently, contrary to Article 5 § 1 ECHR. One exception to this rule may be found, which relates to the application of detention on remand in criminal proceedings that were the cause for postponement of surrender. In such a case, deprivation of liberty is simultaneously justified under Article 5 § 1 (c) of the ECHR, that is, an EAW is no longer the sole legal basis for such deprivation of liberty. The same applies in the case of surrender postponed for the purpose of execution of the sentence of deprivation of liberty in Poland; detention pending surrender is not the only legal basis for deprivation of liberty of the requested person. It is justified as well under Article 5 § 1 (a) ECHR.

6. Conclusions

Although the FD EAW does not intend to harmonise the law on detention pending surrender, such harmonising effect is provided by other sources of EU law, in particular, Article 6 of the Charter of Fundamental Rights, CJEU jurisprudence and the package of directives on the rights of suspects in criminal proceedings.[104] Thus, EU law seems to offer more protection in a number of ways to the requested person than does Article 5 ECHR.

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103 Ibid., 298–299.

104 In particular, one should mention the Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294, 6.11.2013, p. 1–12). In Poland this

First, Article 5 § 1(f) ECHR does not specify the authority that decides on putting and keeping the requested person in detention pending surrender. EU law requires that such decisions are taken by a "judicial authority" (Article 12 FD EAW). This can either be a court or a public prosecutor but the latter only if his or her independence *vis-à-vis* the executive is guaranteed. Moreover, under Article 12 FD EAW, the decision whether to keep in detention or release the requested person must be taken *ex officio*, whereas under Article 5 § 4 ECHR, the requested person must request such a decision.

Second, EU law specifies the minimum information an arrested requested person must be given, that is, the information contained in the EAW. According to the CJEU, this information corresponds to the information that must be given to a person who is arrested on suspicion of having committed an offence (Article 5 § 1(c) ECHR). Consequently, it seems that in surrender cases, EU law affords more protection than does Article 5 § 2 ECHR.

Third, EU law dictates that the requested person must be released if the time limits for surrender have expired, and he or she is still being held in custody (Article 23(5) FD EAW). The same rule applies if a decision on extension of those time limits was taken without any intervention by an "executing judicial authority" that is independent *vis-à-vis* the executive. In this respect, EU law offers more protection than Article 5 ECHR because there is a duty to release the requested person irrespective of whether the duration of detention is "excessive."

The right to recourse to a court in EU law is fully compatible with Article 5 § 4 ECHR: if the executing MS has designated a prosecutor as an "executing judicial authority," its decision on the execution of the EAW and detention pending surrender "must be capable of being subject, in that Member State, to an effective judicial remedy," that is, review by a court.

Neither EU law nor Article 5 ECHR pose a fixed time limit for detention pending surrender. In fact, the CJEU excludes a fixed limit for such detention. Despite this, both the Netherlands and Poland have introduced fixed time limits for detention pending surrender, evidently in the desire

Directive was implemented, *inter alia*, by the Ordinance of the Minister of Justice mentioned in footnote 82.

to limit the duration of the deprivation of liberty of the requested person in the executing MS. However, this impedes the effectiveness of the EAW system. While the legislature in the Netherlands reacted to the CJEU's jurisprudence on time limits and changed the national law in this respect, the Polish legislature did not undertake such an initiative. It has been argued in this paper that Article 607k § 3 CCP is contrary to the EU law insofar as it provides for the maximum period of 100 days of detention pending surrender. Furthermore, due to the clear and precise wording of this provision, its interpretation in conformity with EU law would be *contra legem*. Detention pending surrender prolonged beyond this time limit should also not be assessed as lawful within the meaning of Article 5 § 1 ECHR. With regard to the case-law of the ECtHR on Article 5 § 1 (f) ECHR, removing this time limit from the Polish Code of Criminal Procedure would not be contrary to the protection of the right to liberty of the requested person. Since the provisions of FD EAW are not directly effective, it will be the responsibility of the Polish legislature and not national courts to bring national law into conformity with EU law in this regard.[105]

Polish law provides for exclusive competence of courts to decide on detention pending surrender. It is thus fully compatible with the requirements stemming from CJEU jurisprudence.

The analysis of the law in the Netherlands brings several conclusions. Although the amendments to Article 64(1) LoS removed the fixed time limit of 90 days, they introduced a new problem: the limitation of the possibilities to extend the time limit of 90 days, no doubt in order to limit the duration of surrender proceedings and, consequently, the duration of detention. However, the result is actually a limitation on the effectiveness of the EAW. By excluding the possibility of conditionally releasing the requested person once the DCA has ordered the execution of the EAW, the law seeks to safeguard the effectiveness of the EAW. But this runs counter to Article 6 of the Charter and the FD EAW. The DCA can disapply that provision but only to the extent that excluding the possibility of conditional release is not in accordance with Article 6 of the Charter. Finally, the role of the prosecutor concerning detention is problematic since Dutch public prosecutors cannot be regarded as "executing judicial authorities".

[105] See: Miąsik and Szwarc, "Primacy," 588–589.

The DCA has introduced a conforming interpretation of various provisions to ensure as far as possible that decisions are taken by the "executing judicial authority". At any rate, it is the duty of the legislature to bring all of these provisions into line with EU law. Partly as a reaction to infringement proceedings, the legislature is in the process of preparing new amendments to the LoS to remedy the defects identified in this article.

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EAW: Next Steps, Will Pandora's Box Be Opened?

Vincent Glerum
Dr., Professor of International and European Criminal Law, Faculty of Law, University of Groningen, correspondence address: Postbus 716, 9700 AS Groningen, the Netherlands, e-mail: v.h.glerum@rug.nl
https://orcid.org/0000-0001-7668-1939

Hans Kijlstra
Former senior judge in the District Court of Amsterdam; at present substitute judge in the Surrender and Extradition Chamber of that court, correspondence address: Postbus 84500, 1080 BN Amsterdam, e-mail: h.kijlstra@rechtspraak.nl
https://orcid.org/0009-0002-7451-1762

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Abstract: The authors advocate operational improvement of the European Arrest Warrant system. When applying the judicial cooperation instruments concerning criminal matters, more attention should be devoted to the requirements of proportionality, effective judicial protection, and coherence. The power to issue an EAW should be more circumscribed whereas executing authorities should be allowed more flexibility in the decision making process as far as the execution of an EAW is concerned. The authors conclude by sketching amendments to the legal and practical framework and the efforts required to implement them as well as by addressing the issue of political feasibility.

1. Introduction

The European Commission (EC) refers to the European Arrest Warrant (EAW) as the most successful instrument of judicial cooperation in criminal matters in the EU.[1] At the same time there has been ongoing criticism.[2]

The authors are grateful to Luberta Werkman for her valuable feedback.

[1] "European Arrest Warrant," European Commission, accessed March 16, 2023, https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/european-arrest-warrant_en.

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The focus of this article is to sketch amendments to the current arrangements for issuing and executing EAWs in order to do more justice to the requirements of both *proportionality* and *effective judicial protection*. Crucial for doing justice to those requirements is improving the *coherence* of applying the available instruments concerning judicial cooperation in criminal matters. Coherence can be achieved by a balanced assessment of which instrument to use and by making this assessment at the very start of the process of either enforcing a sentence or conducting a criminal prosecution. Furthermore, the possibility of reconsidering at a later stage, especially during the execution proceedings, whether an EAW should be maintained or replaced with another measure would contribute to a more coherent application of the available instruments. In the context of coherence, the overarching goal of fighting (cross-border) criminality and preventing impunity will also play a role.

This article draws partly upon the findings of the *ImprovEAW* Project[3] but it also incorporates ideas developed in the course of the authors' long experience with EAWs. On the one hand, the article analyses the concepts mentioned before and relates them to the current legal framework and practice, and, on the other, the article focuses on amendments to the current arrangements in order to show the way forward: the next steps.

The article concludes by paying attention to the implementation of our ideas and to their political feasibility.

2. Improving the EAW

2.1. Why?

Why should we want to improve the EAW at all? After all, it is a success. And furthermore, issuing and executing EAWs has become "business as usual", considering the numbers of EAWs issued and executed every year.[4]

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2 See, *inter alios*, Steve Peers, "Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?," *Common Market Law Review* 41, no. 1 (2004): passim, and André Klip, "Eroding Mutual Trust in an European Criminal Justice Area without Added Value," *European Journal of Crime, Criminal Law and Criminal Justice* 28, no. 2 (2020): passim.

3 Renata Barbosa et al., *Improving the European Arrest Warrant* (The Hague: Eleven, 2022).

4 See: *Statistics on the Practical Operation of the European Arrest Warrant – 2021*, SWD(2023), 262 final.

In practice, however, the EAW shows serious shortcomings (*infra*, para. 2.2). Those shortcomings can lead to unjustified decisions, needless delays and extra costs, and they can also have an adverse impact on mutual trust and, therefore, on judicial cooperation in criminal matters within the EU. In short, the EAW might be called a success but, in our eyes, not an unqualified success. In this regard we would like to point out that the principle of sincere cooperation requires Member States (MS) not only to do their utmost to give effect to EAWs issued but also to do their utmost to safeguard adequate effective judicial protection. Shortcomings that stand in the way should be removed. And while it might be business as usual for MS to issue and execute EAWs, the impact on the requested person is significant.

A third reason for looking at improvements is our observation that the system has become more and more complicated. Simplifying the system contributes to efficiency and effectiveness as well as to the quality of decision-making.

2.2. Shortcomings

With regard to the shortcomings that specifically touch upon the subject matter of this article, i.e. proportionality, judicial protection and coherence, we refer to para. 3 of this article. That paragraph will demonstrate that there are defects in the way those issues are governed and dealt with in practice.

On a more general level the main obstacle to the mutual recognition of EAWs is the failure of MS to adequately transpose the EU legal framework into their national legislations. As an example we mention that many MS transposed grounds for optional refusal as mandatory grounds for refusal. Another important cause of problems is the fact that the authorities of MS disregard the autonomous meaning of concepts of EU legislation by interpreting and applying those concepts according to their national legal meaning. Those and further examples of shortcomings can be found in the *ImprovEAW* Project report.[5]

[5] Barbosa et al., *Improving the European Arrest Warrant*.

2.3. Business as Usual

Being confronted with an EAW is certainly not "business as usual" for the requested person (and his or her family). The EAW is more intrusive than most other means of cooperation in criminal matters since it entails detaining the requested person. Detention is a consequence of arresting the requested person in the executing MS. After being surrendered, the requested person will be detained in the issuing MS. This has a huge impact on his or her freedom, family and social ties, his or her ability to work and earn a living for his or her family. Detention also limits the possibility to travel freely within the EU. Given the intrusive nature of the EAW, the proportionality of the issuance of the EAW requires special attention.

Furthermore, although issuing and executing EAWs might be a mere routine for some JAs, that may not be the case for JAs of MS that have not centralised the EAW-jurisdiction.

2.4. The System Has Become Complicated

The complexity involved in the concept of *effective judicial protection* is directly linked to the subject matter of this article. We will elaborate on this in paras. 3.3 and 3.4. It is further exemplified by the issue of *in absentia* judgements[6]: at the national level the judgements of the Court of Justice give rise to a growing and evermore casuistic case law with regard to the question whether surrender would breach the requested person's rights of defence. We also refer to the two-step test in cases in which a possible violation of fundamental rights is at stake[7] and to the definition of the concept of "judicial authority" (see infra para. 3.3).

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6 Kei Hannah Brodersen, Vincent Glerum, and André Klip, *The European Arrest Warrant and in Absentia Judgements* (The Hague: Boom, 2020); Kei Hannah Brodersen, Vincent Glerum, and André Klip, "The European Arrest Warrant and *in absentia* Judgements: The Cause of Much Trouble," *New Journal of European Criminal Law* 13, no. 1 (2022): 7–27.

7 For recent reflections on this topic see: Barbosa et al., *Improving the European Arrest Warrant*, 201–223; Anne Weyembergh and Lucas Pinelli, "Detention Conditions in the Issuing Member State as a Ground for Non-Execution of the European Arrest Warrant: State of Play and Challenges Ahead," *European Criminal Law Review* 12, no. 1 (2022): 26–52; Frank Zimmermann, "Concerns Regarding the Rule of Law as a Ground for Non-Execution of the European Arrest Warrant: Suggestions for a Reform," *European Criminal Law Review* 12, no. 1 (2022): 4–24.

2.5 Conclusion

In our opinion there certainly is room for improving the practice of issuing and executing EAWs. We also think that, where there is room, there is also an obligation to try to implement improvements. After all, improvements will contribute to mutual trust and mutual recognition, to the effectiveness and efficiency of the system and to a better protection of the rights of requested persons.

3. Proportionality, Effective Judicial Protection and Coherence

3.1 Proportionality (Legal Framework)

In accordance with the principle of proportionality the means employed must be appropriate to achieve the objective pursued and must not go beyond what is necessary to achieve it.[8] This principle is a general principle of EU law, which means that it is binding on national authorities when they apply the provisions of the national law adopted to transpose FD 2002/584/JHA (FD). Moreover, as the EAW is capable of infringing the right to liberty (Article 6 of the Charter of Fundamental Rights of the European Union (the Charter)) of the person concerned, any limitation on the exercise of that right is subject to the principle of proportionality (Article 52(1) of the Charter). Against this background, it is hardly surprising that the Court of Justice has ruled that it is the duty of the issuing JA to "review, in particular, observance of the conditions necessary for the issuing of the [EAW] and examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant."[9] This review is a part of the second level of the dual level of protection for procedural and fundamental rights of the requested person (*infra* para. 3.2), i.e. the level at which the EAW is issued.[10] What is surprising, however, is that the Court of Justice seems to reduce the examination of the proportionality of issuing an execution-EAW[11] to a mere formality. When deciding whether to issue an execution-EAW, the examination of proportionality coincides with

8 See, e.g., CJEC Judgement of 18 November 1987, Maisena v. BALM, Case 56/86, ECLI:EU:C:1987:493, para. 15.

9 See, e.g., CJEU Judgement of 27 May 2019, OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau), Joined Cases 508/18 & 82/19 PPU, ECLI:EU:C:2019:456, para. 71.

10 Ibid.

11 An EAW issued for the purpose of executing a custodial sentence or detention order.

the review of observance of the condition set forth in Article 2(1) of the FD: a sentence or sentences of at least four months must have been imposed. From that condition the Court of Justice seems to deduce that where that condition is met the EAW is proportionate *ipso facto*.[12] The review of proportionality is incorporated, as it were, in the judgement imposing the sentence.[13] This line of reasoning gives rise to two objections. Firstly, as AG Campos Sánchez-Bordona has pointed out, there are other relevant factors to take into account when assessing proportionality than the sentence imposed, such as "the time elapsed between the sentence and the issue of the EAW."[14] Secondly, the requirement of Article 2(1) relates to the duration of the sentence imposed.[15] However, the actual time to be served in the issuing MS may be less than the sentence imposed and even less than four months. Consequently, the remaining sentence to be served (see Section c(2) of the EAW-form) is a much more reliable indicator of proportionality than the sentence imposed.

As far as the examination of the proportionality of issuing a prosecution-EAW[16] is concerned, the Court of Justice distinguishes between (reviewing) the proportionality of the national arrest warrant (NAW) and (reviewing) the proportionality of the EAW. In the *NJ (Public Prosecutor's Office, Vienna)* case it concluded that the national court had conducted a full review of the proportionality of the prosecution-EAW.[17] That review related to "the impinging on the rights of the person concerned which goes beyond the infringements of his right to freedom already examined [in the context of the NAW]."[18] In conducting that review, the court was required (by national law) to take into account "in particular, the effects of the surrender procedure and the transfer of the person concerned residing

12 CJEU Judgement of 12 December 2019, Openbaar Ministerie (Public Prosecutor, Brussels), Case 627/19, ECLI:EU:C:2019:1079, para. 38.

13 Ibid., para. 35.

14 The Opinion delivered on 26 November 2019, ECLI:EU:C:2019:1014, para. 30.

15 Barbosa et al., *Improving the European Arrest Warrant*, 97–98.

16 An EAW issued for the purpose of conducting a prosecution.

17 CJEU Judgement of 9 November 2019, NJ (Public Prosecutor's Office, Vienna), Case 489/19 PPU, ECLI:EU:C:2019:849, para. 46.

18 Ibid., para. 44.

in a Member State other than the [issuing Member State] on that person's social and family relationships."[19]

With regard to the European Investigation Order (EIO) EU law expressly recognises the availability of less intrusive means to achieve the objective pursued as relevant to the examination of proportionality: "[w]ith a view to the proportionate use of an EAW", Recital 26 of Directive 2014/41 calls upon the issuing JA to "consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings."[20] Although neither the case law of the Court of Justice on the EAW nor the FD explicitly refers to less intrusive alternatives, the duty to consider such alternatives is inherent in the very concept of proportionality. Consequently, the issuing JA should consider whether there is an instrument of judicial cooperation which is less intrusive than the EAW but which is equally effective in achieving the objective pursued.

3.2. Proportionality (Practice and Shortcomings)

Although it is clear that the issuing JA must assess proportionality, at least when deciding whether to issue a prosecution-EAW, that duty does not have an explicit legal basis in the legal order of some MS, e.g. the Netherlands. That may cause problems particularly where the jurisdiction to issue EAWs is decentralised, as it is in the Netherlands. Research shows that issuing JAs in the Netherlands, although aware of the duty, restrict themselves to assessing the seriousness of the offence(s) on the basis of the maximum penalty that can be imposed. They are not provided with the case file but rather with the EAW-form completed by the prosecutor. Less intrusive alternatives to issuing an EAW are rarely, if ever, taken into account. Instances in which the issuing JA refuses to issue an EAW are very rare.[21] With the exception of Poland (see infra), issuing JAs in other MS do not seem to carry out a fully-fledged proportionality assessment, either.[22]

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19 Ibid.

20 OJ L 130, 1–36.

21 Vincent Glerum and Hans Kijlstra, "Practice in the Netherlands," in *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, eds. Renata Barbosa et al. (The Hague: Eleven, 2022), 123–127.

22 Barbosa et al., *Improving the European Arrest Warrant*.

By contrast, in Poland the duty to assess the proportionality of issuing an EAW is laid down explicitly in national law. Research shows that Polish issuing courts, when assessing proportionality, not only take into account the severity of the penalty or the type of offence but also review whether less intrusive alternatives to issuing an EAW are available. A refusal to issue an EAW on account of a lack of proportionality is not a rare occurrence.[23]

3.3. Effective Judicial Protection (Legal Framework)

There is a strong link between the examination of the proportionality of issuing the EAW and the requirements of effective judicial protection. The issuing JA's duty to examine the proportionality of issuing an EAW is a part of the second level of the dual level of protection for the requested person's procedural and fundamental rights in the issuing MS. The dual level of protection, in its turn, is linked to the requirement of effective judicial protection. That dual level consists of a "judicial decision" at the level of the adoption of the NAW and a decision by the "issuing [JA]" at the level of the adoption of the EAW. The NAW issued by a prosecutor constitutes a "judicial decision" which may serve as the basis for issuing a prosecution-EAW (Article 8(1)(c) of the FD). An EAW can be issued by a prosecutor, if the national law of the issuing MS contains provisions which are capable of guaranteeing that the issuing prosecutor is not exposed to any risk of interference by, in particular, the executive.[24] In short, neither the concept of "judicial decision" nor the concept of "issuing [JA]" is limited to (decisions issued by) courts. This is problematic since the EAW can impinge on the requested person's right to freedom. Evidently, that is why the Court of Justice felt the need to intertwine the dual level of protection with the requirement of effective judicial protection, i.e. effective protection by a court. At least at one of the two levels, the decision must meet that requirement. Consequently, if a prosecution-EAW is issued by a prosecutor, at least the NAW must meet the requirements of effective judicial protection. Moreover, if the EAW is issued by a prosecutor, the decision to issue that EAW and, in particular,

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23 Małgorzata Wąsek-Wiaderek and Adrian Zbiciak, "Practice in Poland," in *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, eds. Renata Barbosa et al. (The Hague: Eleven, 2022), 256–262.

24 See, e.g., OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau), para. 74.

the proportionality thereof, must be amenable to court proceedings that meet in full the requirement of effective judicial protection.

Much effort has been spent by executing JAs and the Court of Justice in trying to establish whether the legal order of a particular issuing MS provides for the possibility of court proceedings against the decision to issue a prosecution-EAW by a prosecutor. The approach of the Court of Justice in answering preliminary references concerning that topic consists in making a global assessment of the applicable legal order. A separate right of appeal is not required. Where the legal order provides for the pre-conditions for the issuance of the EAW and its proportionality to be reviewed by a court "before or almost at the same time as it is issued and, in any event, after the [EAW] has been issued," that is "before or after the actual surrender of the requested person," that system meets the requirement of effective judicial protection.[25] This wording gave rise to the interpretation that judicial review of a prosecutor's decision to issue a prosecution-EAW and its proportionality *a posteriori*, i.e. *after* surrender, would suffice.[26] In *MM* the Court of Justice subsequently held that – in the absence of a separate legal remedy against the decision to issue the EAW and its proportionality whether before, after or at the same time of its adoption – the court in the issuing MS, that was called upon to give a ruling in the criminal proceedings *after the surrender* of the person concerned, had to be able to carry out an indirect review of the EAW if the validity of the EAW had been challenged.[27] That judgement might be seen as confirming the interpretation that judicial review *a posteriori* satisfies the requirement of effective judicial protection. However, in the judgement in the *Svishtov Regional Prosecutor's Office* case the Court of Justice reiterated that the dual level of protection "means that a decision meeting the requirements inherent in effective judicial protection should be adopted, at least, at one of the two levels of that

25 CJEU Judgement of 12 December 2019, Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours), Joined Cases 566/19 PPU & 626/19 PPU, ECLI:EU:C:2019:1077, paras. 65–71.

26 See, e.g., the opinion of AG Pikamäe delivered on 30 September 2020, ECLI:EU:C:2020:758, para. 75 in fine.

27 CJEU Judgement of 13 January 2021, MM, Case 414/20 PPU, ECLI:EU:C:2021:4, para. 72.

protection" and explicitly stated that, therefore, *either* the NAW *or* the EAW had to be capable of being the subject of judicial review *before surrender*.[28]

To summarise, that case law amounts to a multi-dimensional matrix of relevant factors for assessing whether the requirements of effective judicial protection are met in the case of a prosecution-EAW:

1. There are two arrest warrants at issue, the NAW and the EAW.
2. Was the NAW issued by a prosecutor or a court?
3. Was the EAW issued by a prosecutor or a court?
4. If issued by a prosecutor, can the decision to issue the NAW and/or the EAW be reviewed by a court?
5. Is such a review available before or after surrender?

In itself, that matrix already is hard to process but the case law also gives rise to questions and uncertainty (infra 3.4).

3.4. Effective Judicial Protection (Practice and Shortcomings)

Judicial review *before surrender* has the potential to prevent the surrender to the issuing MS and to put an end to the detention in the executing MS. Where the competent court in the issuing MS finds that either the NAW or the EAW should not have been issued, the requested person cannot be detained in the executing MS anymore nor surrendered to the issuing MS. Such judicial protection before the surrender is certainly more effective than an *a posteriori* review of the NAW or the EAW, i.e. any judicial review after the detention in the executing MS and the surrender to the issuing MS. Nevertheless, *Svishtov* and the subsequent case law raise the question whether the NAW and the EAW both must be taken by a court or be amenable to be reviewed by a court, *and* at least one of those decisions must be taken by a court or be amenable to be reviewed by a court before the surrender (in other words, *Svishtov* adds a requirement) or *only one* of those decisions must be taken by a court or be amenable to be reviewed by a court, *viz*. before the surrender (in other words, *Svishtov* turns cumulative requirements into alternative requirements).[29] If the latter is the case,

[28] CJEU Judgement of 10 March 201, Svishtov Regional Prosecutor's Office, Case 648/20 PPU, ECLI:EU:C:2021:187, paras. 43–44.

[29] CJEU Judgement of 30 June 2022, Spetsializirana prokuratura (Information on the national arrest decision), Case 105/21, ECLI:EU:C:2022:511, para. 52 seems to suggest the latter.

then that case law weakens the protection of the requested person's rights. This question is inextricably linked with the scope of judicial review before the surrender. If, e.g., judicial review of the NAW before the surrender is not required to encompass the pre-conditions for the issuance of the EAW and its proportionality but rather is limited to the lawfulness of the NAW itself,[30] the protection of the requested person's rights is weakened even further.

At the root of all of this complexity and uncertainty is the definition of the "issuing JA". Since that definition does not limit itself to courts but includes prosecutors, the Court of Justice has created additional safeguards. If EU law were to prescribe that only courts can issue EAWs, there would be no need for such safeguards. When deciding whether to issue an EAW, the issuing court would have to check whether the pre-conditions for the issuance of the EAW are met and whether it would be proportionate to issue the EAW, thereby guaranteeing that all EAWs are issued after *judicial* review *before surrender*.

However, even if authorities which are not courts were to be excluded from the power to issue prosecution-EAWs, there would still be a legal vacuum with regard to NAWs. Prosecution-EAWs are entirely dependent on the NAWs on which they are based. If the NAW is declared invalid, withdrawn or suspended by the competent authority of the issuing MS, the EAW cannot be executed because it is no longer based on an *enforceable* national judicial decision (Article 8(1)(c) of the FD) and, therefore, it is invalid.[31] The right to be brought promptly before a judge in the issuing MS, as guaranteed by Article 5(3) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and by Article 6 of the Charter,[32] does not apply if the requested person is arrested and detained in the executing MS with a view to surrender. Detention in the executing MS on the basis of a prosecution-EAW falls under the heading of

Cf. Adriano Martufi, "Effective Judicial Protection and the European Arrest Warrant: Navigating between Procedural Autonomy and Mutual Trust," *Common Market Law Review* 59, no. 5 (2022): 1398–1404.

30 Svishtov Regional Prosecutor's Office, para. 57 only refers to the lawfulness of the NAW.

31 Cf. CJEU Judgement of 6 December 2018, IK (Enforcement of an additional sentence), Case 551/18 PPU, ECLI:EU:C:2018:991, para. 43.

32 Which corresponds to Art. 5 of the ECHR: Spetsializirana prokuratura (Information on the national arrest decision), para. 54.

Article 5(1)(f) of the ECHR,[33] not under that of Article 5(1)(c) and (3) of the ECHR.[34] This means that, under the ECHR and the Charter, the person concerned has just the right to challenge the NAW before a judge *after his/her surrender to* and *his/her arrest in the issuing MS*. In line with this, the rights conferred by Directive 2012/13[35] upon suspects/accused persons who are arrested or detained only apply to requested persons *once surrendered* to the issuing MS[36] and the issuing JA is not required to provide the requested person with the NAW and information on the possibilities of challenging that decision.[37]

This is problematic. Even though the FD contains short and uniform time limits for the decision to execute the EAW and for the actual surrender (Article 17 and 23 FD), in practice the proceedings in the executing MS can take a considerable amount of time.[38] All the while the requested person cannot contest the NAW. Moreover, according to the case law of the ECtHR, the issuing MS is responsible for the lawfulness of the NAW which, after all, constitutes the grounds for the detention of the requested person in the executing MS.[39] Given that responsibility, it would also be in the best interest of the issuing MS to review the lawfulness of the NAW as soon as possible. However, under Article 5 of the ECHR the issuing MS is under no duty to review the lawfulness of that warrant prior to the surrender or to provide for it to be reviewed. At the time of the adoption of the ECHR there may

33 Although Art. 5(1)(f) refers to "extradition", this concept also encompasses surrender on the basis of the EAW. See, e.g., ECtHR Decision of 25 June 2019, West v. Hungary, application no. 5380/12, para. 42.

34 See, e.g., ECtHR Judgement of 24 July 2015, Čalovskis v. Latvia, application no. 22205/13, para. 180. This is also the view of the Court of Justice: CJEU Judgement of 28 January 2021, Spetsializirana prokuratura (Letter of rights), Case 649/19, ECLI:EU:C:2021:75, paras. 54–55.

35 OJ 2012, L 142/1.

36 Spetsializirana prokuratura (Letter of rights), para. 61.

37 Spetsializirana prokuratura (Information on the national arrest decision), para. 60.

38 In 2021, on average the proceedings lasted 53.72 days (from arrest to the final decision) where the person concerned did not consent to surrender. However, the 90-day time limit for taking a decision on the execution of an EAW was exceeded in 6.21% of surrender proceedings. Most of those cases concerned The Netherlands, Germany and Ireland: *Statistics on the practical operation*, 14–15.

39 See, e.g., ECtHR Judgement of 2 May 2017, Vasiliciuc v. Moldova, application no. 15944/11, para. 37.

have been good reasons to distinguish between detention on the basis of a suspicion that an offence has been committed (Article 5(1)(c)) and detention pending extradition/surrender (Article 5(1)(f)). At present, however, two circumstances militate against maintaining that distinction. Firstly, the EU is an area of freedom, security, and justice without internal borders. Whereas internal borders do not constitute any obstacle to recognising and enforcing a judicial decision from another MS, those borders should equally not constitute an obstacle to challenging (the grounds for) that decision. Secondly, given the state-of-the-art audiovisual communication methods, it is relatively easy for the authority of a MS to hear a defendant who is present in another MS.[40] Such methods could also be employed to enable the requested person to challenge the lawfulness of the NAW while he/she is still staying in the executing MS, i.e. before the surrender.

3.5. Coherence

What do we mean by coherence? For the purposes of this article we use the following definition of coherence: the application of instruments in a given individual case[41] is coherent if (and only if) instruments are applied in a comprehensive, proportional, consistent, and complete way.

In order to ensure a coherent application of instruments this methodology should be followed when deciding to apply an instrument:

- take into consideration all available options and assess their effectiveness and intrusiveness (*comprehensiveness*);
- choose the option that is sufficiently effective and the least intrusive (*proportionality*);[42]

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40 Cf. Art. 24(1) of Directive 2014/41.

41 This is about coherence at an individual level (coherence in a given case). It is also important to look at coherence at a general level. The application of instruments in a given case should at least be consistent with the application of instruments in another case. We will not dwell upon this angle in this article.

42 When assessing the proportionality of an available instrument, at least the following dimensions should be taken into account. Using an instrument without detention is less intrusive than using an instrument with detention (EAW). Involvement without physical presence in the requesting MS (e.g. through video-conferencing) is less intrusive than transferring the person concerned. Involvement on the basis of voluntary arrangements is less intrusive than employing coercive measures.

- do not choose an option that is incompatible with a measure already applied in the given case (*consistency*);
- as long as the objective is not achieved, do not refrain from using an option that has not yet been used and that meets the criteria of proportionality and consistency (*completeness*).[43]

Two examples of a *lack of comprehensiveness*. The first example has already been mentioned before: the preamble to Directive 2014/41 urges the issuing JA to consider the issuance of a EIO instead of an EAW. The failure to consider that (less intrusive) alternative constitutes a lack of comprehensiveness. Comprehensiveness may also be missing when issuing a prosecution-EAW in order to further investigate a case where the address of the requested person abroad is known and there are no reasons to think that this person is hiding from justice.[44] In such a case, the requirement of comprehensiveness is not met when the option of trying to arrange for the availability of the requested person on a voluntary basis is not considered before deciding to issue the EAW.

The examples of a lack of comprehensiveness also relate to a *lack of proportionality*. If issuing a EIO is thought to be sufficient in order to have a suspect interrogated and to initiate or continue the prosecution procedure, issuing the EAW for the same purpose is not proportionate.[45] The issuance of the EAW is not proportionate, either, when the requested person is prepared to travel to the issuing MS and arrangements between the competent authority and the requested person can be made on a voluntary basis.

Two examples of *inconsistency*. The JA of a MS issues an execution-EAW on the basis of the FD while, at the same time, another authority of that MS initiates mutual recognition of the same custodial sentence on the basis of FD 2008/909/JHA.[46] Another problem is that sometimes the executing

43 See in a somewhat different context Ken Kress, "Coherence," in *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis Patterson (Malden: Wiley-Blackwell, 2010), 521 ff.

44 Wąsek-Wiaderek, "Practice in Poland," 261–262.

45 A EIO, in principle, does not interfere with the right to liberty: CJEU Judgement of 8 December 2020, Staatsanwaltschaft Wien (Falsified transfer orders), Case 584/19, ECLI:EU:C:2020:1002, para. 73.

46 *Report on Eurojust's casework in the Field of the European Arrest Warrant* (Eurojust, 2021), 61. See also: District Court of Amsterdam, Judgement of 29 June 2022, ECLI:NL:RBAMS:2022:3762.

JA refuses to surrender a requested person for the purpose of enforcing a sentence on the basis of Article 4(6) of the FD, while subsequently another authority of the same MS refuses to recognise and execute that sentence, e.g. because it requires a certificate under FD 2008/909.[47]

The requirement of *completeness* is linked to the very goal of using one or more of the available instruments, i.e. (providing assistance to) either enforcing a sentence or conducting a criminal prosecution. In our definition, the application of instruments in a given individual case is not coherent as long as this goal is not achieved and at least one instrument remains that is proportional and consistent with other instruments already applied. In this way, the concept of "coherence" does justice to the overarching objective of the EU instruments on judicial cooperation in criminal matters: combatting impunity.[48]

Which other options than issuing an EAW are available to get a sentence executed or a criminal prosecution implemented? In our view, at least the following options should be taken into account when deciding on the issuance of the EAW, insofar as they are applicable to the case at hand: the EIO, the European Supervision Order (ESO), mutual recognition of a sentence (FD 2008/909), a transfer of criminal proceedings to another MS,[49] making arrangements with the requested person on a voluntary basis and summoning the requested person on his/her address abroad.

As far as we can see at the moment the fact that different authorities are competent with regard to the different instruments available is one of the most important obstacles to a coherent application of those instruments. A prosecutor, e.g., might be competent to issue the EIO where a court is competent to issue the EAW. Further research has to be carried out and will actually be conducted within the framework of a project funded by the EU,

47 *Report on Eurojust's casework*, 30.

48 See with regard to the EAW e.g. CJEU Judgement of 8 December 2022, CJ (Decision to postpone surrender due to criminal prosecution), Case 492/22 PPU, ECLI:EU:C:2022:964, para. 74.

49 See, e.g., the recent proposal of the EC for rules on the transfer of criminal proceedings between Member States: COM(2023) 185 final.

that will deal with the issue of coherence in the application of instruments of the cooperation in criminal matters within the EU.[50]

3.6. Relationship between Proportionality, Effective Judicial Protection, and Coherence

In our definition, a coherent application of the available instruments implies an assessment of the proportionality of each of those instruments in a given case. Furthermore, both of those concepts relate to the concept of effective judicial protection in the sense that more coherence leads to more proportionality and to a more consistent use of instruments which, ultimately, contributes to strengthening the position of the requested person.

4. Amending the Current Procedure: Specifications and Implementation[51]

The ideas mentioned before are far from ready to be implemented. Describing amendments to the current arrangements in such detail that they are ready to be implemented is outside the scope of this article and requires further research. We will limit ourselves here to listing some specifications for such amendments, which can be used as a starting point. The list is not exhaustive and is only meant to illustrate the direction of the way forward. We'll also give an outline of implementation efforts required.

4.1. Guiding Principle: Adjusting the Room to Manoeuvre of JAs

One could adopt the guiding principle that there should be less flexibility available for issuing JAs and more flexibility for executing JAs in order to do justice to the requirements of proportionality and effective judicial protection and to realise a more coherent application of the available instruments.[52] After all, once the issuing JA has chosen which instrument to apply, the principle of mutual recognition entails that this choice is locked

50 *Mutual Recognition 2.0* (*MR 2.0*) will be carried out by experts from Germany, the Netherlands, Poland and Spain.

51 See further: Barbosa et al., *Improving the European Arrest Warrant*, 275–308; André Klip, "A Next Level Model for the European Arrest Warrant," *European Journal of Crime, Criminal Law and Criminal Justice* 30, no. 2 (2022): 107–126.

52 See: Vincent Glerum, *Tussen vrijheid en gebondenheid. Het Europees aanhoudingsbevel 2.0* (Deventer: Wolters Kluwer, 2022).

in. Especially the examination of proportionality in the context of issuing the EAW should be more governed and bound by legislation and more judicial protection in the issuance procedure should be provided for. With regard to the execution procedure, the executing JA should have more possibilities and flexibility to engage in a dialogue with the issuing JA about other options than executing the EAW if it could lead to a better outcome.

4.2. Issuing the EAW

- Before issuing the EAW the possibility of other measures should be taken into consideration, as the following examples illustrate.
  · Is there a known address of the required person abroad? If so, then try to make arrangements on a voluntary basis. Of course there are exceptions to this rule, e.g., if for some reason this option is doomed to fail or if for reasons of urgency it is not feasible to first try other measures than issuing the EAW.
  · Is it possible to hear a requested person by means of video-conferencing and would this suffice? If so, then refrain from issuing the EAW.
  · Is it viable to have a custodial sentence recognised by the MS where the requested person resides? If so, then the issuance of the EAW is not the best option since it is more intrusive and also more cumbersome for competent authorities.
- Criteria for the use of the available options should be aligned.
- The competence in respect of the available options should be aligned by allocating it to the same authority or by putting in place effective coordination mechanisms.
- The EAW-form should contain a section concerning proportionality in order that the issuing JA is confronted with the duty to assess proportionality when deciding on the issuance of the EAW.

4.3. Executing the EAW

- It should be possible for the requested person to challenge, during the execution procedure, the NAW on which the prosecution-EAW is based and/or the EAW itself (prosecution as well as execution-EAW), e.g. by using video-conferencing or another distance communication technology. After all, with the passage of time the factual and legal

situation may change, which may have consequences for its assessment, as the following examples show.
· Although not a resident, the requested person has become settled in the executing MS; consequently, transferring the criminal proceedings from the issuing MS to that MS should be considered.
· The requested person proposes that he or she will attend his or her trial in the issuing MS on a voluntary basis.
· The requested person wants to prove that the suspicion against him or her is unfounded and groundless because of new evidence.

– There should be a mechanism for involving the issuing JA directly in the execution procedure, preferably through video-conferencing or another distance communication technology, thus ensuring a real dialogue[53] or even a "trilogue" if the present bullet is combined with the previous one.
· As under the Directive on the EIO (Article 6(3)), the executing JA should be able to voice its doubts about proportionality to the issuing JA. The issuing JA should be able to reconsider the issuance of the NAW and/or the EAW, to replace a prosecution-EAW with the ESO or EIO or to arrange for the transfer of the criminal procedure to the executing MS, ex officio, at the request of the executing JA or on the basis of what the requested person puts forward.

4.4. Implementing Issues

Some of the improvements may require amending the existing legal framework and others can be implemented within that legal framework.

[53] Of course, there is the instrument of Art. 15 of the FD (providing/requesting supplementary information). But a more direct involvement and especially a direct 'dialogue' between the issuing and executing JAs could contribute to speeding up the proceedings, to better judicial protection and more coherence in applying the available options. At the same time, applying Art. 15(2) can result in a dialogue as a Dutch example illustrates. In this case, the requested person was pregnant and the issuing JA was asked whether there were adequate facilities for detaining mother and child in the issuing MS. The issuing JA announced, proprio motu, that it was prepared to reconsider the EAW once the co-perpetrator was heard after his surrender. In the end, the EAW was withdrawn: District Court of Amsterdam Judgement of 10 February 2023, ECLI:NL:RBAMS:2023:1023.

4.4.1. Amending the Legal Framework

Amending EU-legislation:

- Amending the FD:
  - · Incorporate proportionality requirements in the issuance procedure.
  - · Create possibilities for challenging the NAW and EAW and for the involvement of issuing JAs during the executing proceedings.
  - · Provide for a legal basis for using video-conferencing or another distance communication technology for challenging the NAW/EAW and involving issuing JAs during the execution procedure.[54]
  - – Amend the EAW-form (adding a section on proportionality)
- Adopt an EU-instrument on the transfer of proceedings.[55]
- Align the FD, FD 2008/909/JHA, Directive on the EIO and the FD on the ESO.

Amending the national legislation:

- Attribute the jurisdiction concerning the available instruments only to one competent authority or provide for mechanisms to coordinate between different authorities.
- Allocate the competence to issue and execute EAWs only to courts.

4.4.2. Practical Improvements within the Existing Legal Framework

- Even without amendments to national legislation, the issuing JA may coordinate ex officio with other authorities of its MS to determine which available instrument to employ.
- The national authorities may also adopt guidelines with regard to, e.g., proportionality.

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54 The EC's Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation (COM(2021) 759 final) could be amended in this vein.

55 As stated before, the EC has submitted a proposal for the adoption of a regulation on the transfer of criminal proceedings between Member States.

5. Final Considerations

We realise that amending the EU-legislation can take a lot of time and effort. Questions of political feasibility may also arise.[56] Clearly, the EU and the MS have other priorities at the moment. Furthermore, amending EU legislation may cause Pandora's box to open. It is not without reason that to date the FD has only been amended once.

Similar circumstances apply to amending national legislation but to a lesser degree. When looking back one can observe that at the national level MS have indeed made several amendments of the legislation with regard to the issuance and execution of EAWs.[57]

Considerations with regard to time and effort and to questions of political feasibility are however less convincing when it comes to implementing practical solutions in everyday practice.

Finally, we would like to put considerations of (political) feasibility into context. Such considerations should not preclude thinking about improving the EAW. Furthermore, considerations of (political) feasibility can shift under the influence of thoughts, and maybe they actually will. So, if Pandora's box is indeed to be opened, let's not trap hope inside by slamming the lid shut too quickly.

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[56] As the authors experienced at the COPEN-meeting during which they presented some findings of the *ImprovEAW* Project. It seemed as if for some amending the EU legal framework is a no-go.

[57] Barbosa et al., *Improving the European Arrest Warrant*, passim.

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Right to Effective Legal Remedy in Criminal Proceedings in the EU. Implementation and Need for Standards

Paweł Wiliński
Professor, Dr. habil., Department of Criminal Proceedings, Faculty of Law and Administration, Adam Mickiewicz University of Poznań, correspondence address: al. Niepodległości 53, 61-714 Poznań, Poland, e-mail: wilinski@amu.edu.pl
https://orcid.org/0000-0002-3798-7879

Karolina Kiejnich-Kruk
Dr., Assistant Professor, Department of Criminal Proceedings, Faculty of Law and Administration, Adam Mickiewicz University of Poznań, correspondence address: al. Niepodległości 53, 61-714 Poznań, Poland, e-mail: karolina.kiejnich@amu.edu.pl
https://orcid.org/0000-0003-1551-5448

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Abstract: In order to secure rights and guarantees provided by the legal system of the European Union, legal acts in the field of the criminal cooperation refer to the right to an effective remedy. Given that, two instruments are particularly important as they were the first to aim to set the standard and frame for the effective remedy conceptual framework: the Directive 2013/48/EU and the Directive (EU) 2016/343. The Authors analyse the legislation process within that context, the approach of Member States, (non)existing standards and related consequences, such as the possibilities of proper implementation of the right to the effective remedy into the national legal systems, verification of that process as well as the chances to achieve the harmonisation of minimal standards of the protection of fundamental rights in the area of criminal proceedings in the EU.

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1. Introduction

The discussion of the European criminal procedure is still more of a dialogue involving disconnected respective procedure-related institutions than a description of a coherent system. The strategy of the approximation of procedural standards adopted and accepted by Member States means the mutual recognition of judgements and other decisions, the recognition and development of common standards, the creation of simplified procedures for surrendering persons[1] (like the European Arrest Warrant[2]) and evidence (like the European Evidence Warrant), and so on. It is a lot about mutual trust in legal systems and their recognition.[3] It also demands the introduction of numerous further simplifications of legal cooperation.[4]

Among other legal acts of the European Union in the field of criminal procedure, guarantee instruments attract special attention.[5] They serve the purpose of recognising and protecting the procedural guarantees of an individual. They aim at standarising the level of legal protection afforded to participants in the criminal process,[6] especially those who are ex-

1 See: Montaldo Stefano, "Intersections among EU Judicial Cooperation Instruments and the Quest for an Advanced and Consistent European Judicial Space: The Case of the Transfer and Surrender of Convicts in the EU" *New Journal of European Criminal Law* 13, no. 3 (2022): 252–269.

2 Asif Efrat, Assessing Mutual Trust among EU Members: Evidence from European Arrest Warrant," *Journal of European Public Policy*, no. 26 (2019): 656 and next.

3 More: Willems Auke, *The Principle of Mutual Trust in EU Criminal Law* (Oxford et al.: Hart 2021), 312.

4 See: Élodie Sellier and Anne Weyembergh, eds., *Criminal Procedures and Cross-Border Cooperation in the EU Area of Criminal Justice. Together but Apart?* (Bruxelles: Éditions de l'Université de Bruxelles, 2020), 459; also: Jannemieke Ouwerkerk et al., eds., *The Future of EU Criminal Justice Policy and Practice. Legal and Criminological Perspectives* (Brill: Nijhoff, 2019), 261.

5 And have an additional value in the era of the rule of law breakdown noticed in some EU Member States, i.a. in Poland, Hungary, see: Anna Gora and Pieter de Vilde, "The Essence of Democratic Backsliding in the European Union: Deliberation and Rule of Law," *Journal of European Public Policy* 29, no. 3 (2022): 342 and next.

6 It seems to be even more demanding in relation to ex EU Member States, see: Wolfgang Schomburg, Anna Oehmichen, and Kays Katrin, "Human Rights and the Rule of Law in Judicial Cooperation in Criminal Matters under the EU-UK Trade and Cooperation Agreement," *New Journal of European Criminal Law* 12, no. 2 (2021): 246–256.

posed to a particular degree of restriction on their freedoms and rights,[7] such as victims, suspects, and witnesses.[8] Therefore, the selection of those legal measures is not, or at least should not be, accidental. It is based on common values and standards,[9] which arise from the overarching legal acts binding the Member States of the European Union that are enshrined in the European Convention on Human Rights (ECHR)[10] and the Charter of Fundamental Rights (CFR).[11]

The effective implementation of this EU legislation into national legal systems is the responsibility of the Member States. Countries are also directly responsible for the effectiveness of their national instruments and the way they are ultimately governed. The freedom of states, however, primarily concerns the form of governing those issues, and not the result itself. Indeed, Member States are obliged to ensure the effectiveness of each of those legal instruments.

The obligation to ensure the effectiveness of the direct and independent implementation of the European instruments is, in fact, a relic of the international law principles derived from the conceptual framework of state independence. Member States fulfill their obligations through the properly relevant implementation of the European instruments in such a way that will preserve the integrity of their internal legal systems.[12] However, from this perspective, the quality of implementation becomes critical to

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7 See: Tony Marguery, "European Union Fundamental Rights and Member States Action in EU Criminal Law," *Maastricht Journal of European and Comparative Law* 20, no. 2 (2013): 283 and next.

8 See, i.a.: Anna Pivaty et. al., "Strengthening the Protection of the Right to Remain Silent at the Investigative Stage: What Role for the EU Legislator?," *New Journal of European Criminal Law* 12, no. 3 (2021): 427–448.

9 See more: Irene Wieczorek, *The Legitimacy of EU Criminal Law* (Oxford et al.: Hart, 2020), 243.

10 The Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, from November 4, 1950. See: Pieter van Dijk et al., eds., *Theory and Practice of the European Convention of Human Rights* (Cambridge-Antwerp-Portland: Intersentia, 2018), 1–78, 331–352.

11 The Charter of Fundamental Rights of the European Union, proclaimed by EU in 2000, came into force in Dec. 2009 together with the Treaty of Lisbon.

12 See also: Cristina Sáenz Pérez, "What about Fundamental Rights? Security and Fundamental Rights in the Midst of a Rule of Law Breakdown," *New Journal of European Criminal Law* 13, no. 4 (2022): 526–545.

the integrity of the common European system, and the foundation and pre-condition for achieving a common standard. For all those reasons, it is of particular importance for the European Union and all its Member States that this commitment carries real content – all common instruments must be implemented in full and not purely for the sake of appearances.

The mere commitment of the EU Member State and its assurance of the implementation of those guarantees do not mean that the guarantees will always be implemented in the right way.[13] Sometimes a Member State does not intend to implement new dedicated solutions but instead tries to demonstrate that the guarantees are already provided by the existing procedural institutions, even when they are insufficient or changes are in fact necessary. At other times, the regulations that seem to exist do not provide real procedural protection. As a result, the practice of criminal proceedings deviates from the expected standard.

In this context, attention should be drawn to a special procedural instrument, the aim of which is to respond to the ineffective implementation of guarantees available to an individual. This is the "right to an effective legal remedy" for the violation of the guarantees provided by the EU law.[14] The provisions on effective legal remedies are set forth in the EU directives concerning criminal proceedings. However, neither the definition nor the clear standard of those provisions is governed in the EU legal acts or public discourse. As a consequence, open questions remain in this area:

1) how did the Member States assess that their national legal systems met the EU standards and the requirements of the Directives in the context of the right to an effective legal remedy,

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13 See: Wendy De Bondt and Gert Vermeulen, "The Procedural Debate. A Bridge Too Far or Still Not Far Enough?," *Eucrim*, no. 4 (2010): 163–167; Robin Lööf, "Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU," *European Law Journal* 12, no. 3 (2006): 421–430; Laurens van Puyenbroeck and Gert Vermeulen, "Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU," *International and Comparative Law Quarterly* 60, no. 4 (2011): 1017–1038.

14 Herwig Hofmann, "The Right to an Effective Remedy and to a Fair Trial – Article 47 of the Charter and the Member States," in *The Charter of Fundamental Rights of the European Union*, eds. Steve Peers and Tamara Harvey (Oxford: Hart Bloomsberg, 2019), p. 33; Kathleen Gutman, "The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?," *German Law Journal* 20, no. 6 (2019): 886–889.

2) how are the Member States supposed to implement the Directives correctly in this regard,
3) how can the Commission assess the completeness and correctness of the transposition of the EU law into national laws.[15]

Without standarising the conceptual framework of effective legal remedies, those questions remain rhetorical, and so does the question about the real status of the harmonisation of laws amongst Member States. In this contribution, Authors present the legislative and implementation process (as exemplified by the Polish legal system) in respect of the right to an effective remedy set forth in the Directive 2013/48/EU[16] and Directive (EU) 2016/343[17] in order to confirm the presented thesis, raise awareness of the consequences of the status quo, and look for a practicable arrangement.

2. Effective Legal Remedy Conceptual Framework

The effective legal remedy conceptual framework is not a new construction. It is not even an original instrument for the EU cooperation but was derived from a common law concept adopted by the ECHR.[18] According to Article 13 of the ECHR, "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." The jurisprudence of the European Court

15 See: Karolina Kiejnich, "Harmonisation of EU Criminal Law – Issues of Implementing EU Directives," in *European Union and Its Values: Freedom, Solidarity, Democracy*, eds. Agnieszka Kłos et al. (Warsaw: CeDeWu, 2020), 37.

16 The Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, pp. 1–12.

17 The Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, pp. 1–11.

18 See the complex analysis pp. Tom Barkhuysen and Michiel L. van Emmerik, "Chapter 32: Right to an Effective Remedy" in *Theory and Practice of the European Convention of Human Rights*, eds. Pieter Van Dijk et al. (Cambridge-Antwerp-Portland: Intersentia, 2018), 1035–1061.

of Human Rights (ECtHR) has developed the concept of an effective legal remedy, clarifying its essence, mostly by considering its meaning and scope of influence.[19]

The provisions of the CFR are, undoubtedly, modelled on this regulation. According to Article 47 of the CFR (the right to an effective remedy and to a fair trial):

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended, and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.[20]

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[19] Among others: ECtHR Judgement of 25 June 1997, 20605/92, Halford v. The United Kingdom, HUDOC, p. 64; ECtHR Judgement of 16 November 1996, 22414/93, Chahal v. The United Kingdom, HUDOC, p. 145; ECtHR Judgement 10 September 2010, 31333/06, McFarlane v. Ireland, HUDOC, p. 108; ECtHR Judgement of 31 July 2003, 50389/99, Doran v. Ireland, HUDOC, p. 55; ECtHR Judgement of 28 October 1998, 24760/94, Assenov and Others v. Bulgaria, HUDOC, p. 117; ECtHR Judgement of 4 July 2006, 59450/00, Ramirez Sanchez v. France, HUDOC, p. 157; ECtHR Judgement of 27 April 1988, 9659/82, 9658/82, Boyle and Rice v. The United Kingdom, HUDOC, p. 52; ECtHR Judgement of 20 March 2008, 15339/02 et al, Budayeva v. Russia, HUDOC, p. 191; ECtHR Judgement of 30 October 1991, 3163/87, 13164/87, 13165/87, 13447/87, 13448/87, Vilvarajah and Others v. The United Kingdom, HUDOC, p. 122; ECtHR Judgement of 21 September 2000, 35394/97, Khan v. The United Kingdom, HUDOC, p. 44; ECtHR Judgement of 28 March 2000, 22535/93, Mahmut Kaya v. Turkey, HUDOC, p. 124; ECtHR Judgement of 14 March 2002, 46477/99, Paul and Audrey Edwards v. The United Kingdom, HUDOC, p. 96; ECtHR Judgement of 24 April 2003, 24351/94, Aktaş v. Turkey, HUDOC, p. 328; ECtHR Judgement of 21 February 1986, 8793/79, James and Others v. The United Kingdom, HUDOC, p. 84; ECtHR Judgement of 21 January, 0696/09, M.S.S. v. Belgium and Greece, HUDOC, p. 288; ECtHR Judgement of 8 June 2006, 75529/01, Sürmeli v. Germany, HUDOC, p. 98.

[20] Among others: Case C-268/06, Impact v. Minister for Agriculture and Food and ot., 15 April 2008, p. 42; Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council of EU and others, 3 September 2008, p. 335; Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. German Federal Republic, 11 December 2010, p. 48; Cases C-317/08, C-318/08, C-319/08 i C-320/08, Rosalba Alassini v. Telecom Italia SpA and Filomena Califano v. Wind SpA and Lucia Anna Giorgia Iacono pv. Telecom Italia SpA and Multiservice Srl v. Telecom Italia SpA, 18 March

The legal system of the European Union in the field of the criminal cooperation has already referred to this right several times. The right to an effective remedy has been granted to individuals in several acts (as referred to below). At the same time, however, this right has been governed in an extremely vague manner, without the practicable elements that seem necessary for its operational effectiveness (in terms of the procedural effectiveness).[21] This accounts for the need for further elaboration upon the importance of effective legal remedies.

As mentioned above, the requirement for an effective legal remedy currently exists in the following EU legislation concerning criminal proceedings:

1) The Council Framework Decision 2003/577/JHA of 22 July 2003,[22]
2) The Council Framework Decision 2006/783/JHA,[23]
3) The Directive 2012/29/EU,[24]
4) The Directive 2012/13/EU,[25]

2010, p. 47; Case C-199/11, Europese Gemeenschap v. Otis NV et al., 6 November 2012, p. 49; Case C-175/11, H.I.D., B.A. v. Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General, 31 January 2013, p. 102; Case C-64/16, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, 27 February 2018, p. 34; Case C-619/18, European Commission v. Poland, 24 June 2019, p. 52, 54; Case C-556/17, Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal, 29 July 2019, p. 56,.

21 See i.a.: Michele Caianiello and Giulia Lasagni, "Comparative Remarks," in *Effective Protection of the Rights of the Accused in the EU Directives*, eds. G. Contissa et al. (Leiden: Brill Nijhof, 2022), 234–235; Martyna Kusak, *Mutual Admissibility of Evidence in Criminal Matters in the EU. A Study of Telephone Tapping and House Search* (Antwerpen: Maklu Publishers, 2016), 23 and 147.

22 The Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 02.08.2003, p. 45.

23 The Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328, 24.11.2006, p. 59.

24 The Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, pp. 57–73.

25 The Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, pp. 1–10.

5) The Directive 2013/48/EU,[26]
6) The Directive 2014/41/EU,[27]
7) The Directive 2014/42/EU,[28]
8) The Directive (EU) 2016/343,[29]
9) The Directive (EU) 2016/680,[30]
10) The Directive (EU) 2016/800,[31]
11) The Directive (EU) 2016/1919.[32]

Among the legal acts mentioned above, two instruments are particularly important in terms of the analyzed issues as they have been the first of those EU legal acts to aim to set the standard and frame for the effective remedy conceptual framework: the Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of

[26] The Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, pp. 1–12.

[27] The Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, pp. 1–36.

[28] The Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.4.2014, pp. 39–50.

[29] The Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, pp. 1–11.

[30] The Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of crime prevention, investigation, detection and prosecution of criminal offences and the execution of penalties, on the free movement of such data and repealing Council Framework Decision 2008/977/JHA3, OJ L 119, 4.5.2016; pp. 89–131.

[31] The Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, pp. 1–20.

[32] The Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, pp. 1–8.

access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, and the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. The comments below will mostly focus on those two Directives and on the implications of the implementation of this procedure into practice.

3. Conceptual Framework of Effective Legal Remedy in Terms of the Directive 2013/48/EU

The draft proposal of the Directive 2013/48/EU was adopted by the Commission on 8 June 2011. Initially, the issue of an effective remedy was governed in Article 13 of the Directive, and its purpose was declared as follows:

> This Article reflects ECHR jurisprudence that the most appropriate form of redress for breaching the ECHR right to a fair trial is to ensure that a suspect or accused person is put, as far as possible, in the position in which he would have been had his rights not been so breached (Salduz v Turkey, judgement of 27 November 2008, application no. 36391/02, § 72). The ECHR has ruled that even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction — whatever its justification — must not unduly prejudice the rights of the accused under Article 6 of the ECHR and such rights will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction. Therefore, this Article bans, in principle, the use of evidence obtained where access to a lawyer was denied save in those exceptional cases where the use of such evidence will not prejudice the rights of the defence.[33]

That purpose was subsequently supplemented in the Preamble (Paras. 25–27) referencing the jurisprudence of the ECHR as far as the result was

[33] The Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, p. 9, accessed September 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0326&from=EN.

concerned in terms of an effective remedy that should have placed a person in the same position he or she would have found herself or himself had the breach not occurred. Examples of possible remedies were named, including a retrial or equivalent measures. The prohibition on the use of any statements given in breach of the right of access to a lawyer was indicated as a proper remedy if irretrievable damage to the rights of the defense was made.[34]

The wording of Article 13 of the Directive 2013/48/EU in the version proposed by the Commission was as follows:

> 1. Member States shall ensure that a person to whom Article 2 refers has an effective remedy in instances where his right of access to a lawyer has been breached.
>
> 2. The remedy shall have the effect of placing the suspect or accused person in the same position in which he would have found himself had the breach not occurred.
>
> 3. Member States shall ensure that statements made by the suspect or accused person or evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 8, may not be used at any stage of the procedure as evidence against him, unless the use of such evidence would not prejudice the rights of the defence.[35]

The European Economic and Social Committee, in its opinion of 7 December 2011, made no reference to the regulation of remedial measures.[36] However, the European Parliament made several amendments to

[34] The Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, p. 15, accessed September 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0326&from=EN.

[35] The Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, p. 20, accessed September 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0326&from=EN.

[36] The Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest' COM (2011) 326 final – 2011/0154 (COD), accessed September 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011AE1856&from=EN.

the Commission's proposal. In amendments to the Preamble, Paragraph 26 was deleted and Paragraphs 25 and 27 were rewritten. Clear examples of the possible remedies were removed. The reference to the jurisprudence of the ECHR remained but in a different wording. Legislators banished the idea of raising the expected realms of remedies as well as a clear indication on the prohibition of evidence in certain circumstances. Instead, the door to the exceptions to this rule was widely opened.[37]

Consequently, the different wording for Article 13 was eventually proposed:

> 1. Member States shall ensure that suspects or accused persons in criminal proceedings as well as requested persons in European Arrest Warrant proceedings have an effective remedy under national law in instances where their rights under this Directive have been breached.
>
> 3. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by a suspect or accused person or of evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.[38]

Those provisions, with changes into the numbering, entered into force as worded above. Consequently, they have given rise to two powers:

- the right to an effective remedy in the case of a breach of the rights provided for in the Directive; and
- the right to a judicial review of evidence obtained in breach of the right of access to a lawyer or in cases where a derogation from that right has

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37 The Report on the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (COM (2011)0326 – C7–0157/2011 – 2011/0154(COD)), accessed September 25, 2023, accessed September 25, 2023, https://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2013/0228/P7_A(2013)0228_EN.pdf.

38 The Report on the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (COM (2011)0326 – C7–0157/2011 – 2011/0154(COD)), https://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2013/0228/P7_A(2013)0228_EN.pdf.

been allowed in accordance with the Directive, in compliance with the standards of the right to defense and the right to a fair trial.

However, those provisions do not oblige Member States to exclude evidence. More importantly, they do not provide any explanation of the effective remedy conceptual framework, its aims or its expected results.[39] Following the implementation of the amendments, the reluctance of the Member States to interfere with the EU law in domestic systems for the admissibility of evidence in criminal proceedings can also be clearly seen.[40] The Legal Affairs Committee also took the view during the legislative phase that "this Directive should not seek to impose a choice between a legalistic approach to the admissibility of evidence and a more flexible approach in which courts have the right to evaluate evidence based on how it was obtained,"[41] suggesting the change into the wording of Article 13(3) of the Directive proposed by the Commission.

The proposal for the Directive 2013/48/EU contained bold draft regulations in the field of effective remedies, specifying them significantly. That specification was supposed to give detail in two areas:

1) the draft contained a reference to one of the definitions of an effective remedy available in the European space, emphasising the restoration of the situation as it was before the infringement. This could have been of great importance for the issue of effective remedies in the EU law. Up to now, neither this definition nor even a clear standard has been formulated in the EU criminal law system.
2) a specific remedy was indicated: evidence obtained in breach of the right of access to a lawyer or in situations where a derogation from this

[39] Anneli Soo, "(Effective) Remedies for a Violation of the Right to Counsel during Criminal Proceedings in the European Union: An Empirical Study," *Utrecht Law Review* 14, no. 1 (2018): i. 1, 53–54.

[40] Karolina Kiejnich-Kruk, *Prawo do skutecznego środka naprawczego w postępowaniu dowodowym* (Warsaw: Wolters Kluwer, 2023), 89.

[41] The REPORT on the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest (COM (2011)0326 – C7–0157/2011 – 2011/0154(COD)), accessed September 25, 2023, https://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2013/0228/P7_A(2013)0228_EN.pdf.

right was allowed was inadmissible unless its use would not infringe the right of the defense.

During the legislative procedure, the obligation of Member States to implement regulations to exclude evidence from a criminal procedure was abandoned. It was made clear that the requirement for an effective remedy did not interfere with the national system for the admissibility of evidence. As a result, the text of the Directive that was adopted has reflected the conservative position of the Member States. It is vague and does not lead to the actual practicability to invoke a right to an effective remedy in the event of an infringement of the Directive.[42] The Directive grants the accused the right to an effective remedy but it is impossible to understand from the content of the Directive what such a remedy might be, and what would be its functions, objectives and results. We must assess this legal arrangement negatively.

The Commission's proposal here was further-reaching and clearer, and it set higher standards for the rights of the defense by specifying the right to an effective remedy. However, as the legislative work on the draft proved, the Member States were not ready for its adoption or to accept an undertaking referring to the exclusion of evidence and the definition of an effective remedy.[43]

4. Conceptual Framework of Effective Legal Remedy in Terms of the Directive 2016/343/EU

The European Commission adopted the proposal for the Directive 2016/343 on 27 November 2013. In the recitals regarding the establishment of the right to an effective remedy in the Directive 2016/343, it was clearly pointed out that:

> The ECtHR has consistently held that the most appropriate form of redress for a violation of the right to a fair trial in Article 6(2) ECHR would be to ensure that suspects or accused persons, as far as possible, are put in the position in which they would have been had their rights not been disregarded (see Teteriny v Russia (Judgement of 30.6.2005, Application 11931/03, Paragraph 56), Jeličić v Bosnia and Herzegovina (Judgement of 31.10.2006, Application 41183/02,

42 Caianiello and Lasagni, "Comparative Remarks," 234.

43 Cf. Hofmann, "The Right to an Effective Remedy and to a Fair Trial," 27–28.

> Paragraph 53), and Mehmet and Suna Yiğit v Turkey (Judgement of 17.7.2007, Application 52658/99, Paragraph 47), Salduz v Turkey, Paragraph 72)).[44]

Once again, therefore, the Commission referred to the case law of the ECtHR as a source for the conceptual framework of an effective remedy. More importantly, the Commission referred to the specific purpose of the remedy, which was to place a subject of violation in a situation as close as possible to the one which would have existed if the violation had not occurred.

Recital 26 of the Commission's proposal states as follows:

> The principle of effectiveness of Union law requires that Member States put in place adequate and effective remedies in the event of a breach of a right conferred upon individuals by Union law. An effective remedy available in the event of a breach of any of the principles laid down in this Directive should have, as far as possible, the effect of placing the suspects or accused persons in the same position in which they would have found themselves had the breach not occurred.[45]

The expected outcome and purpose of the effective remedies was therefore indicated again. For the third time, that statement was included in the body of the provision (Article 10 of the Directive), reading as follows:

> 1. Member States shall ensure that suspects or accused persons have an effective remedy if their rights under this Directive are breached.
>
> 2. The remedy shall have, as far as possible, the effect of placing suspects or accused persons in the same position in which they would have found themselves had the breach not occurred, with a view to preserving the right to a fair trial and the right to defence.[46]

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44 The Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, pp. 9–10, accessed September 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0821&from=EN.

45 The Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, p. 14, accessed September 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0821&from=EN.

46 The Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at

This time, the Commission did not explicitly suggest the form that a remedy should take. However, this did not save Article 10 from being amended at the legislative stage. The Economic and Social Committee, as was its tradition, did not address the issue of remedies in its opinion.[47] Both the Council and the Parliament adopted the text of the Directive with amendments at first reading. On 9 March 2016 the text of the Directive was approved by the President of the Council and the President of the European Parliament. Finally, the recitals on remedies were included in the Preamble in Paragraphs 44 and 45. It was raised that an effective remedy should, as far as possible, have the effect of placing the suspects or accused persons in the same position in which they would have found themselves had the breach not occurred, with a view of protecting the right to a fair trial and the rights of the defense. The reference to the ECHR case law was also maintained, including the need for the exclusion of personal evidence obtained in breach of Article 3 of the ECHR. This time, the Commission's proposal to include a reference in the text of the Directive into one of the accepted definitions of an effective remedy (understood as a remedy that would, as far as possible, put the suspect or accused person in the position in which they would have found themselves had the breach not occurred) was accepted. At the legislative stage, some changes were made to the wording of the recitals but in principle the understanding of the concept of a legal remedy, the desired result of its application and the purposes for which it should be applied was accepted.

The above wording does not mean that the text of the Preamble and the Directive allows for a complete decoding of the concept of an effective remedy and possible implementing instruments. It should, nevertheless, be regarded as an important step forward.[48] What is particularly interesting is that, despite the lack of clear demands in the Commission's proposal, the final text of the Directive addresses the issue of the admissibility of

trial in criminal proceedings, p. 18, accessed September 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0821&from=EN.

47 The Opinion of the European Economic and Social Committee, accessed September 25, 2023, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014AE0347.

48 Cf. Anna Pivaty et al., "Opening Pandora's Box: The Right to Silence in Police Interrogations and the Directive 2016/343/EU," *New Journal of European Criminal Law* 12, no. 3 (2021): 340–341.

evidence obtained in breach of the rights under the Directive and the assessment of evidence by the courts. The reference is made to the case law of the ECtHR and UN law, from which the standard of the inadmissibility of evidence obtained by torture or inhuman or degrading treatment for the purpose of establishing facts in criminal proceedings derives. As a result of that, Article 10 of the Directive reads as follows:

> (1) Member States shall ensure that suspects and accused persons have an effective remedy if their rights under this Directive are breached.
>
> (2) Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected.

It is therefore emphasised, once again, that the Union legislature is not interfering with national systems for the admissibility of evidence, and nor does the Directive require Member States to govern the exclusion of certain evidence from a trial. The unanswered question is therefore how else a Member State can achieve the objective of putting the subject of infringement in the position he or she would have been in if the infringement had not occurred, and ensure that the rights of the defense and the standard of due process are respected when evaluating evidence obtained in violation of the right not to incriminate oneself.[49]

The authors of the Directive unequivocally endorse the acquis of the European Court of Human Rights but at the same time set lower standards for Member States in terms of protecting the rights of defendants and suspects. This is particularly relevant in the context of Article 13 of the Directive, which stipulates that nothing in the Directive shall be construed as limiting or diminishing the rights and procedural guarantees afforded under the Charter, the ECHR or other relevant provisions of international law or the law of any Member State, that may provide a higher level of protection.

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[49] Steven Cras and Anže Erbežnik, "The Directive on the Presumption of Innocence and the Right to Be Present at Trial," *Eucrim*, no. 1 (2016): 34; Kiejnich-Kruk, *Prawo do skutecznego środka naprawczego*, 96; Stefano Ruggeri, "*Inaudito reo* Proceedings, Defence Rights, and Harmonisation Goals in the EU," *Eucrim*, no. 1 (2016): 47.

5. Lack of Standards Consequences

Twenty-five Member States notified the Commission of the complete implementation of the Directive 2013/48/EU,[50] and twenty-three Member States gave notice of the complete implementation of the Directive 2016/343/EU.[51] Considering the fact that, in respect of the effective remedy provisions, neither a definition nor clear standards or guidelines exist, it must be stated that the Member States cannot properly assess if their national legal systems have met the EU standards and the requirements of the Directives in this regard. As a consequence, it is not possible to implement the Directives correctly and the Commission is incapable of assessing the completeness and correctness of the transposition of the EU law into national laws exhaustively.[52]

Countries' declarations and explanations of their assessment of the implementation could not be easily verified because of the lack of clear standards.[53] This hinders the proper implementation of the Directives and, consequently, the real harmonisation of laws amongst Member States.[54] This is one of the silent reasons why, in fact, Member States do not implement Directives or implement them incorrectly.[55]

The Commission made an effort to indicate a (partial) definition and desirable forms of an effective remedy, putting forward the proposal for the Directive 2013/48. At the legislative stage, however, both the relevant subsection of the Preamble and the provision were removed from the draft.

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50 National transposition measures communicated by the Member States, accessed September 25, 2023, https://eur-lex.europa.eu/legal-content/PL/NIM/?uri=CELEX:32013L0048.

51 National transposition measures communicated by the Member States, accessed September 25, 2023, https://eur-lex.europa.eu/legal-content/PL/NIM/?uri=CELEX:32016L0343.

52 See: Kiejnich, "Harmonisation of EU Criminal Law," 37.

53 Costas Paraskeva, Nikitas Hatzimihail, and Eleni Meleagrou, "General Report: Comparative Analysis of the Legal Treatment of the Right to be Present and the Presumption of Innocence in the PRESENT partner States in the light of Directive 2016/343," *Lex Localis*, (2020): 157–158; M. Biral et al., *The Italian Implementation of the EU Directives on Procedural Safeguards for Accused Persons in Criminal Proceedings*, 74–76, accessed September 25, 2023, https://sistemapenale.it/pdf_contenuti/1669131660_report-italiano-crossjustice.pdf.

54 Cornelia Riehle and Allison Clozel, "10 Years after the Roadmap: Procedural Rights in Criminal Proceedings in the EU Today," *ERA Forum* 20, (2020): 323; cf. Paraskeva, Hatzimihail, and Meleagrou, "General Report: Comparative Analysis," 157–158.

55 Sacha Prechal, *Directives in EC Law* (New York: OUP Oxford, 2005), 7–8.

The desirable standard and the results of an effective remedy are indicated in the Preamble of the Directive 2016/343, which should be considered as a step forward. However, there is still a strong need to develop this area. The definition and the standard of an effective remedy should be universal in the field of the criminal law in the EU, and should not be limited to individual acts of law. What is more, the functions, objectives, and desirable results of an effective legal remedy should be clearly stated for the purpose of the Member States.

6. Conclusions

The above analysis of the implementation of the Directives with regard to an effective legal remedy only gives an impression of the real scale of the outstanding issue to be addressed in order to ensure the effective implementation of common standards. A great reluctance of the Member States can be observed regarding the unification of the understanding of the conceptual framework of the right to an effective remedy. The declared unification remains largely in the realm of theory rather than practice.

Member States should strive to achieve common standards and should consider this to be a great opportunity and not a threat to their sovereignty. Otherwise, declarations on the need for common minimum standards may be seen as superficial and empty. Above all, this would be a real threat to the protection of fundamental rights as well as a threat of arbitrary assessments as to whether or not national legal systems meet the EU requirements.

Before the EU develops independent standards in this area, we should use the standards that have already been put forward, at least in part, by other bodies. As all the EU Member States are members of the Council of Europe, they are obliged to meet the requirements of the European Convention on Human Rights, including Article 13 thereof. Therefore, the transposition of the ECHR standards on effective remedies should be considered and used as a natural and desirable step in the area of the integration of the criminal law in the EU.

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Verification in the Issuing State of Evidence Obtained on the Basis of the European Investigation Order

Sławomir Steinborn
Dr. habil., Associate Professor, Faculty of Law and Administration, University of Gdańsk, correspondence address: ul. Jana Bażyńskiego 6, 80–309 Gdańsk, Poland, e-mail: slawomir.steinborn@ug.edu.pl
https://orcid.org/0000-0001-8381-7814

Dawid Świeczkowski
M.A., Assistant, Faculty of Law and Administration, University of Gdańsk, correspondence address: ul. Jana Bażyńskiego 6, 80–309 Gdańsk, Poland, e-mail: dawid.swieczkowski@ug.edu.pl
https://orcid.org/0000-0001-7310-1732

Keywords:
European Investigation Order, verification of evidence, admissibility of evidence, procedural requirements for issuing a European Investigation Order

Abstract: The aim of this article is to address the issue of the extent of incorporation and verification of evidence for purpose of the criminal trial as the evidence base for the judgement, namely the evidence that is obtained on the basis of the European Investigation Order, including the evidence obtained in various forms that may raise doubts in terms of the protection of individual rights.

The authors would like to focus on the analysis from the perspective of the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters and Polish legislation, and consider what kind of possibilities the issuing state's authorities have to verify admissibility of evidence, especially the way in which the evidence is obtained when it has not been produced upon request but only delivered since it has already been in possession of the executing state's authorities.

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1. Introduction

The development of the modern world and the phenomenon of globalisation, manifested, among others, in establishing social and economic contacts between often distant parts of the globe, the widespread use of electronic communication techniques and the shift of entire spheres of activity and life into the digital world have an impact on the criminal process, too. Even in the proceedings having a purely national dimension, it becomes necessary to obtain evidence located abroad or the cooperation of foreign entities is necessary to obtain evidence for the purpose of the criminal proceedings. For this reason, it has become necessary to look for solutions aimed at improving the collection of evidence from abroad. The most advanced ones include the activities undertaken for several years in the European Union, to mention the European Evidence Warrant (2008),[1] European Investigation Order (2014)[2] or the recently adopted instrument – the European Production and Preservation Orders for electronic evidence in criminal matters (2023).[3]

The diversity of criminal procedures in the European countries, which is particularly visible in the sphere of evidence rules, causes that the question of the conditions on which the admissibility of foreign evidence depends is one of the most important problems in the sphere of the judicial cooperation in criminal matters. To a large extent, this problem would of course be solved by the harmonisation of the law of evidence in the European Union. However, as long as there is no real prospect for this to happen (the EU's competence for such harmonisation seems to be problematic), other solutions need to be sought. In fact, if the cross-border evidence collection is not to be completely abandoned, it is necessary to develop solutions that, on the one hand, take into account the diversity of national

1 The Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (OJ L350, 30 December 2008).

2 The Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters (OJ L130, 1 May 2014) – hereinafter Directive 2014/41/EU.

3 The Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings (OJ L191, 28 July 2023).

procedures, and, on the other hand, constitute effective mechanisms for dealing with this diversity and facilitate a smooth transfer of evidence.[4]

The cooperation based on the European Investigation Order, which is currently the basic instrument providing for the transfer of evidence between EU Member States, although it is founded on the principle of mutual recognition of judgements and undoubtedly in many aspects it allows to obtain foreign evidence more effectively than under the classical international legal assistance, is not free from problems. One of them is the problem of verifying evidence obtained on the basis of this instrument in the issuing country. The key question is to what extent the court examining the case in the issuing state should examine, when creating the factual basis for the judgement, the way the evidence has been obtained in another state on the basis of the EIO. A distinction should be made between the situation where the evidence has been obtained in the executing state at the request of the authority issuing the EIO and the situation where the evidence provided on the basis of the EIO has already been in hands of the authorities of the executing state.

To be specific, the second of the above-mentioned situations will be of particular interest in the further analysis. This is due to the fact that it involves a significant limitation of the influence of the issuing authority on the EIO execution procedure, which, in consequence, may also create problems at the stage of verification of evidence obtained in this manner. In this context, it should be noted at the outset that the assessment of the legality of issuing the EIO and the admissibility of evidence obtained on the basis of the EIO executed in another EU Member State and its use in the national proceedings are essentially separate issues. In this article, the emphasis will be on the latter one.

The assumption of this study is to present the indicated problem from two perspectives. Firstly, the regulations contained in the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 on the European Investigation Order in criminal matters will be analysed. Then, the issues elaborated upon will be presented in the context of the rules adopted in the national law, and therefore primarily on the basis

4 Sabine Gleß, "Grenzüberschreitende Beweissammlung," *Zeitschrift für die gesamte Strafrechtswissenschaft*, no. 3 (2013): 592.

of the Polish Code of Criminal Procedure,[5] although not only in relation to the provisions of Chapter 62c of the CCP, that govern the issues related to requesting the EU Member State to conduct investigative activities based on the EIO, but also taking into account the achievements of the doctrine and jurisprudence regarding Article 587 CCP, specifying the general conditions for the use of evidence obtained as a result of activities carried out by the authorities of foreign countries.

The indicated issues are of particular importance when it comes to the scope of verification of evidence that has been obtained by means of the instruments strongly interfering with the sphere of individual rights, including the use of tools facilitating secret acquisition of data. This issue has recently gained particular relevance due to the preliminary ruling question C-670/20 concerning the use in criminal proceedings of evidence obtained from EncroChat and submitted as part of the EIO.[6]

2. The Context of Directive 2014/41/EU

The issue of the admissibility of the use and assessment of evidence obtained on the basis of the EIO in criminal proceedings pending in the country where the EIO has been issued is not directly governed by the Directive 2014/41/EU. However, the provisions of the Directive are not without significance insofar as they govern the issue of the admissibility of issuing and executing the EIO, which is undoubtedly one of the key issues regarding the cooperation in obtaining evidence on the basis of the EIO.

This assumption is basically in line with the legislative trend regarding the regulation of the cross-border evidence collection, where individual instruments used for this purpose do not refer to the subsequent admissibility

5 The Code of Criminal Procedure of June 6, 1997, consolidated text: Journal of Laws 2022, item 1375, as amended – hereinafter CCP.

6 See the request for a preliminary ruling from the Landgericht Berlin (Germany) lodged on 24 October 2022 – the criminal proceedings against M.N. (Case C-670/22). Cf.: Thomas Wahl, "EncroChat Turns into a Case for the CJEU," *Eucrim*, no. 3 (2022): 197–198; Thomas Wahl, "Germany: Federal Court of Justice Confirms Use of Evidence in EncroChat Cases," *Eucrim*, no. 1 (2022): 36–37; Thomas Wahl, "Verwertung von im Ausland überwachter Chatnachrichten im Strafverfahren Zugleich Besprechung der EncroChat-Beschlüsse des OLG Bremen v. 18.12.2020 – 1 Ws 166/20, und OLG Hamburg v. 29.1.2021 – 1 Ws 2/21," *Zeitschrift fur Internationale Strafrechtsdogmatik*, no. 7–8 (2021): 452–461.

of evidence, as this issue is left to national regulations. Traditionally, taking evidence in the cross-border criminal proceedings is based on the rules of *locus regit actum* or *forum regit actum*, with possible modalities in their application. On the other hand, restrictions on the use of evidence provided by foreign authorities may result from the principle of speciality.[7] The latter issue, however, remains aside from this analysis because, as it is rightly pointed out, the principle of speciality is not referred to in the Directive 2014/41/EU.[8]

According to Article 9(2) of the Directive 2014/41/EU, without prejudice to Article 2, the executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority, provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State. This means that the Directive 2014/41/EU gives priority to the *forum regit actum* rule.[9] Undoubtedly, such a legal arrangement increases the probability that the evidence collected as part of the cross-border cooperation will be considered admissible in the country of issuing the EIO.[10] The executing authority may refuse to apply certain rules indicated by the authority issuing the EIO only if they are contrary to the fundamental principles of law of the executing State. It should be noted, however, that the *forum regit actum* rule is not fully compatible with the mutual recognition regime, which is geared towards the acts undertaken abroad to be recognised by the issuing State, as provided for by the national law of the executing State.[11]

Of course, it is debatable to what extent the current EU regulations governing the transfer of evidence actually implement the principle of mutual recognition, and in particular to what extent it is de facto conditional recognition. However, it is more important that the Directive 2014/41/EU does not provide for the possibility of the automatic refusal to execute the EIO

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7 See: Sławomir Steinborn, „Ewolucja zasad współpracy karnej na obszarze Europy," in *Europejskie prawo karne*, eds. Agnieszka Grzelak, Michał Królikowski, and Andrzej Sakowicz (Warsaw: Wydawnictwo C.H. Beck, 2012), 84–86.

8 See: Martyna Kusak, *Dowody zagraniczne. Gromadzenie i dopuszczalność w polskim procesie karnym. Przewodnik z wzorami* (Warsaw: Wolters Kluwer Polska, 2019), 69.

9 Similarly Gleß, "Grenzüberschreitende," 590; Kusak, *Dowody zagraniczne*, 68.

10 See: Kusak, *Dowody zagraniczne*, 68.

11 Cf.: Kusak, *Dowody zagraniczne*, 68.

if the requirements for obtaining evidence indicated by the issuing state would violate the fundamental principles of the law of the executing state. This is because it is possible only in a situation where one of the grounds for the refusal of execution specified in Article 11 of the Directive 2014/41/EU actually occurs, which will not be so frequent. The Directive gives primacy to the execution of the EIO, which means that in a situation where specific rules of the law of the issuing state cannot be applied, the EIO should be executed, and thus the evidence will be obtained in accordance with the *loci regit actum* rule. This, in turn, reopens the problem of the admissibility of evidence obtained in this way in the issuing state. The adoption of the *forum regit actum* rule in the Directive 2014/41/EU has not given rise to an automatic rule, as it were, of the admissibility of evidence obtained in accordance with the law of the issuing state. Therefore, one should agree with the view that there is no guarantee of the admissibility of evidence in the issuing state, even in the case of taking evidence in accordance with the indications of the issuing state.[12] Finally – and what is particularly important in the context of this analysis – the *forum regit actum* rule does not solve the problem of the admissibility of evidence already existing in the executing state, when it is only transferred to the issuing state as a result of the execution of the order, or the admissibility of evidence obtained by means of the EIO, if it has been (onward) transferred to the EU Member State other than the issuing and executing state.[13]

From the point of view of verifying the admissibility of evidence obtained by means of the EIO, the problem is solved only to a limited extent by the reference made in Article 6(1) of the Directive 2014/41/EU in respect of the principle of proportionality and the rule that issuing a EIO is possible only if the investigative measure indicated in the EIO is admissible in the same domestic case under the same conditions. They are important for the sole admissibility of a given investigative measure but they do not solve the problem of the manner and mode in which this measure is carried out in the executing state, i.e. the conditions in which the specific evidence has been obtained. This indicates that their examination by the criminal court in the issuing state is inevitable. Moreover, it is difficult for this court

12 See: Kusak, *Dowody zagraniczne*, 68.

13 See: Kusak, *Dowody zagraniczne*, 68.

to deny such competence since it takes responsibility for the judgement it issues, and at the same time the standard of modern criminal procedures is that the court hearing the case on the merits has the possibility to assess the admissibility of any domestic evidence that would be taken before it. The mere fact that the evidence has been taken in accordance with the law of the executing state is not a sufficient argument for its admissibility in the issuing state. However, the problem of the criteria for such assessment in relation to the cross-border evidence is a separate issue.

The Directive 2014/41/EU also does not specify such criteria for verifying evidence obtained by means of the EIO. However, some hints can be found in its content. Point 11 of the recitals of the Directive 2014/41/EU stresses the need to verify whether the execution of an investigative measure covered by the EIO is proportionate, appropriate and applicable to the case. The issuing authority should therefore assess whether the requested evidence is necessary and proportionate for the purposes of the proceedings and whether the investigative measure chosen is necessary and proportionate to collect that evidence. The provision of Article 11(1)(f) of the Directive 2014/41/EU, on the other hand, gives the executing state the possibility to refuse if the execution of the investigative measure indicated in the EIO would be incompatible with the executing state's obligations under Article 6 TEU and the Charter. All the more, therefore, evidence obtained in a manner violating the guarantees anchored in Article 6 TEU and the Charter, including the principle of proportionality, should not be used in the trial.

In this context, it should also be noted that since the Directive 2014/41/EU is an instrument based on the principle of mutual recognition, it is impossible to derive from it the obligation for the authority conducting the national criminal proceedings in the issuing state to verify each time that the evidence action carried out meets all the requirements provided for in its national legal order. On the contrary, if the matter were to be reduced only to the principle of mutual recognition, the rule should be to give the effects of an evidentiary act performed in another EU Member State the same force as the effects of an analogous national evidentiary act. However, the cooperation based on the EIO does not have such an advanced nature. Therefore, it is appropriate to state that in a situation where the authority has doubts as to the recognition of a cross-border evidentiary

act (e.g. due to the possibility of a violation of fundamental rights), it will be obliged to consult the authority executing the EIO and apply for providing all the necessary information. In this context, the need to verify the manner of performing the activities, the participation of the defence lawyer or respecting the rights of other participants in the proceedings is indicated.[14]

Rightly, even in the context of the grounds for the refusal to execute the EIO set out in Article 11 of the Directive 2014/41/EU, it is indicated that the authority issuing the EIO is entitled – due to the national model of protection of the right to a fair trial – to consider such evidence inadmissible. It is argued that it is the court's duty to examine whether issuing a judgement on the basis of evidence that could not be obtained in purely domestic proceedings does not violate the fairness of the proceedings.[15]

In the light of the above, the need to verify, in certain situations, the manner of performing an investigative action and respecting procedural guarantees in the executing state should be assessed as justified, in particular through the prism of protecting the guarantees of the participants of the proceedings in the process of collecting evidence. The above also corresponds to the position of the CJEU expressed in the judgement under the Case C-584/19,[16] that Member States must ensure that in criminal proceedings in the issuing State the rights of defence and the fairness of the proceedings are respected when assessing the evidence obtained by means of the EIO.[17] It is rightly emphasised that the cross-border collection of evidence may not lead to a violation of the fairness of the proceedings within the meaning of Article 6 of the ECHR.[18] After all, the use of cross-border evidence may not infringe the right to participate in

14 See: Dominika Czerniak, *Europeizacja postępowania dowodowego w polskim procesie karnym: wpływ standardów europejskich na krajowe postępowanie dowodowe* (Warsaw: C.H. Beck, 2021), 392–403.

15 See also: Czerniak, *Europeizacja*, 392–403. Similarly: Hanna Kuczyńska, "Comment on Art. 589w," in *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka (Warsaw: Legalis, 2023), thesis 52.

16 CJEU Judgement of 8 December 2020, Criminal proceedings against A and Others, Case C-584/19, ECLI:EU:C:2020:1002, para. 62.

17 See also: Jakub Kosowski, „Europejski nakaz dochodzeniowy – zagadnienia wybrane," *Wiedza Obronna* 277, no. 4 (2021): 163–164.

18 The Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950 as amended by Protocols Nos 11 and 14 supplemented by

evidentiary actions (Article 6(3)(d) of the ECHR) or the principle of equality of arms.[19]

However, it cannot be overlooked that the criterion of the fairness of the trial is useful here only to a certain extent because pursuant to Article 6 of the ECHR there are no rules on the admissibility of specific, individual evidence, but the fairness of the proceedings as a whole is assessed.[20] The Court consistently points out that the admissibility of evidence is primarily the matter governed by the domestic law and, in principle, it is for the national courts to assess the evidence submitted to them. The task of the Court under the ECHR is not to determine whether the witness's statements have been properly declared admissible as evidence but rather to assess whether the entirety of the proceedings, including the taking of evidence, has been fair.[21] As a consequence, the question arises to what extent this criterion can be used at the stage of examining the admissibility of evidence and whether it is not more useful when assessing the entire procedure after it has been conducted. Undoubtedly, however, it allows the court examining a criminal case to eliminate a specific piece of evidence, even if it were to happen only before the judgement is passed.

Referring to the previous considerations, it should be noted that in the process of verifying the admissibility of evidence collected by means of the EIO, it is advisable to assess the standard of protection of the defence rights under Article 6(3) of the ECHR. As mentioned above, violation of the right to defence, including its formal aspect – the assistance of a defence lawyer, fundamental violations of the right to information or deprivation of the opportunity to prepare for defence should be classified as significantly influencing the subsequent assessment of the admissibility of evidence

Protocols Nos 1, 4, 6, 7, 12, 13 and 16, ETS No 5: ETS No 009, 4: ETS No 046, 6: ETS No 114, 7: ETS No 117, 12: ETS No 177 – hereinafter ECHR.

19 Czerniak, *Europeizacja*, 392–403. Similarly Kuczyńska, "Comment on Art. 589w," thesis 52. Cf. Inés Armada, "The European Investigation Order and the Lack of European Standards for Gathering Evidence: Is a Fundamental Rights-Based Refusal the Solution?," *New Journal of European Criminal Law* 6, no. 1 (2015): 18.

20 See: Arkadiusz Lach, *Rzetelne postępowanie dowodowe w sprawach karnych w świetle orzecznictwa strasburskiego* (Warsaw: Wolters Kluwer Polska, 2018), *passim*.

21 See, *inter alia*: ECtHR Judgement of 10 May 2011, Case Jakubczyk v. Poland, application no. 17354/04, hudoc.int.

obtained in violation of those rights. When assessing the seriousness of violations, the nature of the evidentiary action should be taken into account. There should be no doubt that the refusal of a defence lawyer to participate in the examination of a witness in a situation where it is directly carried out by the authority of the executing state, and not by way of a videoconference or during a search, constitutes a form of violation of the defendant's procedural rights which is unacceptable under the ECHR, especially if this evidentiary action is of a unique nature and cannot be performed again during trial in the issuing state. Those aspects cannot be overlooked by the court assessing the admissibility of evidence obtained by means of the EIO.[22]

Even more problematic is the issue of verification of evidence that has already been collected in the state executing the EIO and is only to be transferred at the request of the authority of the state issuing the EIO. It should be taken into account here that although Article 1(1) of the Directive 2014/41/EU permits the issuance of the EIO in order to obtain evidence already in the possession of the competent authorities of the executing state, neither that provision nor the subsequent provisions of the Directive provide for differences in the procedure as regards evidence held by the executing state and ordered to be carried out by the issuing state. Meanwhile, there is no doubt that the influence of the authorities of the issuing state (as well as the participants in the main proceedings pending in that state) on the manner and conditions of obtaining evidence, that is already in the possession of the authorities of the executing state, is illusory. For

[22] More about reservations regarding the exercise of the defence rights in the EIO implementation procedures see: Martyna Kusak, „Obrońca a europejski nakaz dochodzeniowy," *Palestra*, no. 3 (2019): 29–38; Chloé Fauchon, "European Investigation Order Directive: What About Defence Rights?," *Vilnius University Open Series* (2021): 42–48; Regina Garcimartín Montero, "The European Investigation Order and the Respect for Fundamental Rights in Criminal Investigations," *Eucrim*, no. 1 (2017): 45–50; Laura Autru Ryolo, "European Investigation Order: The Defence Rights Perspective," in *Transnational Evidence and Multicultural Inquiries in Europe*, ed. Ruggeri Stefano (Springer, 2014), 107–109; Richard Vogler, "Criminal Evidence and Respect for Fair Trial Guarantees in the Dialogue Between the European Court of Human Rights and National Courts," in *Transnational Evidence and Multicultural Inquiries in Europe*, ed. Ruggeri Stefano (Springer, 2014), 181–192; Armada, "The European Investigation Order," 8–31; Alba Hernandez Weiss, "Effective Protection of Rights as a Precondition to Mutual Recognition: Some Thoughts on the CJEU's Gavanozov II Decision," *New Journal of European Criminal Law* 13, no. 2 (2022): 180–197.

obvious reasons, the *forum regit actum* rule cannot be applied here, and the issuing authority has no possibility to reserve the requirement to comply with certain procedural rules of its law when obtaining evidence in the executing state.

The rule that issuing the EIO is possible under the conditions specified in Article 6 of the Directive 2014/41/EU is of a general nature, and therefore the obligation to assess their compliance also applies to the authority issuing the EIO regarding evidence already in hands of the authorities of the executing state. The problem is that at the stage of issuing the EIO, the competent authority may have quite limited knowledge of how the evidence that is already in the possession of the executing state has been obtained. Protection of the guarantees of the parties to the proceedings in the process of collecting evidence at this stage will most often be illusory. The doubts signalled above are clearly visible against the backdrop of the EnchroChat Case.[23]

In view of the above, the fundamental question arises whether the issuance of the EIO to obtain evidence held by the executing authority should follow the general procedure or the procedure specific to the issuance of the EIO to obtain such evidence by the executing authority. From the point of view of the situation of the suspect (the accused), the mode in which the evidence is transferred to the country where the main proceedings are pending is of secondary importance, and the mode in which the evidence has been obtained is of more importance. Therefore, the doubt concerns whether the „original" method of obtaining the evidence should not determine the proper mode of issuing the EIO. In that regard, the Directive 2014/41/EU merely provides for the general condition that the issuing authority must ensure that, in a similar domestic case, ordering the investigative measure indicated in the EIO is admissible under the same conditions (Article 6(1)(b)) and ensures in the executing state that it is carried out in the same way and under the same procedures as if the investigative measure were ordered by an authority of the executing State (Article 9(1)), giving the executing authority the possibility to refuse recognition or execution on the grounds set out in Article 11. There seems to be no basis for

[23] See: the request for a preliminary ruling from the Landgericht Berlin (Germany) lodged on 24 October 2022 – the criminal proceedings against M.N. (Case C-670/22).

differentiation under Article 6 of the Directive 2014/41/EU on the competence and conditions for issuing the EIO, depending on whether the EIO concerns the performance of an investigative measure or simply the transfer of evidence already in hands of the authorities of the executing state. Since both situations involve obtaining evidence for the purposes of domestic criminal proceedings, the conditions for the admissibility of such evidence provided for in the national law should be respected in each case. The mere fact that a given piece of evidence is already in the possession of the authority of a foreign state does not automatically mean that it is admissible in the proceedings pending in another state. This issue is settled by the law of that state.

In this context, it is worth recalling that the Council Framework Decision 2008/978/JHA on the EEW has already provided for the guarantee that a EEW should only be issued where, in a comparable situation, the relevant objects, documents or data could be obtained under the law of the issuing state.

However, one cannot lose sight of the fact that the potential judicial protection at the stage of issuing the EIO seems to be limited to a minimum, especially if one takes into account that in most cases evidence is gathered at the stage of the preparatory proceedings – in the Polish reality conducted or supervised by the prosecutor, where the judicial control of the evidentiary actions at this stage of proceedings remains significantly limited. This is also clearly visible from the perspective of Article 14(2) of the Directive 2014/41/EU, that allows for questioning the substantive grounds for issuing the EIO only in the issuing state, which in practice of obtaining evidence already in the possession of the authorities of the executing state does not provide adequate guarantees of protection of the rights of participants in the proceedings at this stage. Here comes back the problem of the authority issuing the EIO having adequate information on how to obtain specific evidence. In more complex situations, a reliable assessment through the prism of the conditions set out in Article 6 of the Directive 2014/41 will in fact require obtaining detailed information on how to obtain the evidence before issuing the EIO.

Considering the above, judicial protection is of particular importance, which is associated with the assessment of the collected evidence by the court at the stage of the jurisdictional proceedings, in particular at

the stage of issuing a judgement. This protection, also with regard to evidence already in the possession of the executing state, seems to be directly anchored in Article 14(7) of the Directive 2014/41/EU. This provision requires Member States to ensure that in the criminal proceedings in the issuing state, the rights of defence and fair trial are respected when evaluating evidence obtained by means of the EIO. The Directive, followed by the Court of Justice,[24] therefore, binds those guarantees to the assessment of the evidence, which may take place only at the final stage of the proceedings, or – under the Polish legal order – may lead to the rejection of the evidence request at an earlier stage of the proceedings due to the fact that that it is inadmissible to have the evidence taken.

In the latter case, however, we are dealing with a situation in which the assessment of the admissibility of evidence should be carried out *ex ante* – before issuing the EIO, which does not solve the problem in the situation when the prosecutor is the authority competent to issue the EIO and the evidence obtained on the basis of the EIO constitutes the evidence basis for the prosecution and is only subsequently assessed by the court in the jurisdictional phase of the trial. It seems, however, that the Directive 2014/41/EU does not determine in any way the moment when the admissibility of using the cross-border evidence may be assessed – therefore, it may be *ex ante* or *ex post*.

An interesting perspective is presented by the questions for a preliminary ruling in the EncroChat Case. When asking about the legal consequences of obtaining evidence in a manner contrary to the EU law, the German court raised the question of whether, in the event of obtaining evidence on the basis of the EIO that was incompatible with the EU law, the prohibition on the use of evidence may have resulted directly from the EU principle of effectiveness or the EU principle of equivalence. Addressing the above question successfully depends on the circumstances in which the evidence was obtained in the executing state, while taking into account that the evidence in question could not have been ordered in a similar domestic case in the issuing state, and that evidence obtained by such an unlawful domestic measure would not be legally usable in the issuing state. The referring court also drew attention to the problem of whether a breach of the EU law

[24] See the above-mentioned judgement of the CJEU under the Case C-584/19.

in the course of obtaining evidence in the national criminal proceedings should have been taken into account in favour of the defendant at least at the stage of assessing the evidence or imposing a penalty.[25]

In the above context, it should be noted that while the prospect of referring to the EU principles of effectiveness and equivalence may indicate a prohibition on the use of evidence obtained in breach of the EU law, the tipping of the scales towards the national law may raise doubts as to whether in the case in which the court assesses the collected evidence, the exclusion of some of them – due to the doubts as to the protection of the rights of the individual in the proceedings – is fully justified.

Although the free flow of evidence, the guiding principle of which is the admissibility of evidence properly taken in one of the EU Member States, including other countries, too, is the simplest form of mutual recognition of evidence, the incorporation of procedural activities carried out under a given legal order into another system may in fact disrupt the balance of rights and obligations of the process participants. Therefore, where the authorities operate on the borderline between the regulations of two legal orders – the state issuing and state executing the EIO, and at the same time in the area only partially governed by the EU law, it is important that potential differences in the assessment of the admissibility of evidence in different EU Member States are not related to any decrease in procedural guarantees below the level of common standards for the protection of the rights of individual in the criminal proceedings. Irrespective of differences between the national legal orders, the use of evidence obtained abroad will then remain subject to a consistent assessment. As a consequence, the importance of common minimum standards of obtaining evidence is growing – mainly in terms of respecting the fundamental rights, especially defence rights, that are interfered with by investigative measures – whether applied following the issuance of the EIO or already in place.

3. The Context of the Polish National Law

Turning to the domestic law, it should first be pointed out that the national legislator, when constructing the rules on the admissibility of foreign

[25] See the request for a preliminary ruling from the Landgericht Berlin (Germany) lodged on 24 October 2022 – the criminal proceedings against M.N. (Case C-670/22).

evidence, has three potential points of reference (patterns) that may be used when deciding whether evidence obtained in another country may be used in the domestic criminal proceedings. The first option is to assess it solely through the prism of the law of the country in which the evidence has been obtained (*lex loci*). However, in the case of large discrepancies between the rules of evidence in that country and the law of the requesting state (conducting the criminal proceedings), such a solution poses a risk of the so-called import of lower standard. The second option is to make an assessment through the prism of the law of the state in which the evidence is to be used (*lex fori*). However, this rule poses a risk that several pieces of evidence cannot be used due to the practical impossibility of strictly applying the law of that state when obtaining evidence in another state. The third option is to refer to the fundamental principles and human rights that set the basic procedural standards in the criminal trial. In such a case, the national legislator does not expect strict compliance with its own regulations when obtaining the cross-border evidence, however, it reserves the right to assess whether such evidence does not violate the fundamental principles of its law.

The implementation of the provisions of the Directive 2014/41 has brought about, in principle, a simple shift of the regulations contained therein to the Code of Criminal Procedure. In this context, it is worth noting first of all that although Article 589w § 1 of the CCP generally allows for the issuance of a provision regarding the EIO „in the event of the need to take or obtain evidence which is or may be taken in the territory of another Member State of the European Union," however, of particular importance are the requirements set out in Article 589 in § 4 and 5 of the CCP, that provide for the replacement of the decision on the admission or taking of evidence with the decision on issuing the EIO. In the case of a decision to issue the EIO concerning telecommunication interception or obtaining correspondence, including those sent via e-mail, as well as a decision to issue the EIO regarding other evidence, admission and obtaining of which requires a decision – especially by a court, the basic problem remains therefore, whether the conditions under the national law for issuing the EIO by a competent authority (e.g. a court) must also be met when the EIO concerns the evidence already in the possession of the authorities of the executing state. Both the assumptions on which the Directive 2014/41/EU is

based and the systemic reasons for the admissibility of evidence in a criminal process support a positive answer to this question. Only the fulfilment of certain statutory prerequisites for the admissibility of evidence opens the possibility of obtaining it and using it in criminal proceedings. From the point of view of the objectives to be achieved by those conditions, especially limiting the activities of state authorities interfering with the sphere of rights and freedoms of an individual, it is not relevant whether a given evidence is yet to be obtained or whether it is already held by a specific foreign authority. Otherwise, the acquisition of foreign evidence, even of a deeply intrusive nature, would be deprived of any procedural control by an independent court. Different treatment of the indicated situations would give rise to the risk of evasion of the more restrictive requirements of the admissibility of evidence provided for in the national law.

The provisions of Chapter 62c of the CCP implementing the Directive 2014/41/EU do not provide for any rules regarding the examination of the procedure, under which the evidence has been obtained in the executing state, by the Polish authorities. However, it would be wrong to conclude that any evidence submitted by another EU Member State by means of the EIO issued by a Polish authority can automatically be used in the Polish criminal proceedings. This issue remains outside the scope of the provisions of Chapter 62c of the CCP, and therefore general principles should be referred to here.

In this context, attention should be paid to the relationship between the provisions of Article 589x Point 2 of the CCP, that assume the inadmissibility of issuing the EIO in a situation where the Polish law does not allow for taking or obtaining a given evidence, and Article 168a of the CCP, that provides that evidence cannot be considered inadmissible solely on the grounds that it has been obtained in violation of the provisions of the procedure or by means of a prohibited act, unless the evidence has been obtained in connection with the performance of official duties by a public official, as a result of: murder, deliberately causing damage to health or deprivation of liberty. Having in mind the specific nature of the proceedings conducted to obtain evidence on the basis of the EIO, it must therefore be taken into account that the Polish legislator has significantly extended the possibility of using evidence obtained contrary to the procedure in a criminal trial. The regulation provided for in Article 168a of the CCP is

the subject of much controversy. Without going into details, it can be pointed out that when assessing the effects of the violation of the prerequisites for the legality of evidentiary action, the purpose and nature of the prerequisites for the legality of the act and their importance from the point of view of the admissibility of evidence, the essence of the given evidentiary action should be taken into account. Therefore, in the event of a violation of the competence norm entitling a certain authority to conduct evidence proceedings, as well as the substantive premises of this action, it should be considered inadmissible, and therefore it cannot have procedural effects, and the evidence is to be excluded. On the other hand, violation of the competence of the authority performing the activities, exceeding the instructional deadlines, as well as various conditions defining the framework for the legality of the evidentiary action (e.g. participation in the proceedings of persons specified in the Act) do not disqualify the activities, and the assessment of the effects of this violation should be carried out at the stage of credibility's assessment of evidence obtained in this way and the impact of the violation on the content of the judgement. The exception applies only to violations of the right of access to a defence lawyer.[26]

However, even where a given piece of evidence has been obtained by means of the EIO issued after *ex ante* examination of the grounds for the admissibility of a given piece of evidence in accordance with Article 589w § 5 of the CCP, in fact the Polish authorities have quite limited possibilities of *ex post* verification of the correctness of obtaining evidence by the authority of the executing state. One cannot lose sight of the problem of substantive capacity of the court to assess the legality of the evidence obtained in another country and the correctness of taking evidence there.[27] Difficulties may relate to both obtaining appropriate information and sufficient competence to conduct such an assessment through the prism of foreign law. For this reason, among other things, it cannot be assumed that foreign law constitutes a suitable model for making such an assessment.

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26 See: Wojciech Jasiński, *Nielegalnie uzyskane dowody w procesie karnym* (Warsaw: Wolters Kluwer Polska, 2019), 561–562.

27 See: Hanna Kuczyńska, „Zagadnienia dopuszczalności materiału dowodowego w sprawach karnych na obszarze Unii Europejskiej," *Przegląd Prawa Europejskiego i Międzynarodowego*, no. 1 (2012): 23–42; Czerniak, *Europeizacja*, 392–403.

In the absence of sufficient regulations relating directly to the examination of the possibility of using evidence obtained by means of the EIO, attention should be paid to the provision of Article 587 of the CCP. Although it is included in Chapter 62 of the Code of Criminal Procedure, that deals with the traditional international legal assistance and cooperation within joint investigation teams, it seems to have a more general meaning. It has served the basis for the position, according to which compliance with the requirements of the Polish criminal procedure when performing a procedural act by a foreign state authority is not required, as long as the manner of its conduct is not contrary to the principles of the legal order in the Republic of Poland, i.e. rules of a more general and fundamental nature.[28] On the basis of the above provision, the Supreme Court expressed the position, according to which „the provision of Article 587 CCP is based on the principle of mutual recognition of evidence conducted in accordance with the law of the foreign state in which the evidence is taken (*lex loci*), even if these provisions do not faithfully correspond to the provisions in force in Polish law when taking a specific type of evidence."[29]

With regard to the telecommunication interception carried out by the authorities of a foreign state as part of the proceedings pending there, the Supreme Court indicated that:

> the legality of this interception should be assessed according to the provisions in force in the state in which the action is carried out, but a precondition for accepting that this action was not contrary to the principles of the legal order

[28] The principles of the legal order should be understood as rules of a more general nature, that will include constitutional guarantees as well as the basic principles of the criminal process, such as the right to defence, the right to refuse to give explanations, or the prohibition of obtaining evidence in conditions excluding freedom of expression – see: Polish Supreme Court, Judgement of 2 December 2019, Ref. No. III KK 505/19, OSNKW 2020, No. 4, item 11; Polish Supreme Court, Decision of 8 February 2006, Ref. No. III KK 370/04; Appellate Court in Kraków, Judgement of 30 November 2004, Ref. No. II AKa 234/04, unreported; Barbara Augustyniak, „Środki zapobiegawcze," in *Kodeks postępowania karnego. Komentarz*, ed. Dariusz Świecki (Warsaw: Wolters Kluwer Polska, 2022), 969; Piotr Hofmański, Elżbieta Sadzik, and Kazimierz Zgryzek, *Kodeks postępowania karnego. Komentarz* (Warsaw, 2012), 592; Sławomir Steinborn, "Comment on Art. 587," in *Kodeks postępowania karnego. Komentarz*, ed. Lech K. Paprzycki (Warsaw: Lex/el., 2015), thesis 3 .

[29] See: Polish Supreme Court, Judgement of 2 December 2019, Ref. No. III KK 505/19, OSNKW 2020, No. 4, item 11.

in the Republic of Poland, is consent to the use of interception or the subsequent approval of the legality of such interception by a judicial authority of that state (a court or a judge whose systemic features will meet the requirements set out in Article 45(1) of the Constitution or Article 6(1) of the ECHR, i.e. an independent and impartial tribunal established by law).[30]

In turn, the doctrine indicates the need to assess the admissibility of foreign evidence not through the prism of „non-contradiction with the principles of the legal order in the Republic of Poland" but on general principles, in a situation where there are no regulations relating to a specific type of evidence directly. At the same time, it is postulated that evidence should be assessed taking into account the provisions applicable to a particular piece of evidence both in the place where it has been obtained and in the Polish law.[31]

In the related literature it is also emphasised that compliance with the rules in force in the state taking evidence is, in principle, the pre-condition for the use of evidence in the requesting state. At the same time, it is noted that it is difficult to control this issue in this state, and at the same time unlawful taking of evidence in a foreign state does not automatically create a ban on evidence.[32] It is worth adding that the clause of the legal order, formulated in Article 587 of the CCP, cannot be treated as being reduced to the requirement to examine the compliance of activities carried out abroad with the provisions of the Polish law.[33]

The court's obligation to verify whether the manner of taking evidence by a foreign authority is inconsistent with the principles of the Polish legal order has thus far not been understood in a formalistic way, amounting to a detailed confrontation of the institutions operating in both national

30 See: Polish Supreme Court, Judgement of 2 December 2019, Ref. No. III KK 505/19, OSNKW 2020, No. 4, item 11.

31 See: Dobrosława Szumiło-Kulczycka, „Wykorzystanie w procesie karnym dowodów z podsłuchu stosowanego przez państwo obce. Glosa do wyroku SN z dnia 2 grudnia 2019 r., III KK 505/19," *Orzecznictwo Sądów Polskich*, no. 12 (2020): 46–53.

32 See: Barbara Nita-Światłowska and Andrzej Światłowski, „Odczytanie w postępowaniu karnym protokołu czynności dowodowej przeprowadzonej przed obcym organem," *Europejski Przegląd Sądowy*, no. 2 (2013): 6; Steinborn, "Comment on Art. 587," thesis 4a.

33 Cf. Steinborn, "Comment on Art. 587," thesis 4a.

legal systems. However, in the context of assessing the contradiction with the principles of the legal order in Poland, the need to take into account the principles that fundamentally shape the model of the criminal process, i.e. expressed in Article 45(1) of the Constitution of the Republic of Poland, the principle of the right to a fair trial and the principle of the right to defence at all stages of the criminal proceedings conducted against a given person has been strongly underlined.[34] Both of those principles also arise directly from Article 6(1) and 3(c) of the ECHR. When assessing the reliability of actions carried out by the authorities of a foreign state, it is necessary to analyse – to the appropriate extent – its criminal procedural law and the constitutional guarantees, and also to examine whether that state is a party to an international agreement containing guarantees regarding criminal proceedings or granting rights to individuals participating in such proceedings, e.g. the ECHR.[35] In the above context, it is assumed that „the legal order clause would conflict, for example, with taking evidence using methods prohibited by Polish law or taking evidence covered by an absolute prohibition of evidence under Polish law."[36] From the point of view of the effectiveness of the European judicial cooperation in criminal matters, it cannot be assumed that any difference between the regulations of the state where the evidence has been obtained and the regulations of the requesting state (where the criminal proceedings are conducted) is supposed to result in the inadmissibility of the evidence.

It seems that the rules on the use of foreign evidence developed on the basis of Article 587 of the CCP should also apply to evidence obtained on the basis of the EIO. There are no rational reasons why this evidence cannot be subject to such assessment, and on the other hand, that it should be subject to different rules than those resulting from Article 587 of the CCP. This issue seems particularly relevant with regard to evidence

34 See: Polish Supreme Court, Decision of 28 March 2002, Ref. No. V KKN 122/00, OSNKW 2002, issues 7–8, item 60.

35 See: Polish Supreme Court, Decision of 28 March 2002, Ref. No. V KKN 122/00, OSNKW 2002, issues 7–8, item 60.

36 See: Barbara Nita-Światłowska, „Zachowanie wymogów, od spełnienia których zależy dopuszczalność odstąpienia w postępowaniu karnym od zasady bezpośredniości (art. 389, 391 i 393 k.p.k.)," in *System Prawa Karnego Procesowego. Tom VIII. Dowody, cz. 2*, ed. Jerzy Skorupka (Warsaw: 2019), 1628.

already in the possession of the authorities of the executing state. From the perspective of constitutional and international guarantees, it is only important that foreign evidence used in criminal proceedings meet the basic standards of protection of individual rights and freedoms, especially as regards the manner of obtaining them.

Taking into account the assumption that the Polish Criminal Code of Procedure does not preclude the use of evidence obtained abroad *in genere*, and at the same time does not require such evidence to be taken strictly in accordance with the requirements of the Polish law, it must be stated that there are no grounds for *a priori* rejection of certain evidence just because they have been obtained in a foreign state and through the operation of its authorities. In the absence of regulations directly relating to this type of evidence, the admissibility of using foreign evidence in a Polish criminal trial must be assessed on general principles, including the rules arising from Article 587 of the CCP and Article 168a of the CCP.

4. Conclusions

Taking into account the European and national perspective with regard to the issue of assessing evidence obtained by means of the EIO, leads to several basic conclusions.

First of all, the scope of the control of evidence obtained in the discussed mode seems to be important, especially when one takes into account that even in the case of taking evidence in accordance with the indications of the issuing state, there is no guarantee of the admissibility of evidence in the state issuing the EIO. The conclusion, that the manner and mode in which the evidentiary action has been carried out in the executing state (conditions or circumstances in which the specific evidence has been obtained) should be examined by the court examining the criminal case in the issuing state, seems to be fully justified.

In this context, the problem of the criteria for such an assessment is of importance, however, there should be no doubt that the reference point should be the guarantees anchored in Article 6 of the TEU and the Charter, including the principle of proportionality, and evidence obtained in violation of those guarantees should not be used in criminal proceedings pending in the country where the EIO has been issued. In the event of a justified suspicion of a violation of fundamental rights in the procedure

of obtaining evidence by the authorities of the executing state, special attention will be required to verify the manner of performing the investigative action and respecting procedural guarantees in the executing state, in particular through the prism of protecting the individuals' guarantees in the process of collecting evidence.

As for procedural guarantees at the stage of applying to the authorities of another EU Member State to obtain evidence found there, it should be stated that there are no grounds for differentiating the question of the competence and conditions for issuing the EIO depending on whether the EIO concerns the conduct of an investigative action or the transfer of evidence already in hands of the authorities of the executing state. The conditions under the national law for the issuance of the EIO by a competent authority (e.g. a court) are also met in a situation where the order concerns evidence that is already in the possession of the authorities of the executing state.

In this context, it should be taken into account that the mere fact that a given piece of evidence is already in the possession of an authority of a foreign state does not automatically mean its admissibility in proceedings pending in another state. This question should be settled according to the law of that state. It should be emphasised that the assessment of the admissibility of the cross-border evidence may – in the absence of different provisions in the Directive 2014/41/EU – be *ex ante* or *ex post*. As a consequence, it is of great importance to establish common minimum standards for obtaining of evidence – mainly in terms of respecting the rights of the defence and fundamental rights that are interfered with by investigative measures – whether applied following the issuance of the EIO or at an earlier stage.

At the same time, taking into account the limited possibilities of ex post verification of the correctness of obtaining evidence by the authority of the state executing the EIO, it remains important that, while maintaining constitutional and international guarantees, foreign evidence used in criminal proceedings should meet the basic standards of protection of the rights and freedoms of an individual, especially as regards the manner of obtaining it.

In view of the above, it should be clear that any difference between the regulations of the state where the evidence has been obtained and

the regulations of the state where the criminal proceedings are conducted cannot result in exclusion of evidence, especially if the assumption of the effectiveness of the European judicial cooperation in criminal matters is considered. At the same time, it should be remembered that in the absence of regulations directly relating to specific evidence, the admissibility of using foreign evidence in a Polish criminal trial must be assessed on general principles, including the rules arising from Article 587 of the CCP and Article 168a of the CCP.

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Obtaining Evidence Protected by Banking Secrecy through European Investigation Order in Preparatory Proceedings. Remarks from the Polish Perspective

Marek Ryszard Smarzewski
Dr., Assistant Professor, Department of Criminal Procedure, Faculty of Law, Canon Law and Administration, John Paul II Catholic University of Lublin, correspondence address: John Paul II Catholic University, Al. Racławickie 14, 20-950 Lublin, Poland, e-mail: marek.smarzewski@kul.pl
https://orcid.org/0000-0003-0910-9128

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Abstract: The subject matter of considerations undertaken in the paper is the issue of obtaining evidence entailing banking secrecy under the European Investigation Order at the stage of the preparatory proceedings from the Polish perspective. The examination of the described evidence activity is often necessary to make key findings, for example, in the field of the data on bank accounts or bank transactions. Actions taken in this regard may concern the monitoring of banking operations and may also be used for establishing financial links between entities operating in different European Union Member States. The procedure for applying the European Investigation Order generates many problems in the analysed scope, in particular at the stage of the preparatory proceedings, starting from determining the authority competent to issue the European Investigation Order, to the need to consider legitimacy of obtaining the consent by the prosecutor to exempt from banking secrecy in order to further request for the required information. Against the background of the issues presented in the article, an attempt was made to analyse the normative institution of the European Investigation Order, used for obtaining evidence covered by banking secrecy, and to show the model that determines its optimal functioning in the face of existing problems in the application challenges related to the European cooperation in this area.

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1. Introduction

Development of crime, in particular due to the continuous progress in the field of new technologies, has resulted in the gradual transformation of classic crime and its shift into the cyberspace,[1] which became particularly noticeable in the era of the COVID-19 pandemic, as it was pre-conditioned and closely related to a significant increase in human activity in the global network.[2] The category of a threat, and at the same time a factor exposing people to the risk of victimisation, should be perceived as a combination of tools used by standard users of computers and mobile devices as well as not only enabling, but sometimes even imposing from above, dealing with most matters via the network, digitisation of documents or widespread use of electronic banking, often in the absence of appropriate skills allowing for conscious and safe operation of specific applications. This state of affairs, in the face of intensified criminal activity, especially on the Internet, results in a high level of crime threat in the cyberspace, particularly including property offences.[3]

The Internet, due to the widespread accessibility of online banking, may be used to deposit funds from crime in accounts or to money-laundering using them. In practice the activity of organised criminal groups is often carried out through bank accounts set up by the so-called money mules".[4] Therefore, taking into account the fact that it is possible to access bank accounts online and the international nature of criminal organisations, their activities often involve a cross-border component, in particular when, for example, the account to which proceeds of crime were transferred was

1 Cf. Wiesław Pływaczewski, „Współczesne trendy przestępczości zorganizowanej w Europie (analiza wybranych zjawisk przestępczych z uwzględnieniem zadań Agencji Unii Europejskiej ds. Współpracy Organów Ścigania – Europol)," *Studia Prawnoustrojowe*, no. 52 (2021): 387.

2 Cf. Marek Smarzewski, „Cyberprzestępczość a zmiany w polskim prawie karnym," in *Reforma prawa karnego*, ed. Iwona Sepioło-Jankowska (Warsaw: C.H. Beck, 2014), 262.

3 Cf. Paweł Urbanovicz, Marek Smarzewski, „Bezpieczeństwo w cyberprzestrzeni a prawo karne," in *Veritas in caritate*, eds. Marcin Tkaczyk, Marzena Krupa, and Krzysztof Jaworski (Lublin: Wydawnictwo KUL, 2016), 490–492; cf. also Dominika Skoczylas, „Rozwój teleinformatyczny państw Europy Wschodniej w kontekście cyberbezpieczeństwa. Zagrożenia a ochrona cyberprzestrzeni – wybrane zagadnienia," *Prawo i Więź* 41, no. 3 (2022): 329–330.

4 See: Agnieszka Gryszczyńska, "The Impact of the COVID-19 Pandemic on Cybercrime," *Bulletin of the Polish Academy of Sciences. Technical Sciences* 69, no. 4 (2021): 6.

opened in another country. It may also be that these accounts are used to temporarily transfer funds, which are then withdrawn from ATMs abroad.

It should be noted that it is often a key issue to take prompt action by law enforcement agencies, aimed at obtaining evidence that would allow to identify the perpetrator and circumstances relevant from the perspective of the criminal proceedings at its early stage. At the same time – assuming there are premises in this regard – it is justified to take action as soon as possible to block the proceeds of crime, accumulated on a given account. In such cases, the fact that the information is often covered by banking secrecy, may prove difficult.

A significant problem in the cases involving a cross-border factor is not only the cooperation itself, but also its effectiveness measurable by a fast, automated, and often comprehensive action possible on the basis of existing legal instruments regulating the forms of the international cooperation. The institution which, as part of the cooperation between the EU Member States, is the main mechanism for obtaining and transferring evidence is the European Investigation Order (EIO), introduced into the Polish legal order in connection with the implementation of the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.[5]

In its abstract approach, the EIO is the institution that allows for the establishment of the European cooperation in the field of conducting evidentiary proceedings. Against this background, however, certain doubts and questions arise that will be justified to be answered with the ongoing considerations.

Firstly, it should be considered whether the EIO meets the needs of effective evidence-gathering at an early stage of the criminal proceedings. Secondly, there are doubts to what extent the principle of mutual recognition of judicial decisions functions within EIO in a situation where obtaining of evidence requires the fulfilment of additional formal requirements, as is the case, for example, with reference to the information protected by bank secrecy. These doubts become all the more significant when it comes to obtaining of evidence in the area covered by banking secrecy at the stage

[5] Official Journal of the European Union, L 130, 1 May 2014, p. 1–36; thereafter referred to as "EIO Directive".

of the preparatory proceedings, which actually constitutes the subject matter of this study. As part of the subject matter, it is also necessary to specify the authority competent to issue the EIO in case when the exemption from banking secrecy under the Polish law lies within the competence of the locally competent regional court. The paper also highlights the issues regarding the admissibility of evidence obtained under the EIO and the legitimacy of applying the principle of specialty in this procedure.

2. Essence of the European Investigation Order and Obtaining Information Covered by Banking Secrecy under the European Investigation Order in the Light of Provisions of the Directive 2014/41/EU and Provisions of the Code of Criminal Procedure

According to Aricle 82(1) of the Treaty on the Functioning of the European Union,[6] the judicial cooperation in criminal matters in the EU is based on the principle of mutual recognition of judgements and judicial decisions and includes the approximation of provisions, inter alia, in the field of – as defined in 82(2)(a) of the TFEU – mutual admissibility of evidence between the Member States. The implementation of these assumptions is reflected in the EIO Directive. In the Polish legal order, the relevant regulations establishing the EIO have been implemented in chapter 62c and in chapter 62d of the Polish Code of Criminal Procedure.[7]

Within the meaning of Aricle 1(1) of the EIO Directive, the EIO is a judicial decision issued or validated by a judicial authority of one Member State (issuing the EIO) in order to request another Member State (executing the EIO) to carry out one or several specific investigative measures to obtain evidence. According to general assumption, the EIO is executed on the basis of the principle of mutual recognition (Aricle 1(2) of the EIO Directive).

Following the definition expressed in Aricle 2(c) of the EIO Directive, the "issuing authority" of the EIO is generally a judge, a court,

6 Official Journal of the European Union, C 326/67, 26 October 2012, p. 47–390; thereafter referred to as "TFEU".

7 Act of 6 June 1997; consolidated text: Journal of Laws 2022, item 1375, as amended; thereafter referred to as "CCP".

an investigating judge or a public prosecutor competent in the case. The power to issue the EIO is also granted by the EIO Directive to any other authority as defined by the issuing State which, in the specific case, is competent to order the gathering of evidence in accordance with the national law. In the latter case, however, the EIO is subject to the validation of a judicial authority, i.e. a judge, a court, an investigating judge or a prosecutor in the issuing State.

On the plane determined by the selected issues of consideration, the logical point of reference is Aricle 589w of the CPP. In the provision of Aricle 589w § 1 of the CCP, the legislator provided for the powers to issue the EIO *ex officio* or upon a motion of a party, defence counsel or attorney – both for judicial and preparatory proceedings. This means that the court before which the case is pending is competent to issue the EIO in the meaning of the provisions of the CCP at the jurisdictional stage. On the other hand, in the preparatory proceedings, the authority issuing the EIO will be, in particular, a prosecutor conducting the proceedings. Aricle 589w § 2 of the CCP, however, stipulates that if the investigative or verifying proceedings referred to in Aricle 307 of the CCP are conducted by the Police or by the authorities referred to in Aricle 312 of the CCP (the agencies of the Border Guard, Internal Security Agency, National Tax Administration, Central Anti-Corruption Bureau, Military Gendarmerie and other agencies referred to in the special provisions), or if the preparatory proceedings are conducted by the authorities referred to in Aricle 133 § 1 and Aricle 134 § 1 of the Fiscal Criminal Code,[8] the EIO may also be issued by the authority conducting the proceedings. In such a situation, the EIO requires the approval of the prosecutor.

The effectiveness of execution of the EIO depends not only on its issuance by the competent authority, but also on the fulfilment of the conditions for admissibility of the EIO set out in Aricle 6(1) of the EIO Directive. It is crucial to carry out checks in this respect because both the issuance and execution of the EIO depends on the recognition of its necessity and proportionality for the purposes of the proceedings, taking into account the rights of the accused, and on the conclusion that in a similar domestic case ordering an investigative measure is admissible under the same

[8] Act of 10 September 1999; consolidated text: Journal of Laws 2023, item 654, as amended.

conditions. It is necessary to point out that in the light of the Polish criminal procedural law, the possibility of issuing the EIO is conditioned by the existence of the interest of the administration of justice in this respect and the permissibility of examination or obtaining a given evidence (Aricle 589x of the CCP). Moreover, the EIO executing authority is obliged to assess the conditions set out in Aricle 6(1) of the EIO Directive, and in the case of doubts in this regard, it may consult the issuing authority on the purposefulness of the EIO.

In this context, it should be noted that while the EIO refers to the performance of specific investigative measures aimed at obtaining evidence, in the meaning of the EIO Directive and the national law, the EIO may cover any investigative measure, regardless of whether it is explicitly mentioned in the EIO Directive. Nevertheless, without attempting to precisely determine the catalogue of activities that can be carried out within the framework of the EIO, it is necessary to indicate that the content of the EIO Directive provides for detailed regulations regarding certain investigative measures. They relate respectively to: the temporary transfer to the issuing or executing State of persons held in custody for the purpose of carrying out an investigative measure (Aricle 22 and 23 of the EIO Directive); the hearing by videoconference or other audiovisual transmission (Aricle 24 of the EIO Directive); the hearing by a telephone conference (Aricle 25 of the EIO Directive); the information on bank and other financial accounts (Aricle 26 of the EIO Directive); the information on banking and other financial operations (Aricle 27 of the EIO Directive); investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time (Aricle 28 of the EIO Directive); covert investigations (Aricle 29 of the EIO Directive); interception of telecommunications (Aricle 30–31 of the EIO Directive); provisional measures (Aricle 32 of the EIO Directive). At the same time, it should be noted that section C, annex A to the EIO Directive provides for the possibility of requesting the following evidence activities, in addition to those listed above: obtaining information or evidence which is already in the possession of the executing authority; obtaining information contained in the database held by the police or the judicial authorities; hearing; identification of persons holding a subscription of a specified phone number or IP address.

Much more general are the provisions of the CCP concerning the issuance (Aricle 589w – 589zd of the CCP) and execution (Aricle 589ze – 589zt of the CCP) of the EIO. As a rule, they do not specify the procedure to be followed in the case of individual investigative measures, including the types of information that may potentially be obtained by the procedural organs through the EIO. It seems, however, that this is not necessary, since the analysis of the objective scope of the EIO determined by the EIO Directive and the provisions of the CCP should lead to the conclusion that the catalogue of investigative activities that may be requested and performed within the EIO is not closed.

Against the background of such generally presented issues, it can be argued that investigative measures concerning the information protected by banking secrecy play an important role in the criminal proceedings and, consequently, they can often be taken into account as subject of EIO. For this reason, it was logical solution to define in more detail the framework for their taking, whereas banking information is covered by protection and because of the fact that in this case obtaining evidence is subject to the fulfilment of additional conditions. Proper interpretation of the provisions of the EIO Directive in this respect is necessary not only due to the frequent use of banking information, but also due to the fact that obtaining such evidence and its admissibility in the criminal proceedings or conducting ongoing monitoring of financial operations, depend on the fulfilment of additional conditions, including in particular release of the institution from the obligation to keep secret information covered by banking secrecy.

According to Aricle 26(1) of the EIO Directive, the EIO may be issued in order to determine whether a person holds or controls one or more bank accounts and consequently obtain all the detailed information regarding the identified accounts. Similarly, Aricle 26(6) of the EIO Directive establishes the basis for undertaking identical investigative measures in relations to accounts in a non-bank financial institution. The issuing authority shall justify the reasons why it considers that the requested information is likely to be of substantial value for the criminal proceedings and on what basis it presumes that banks or non-banks financial institution in the executing state hold the account, and, to the extent available, which banks or non-banks institution may be involved in a given case (Aricle 26(5) of the EIO Directive).

The second group of banking information, that can be obtained under the EIO, indicated in Aricle 27(1) and (5) of the EIO Directive are those concerning the details of specified bank accounts and banking or non-banking operations which have been carried out during a defined period of time, including the details of any sending or recipient account. In the EIO the issuing authority must justify the reasons why it considers the requested information relevant for the purpose of the criminal proceedings concerned (Aricle 27(4) of the EIO Directive). At the same time it should be noted that the obligation to provide the requested information applies only to the extent that the information is in possession of the bank or non-banking institution (Aricle 27(3) of the EIO Directive).

Within the EIO, it is also possible to monitor of banking or other financial operations that are being carried out through one or more specified accounts. Obtaining the banking information in the indicated manner is acceptable when gathering of evidence requires the conduct of the aforementioned monitoring in real time, continuously and over a certain period of time (Aricle 28(1)(a) of the EIO Directive). In this context, the issuing authority should justify in the EIO that the requested information is relevant for the purpose of the criminal proceedings (Aricle 28(3) of the EIO Directive). Therefore, it must also demonstrate the legitimacy of conducting these activities in a certain way.

The common denominator of the activities undertaken in this context will, as a rule, be the fact that the information to which the procedural activities relates is covered by banking secrecy. This means that entering the scope of legally protected secret in issuing and executing EIO is subject to prior authorisation for such interference on the basis of the legitimate interests of the proceedings. Therefore, in particular at the stage of preparatory proceedings, a dilemma arises regarding the authority competent to issue the EIO decision, the subject of which is the information covered by banking secrecy.

3. Authority Competent to Issue the European Investigation Order and Exemption from Banking Secrecy as the Condition for Issuing the Order

As it can be seen from the previous considerations, unlike the EAW – which, pursuant to Aricle 6 (1) of the Council Framework Decision of 13 June 2002

on the European arrest warrant and the surrender procedures between Member States,[9] requires a decision to be made by a judicial authority – in the case of the EIO, the authority conducting or supervising the criminal proceedings within the meaning of Aricle 2(c) of the EIO Directive in connection with Aricle 589w § 1 and 2 of the CCP is competent to issue a decision. This authority is determined depending on the stage of proceedings. Therefore, in the preparatory proceedings, the role of the prosecutor, as the authority issuing the EIO or approving the EIO issued by the authority conducting investigative or verifying proceedings, will be of key importance.

It is problematic when the EIO relates to the evidence, admission, obtaining or examination of which requires the issue of a prior decision. According to Aricle 589w § 5 of the CCP, the decision on the EIO replaces the required decision. At the same time, however, the CCP specifies that the provisions concerning determined actions and evidence shall apply accordingly. In such a normative environment, doubts arose in the doctrine and jurisprudence, in particular with regard to determining, firstly, which authority is competent to issue the EIO concerning the information on bank accounts and transactions or the EIO requesting monitoring of banking or financial operations carried out through specified accounts (Aricle 26–28 of the EIO Directive), and secondly, whether in the analysed case the EIO is conditioned to be a prior decision on the exemption from banking secrecy in the issuing state.

The protection of banking secrecy is guaranteed in the provisions of Aricle 104–106e of the Act of 29 August 1997 – Banking Law.[10] Due to the subject of considerations and the resulting need to determine the authority competent to issue the EIO on banking information, it is first necessary to refer to Aricle 106b of the BL, regulating the mode of exemption from banking secrecy. Following Aricle 106b(1) of the BL, apart from the circumstances specified in Aricle 105 and Aricle 106a of the BL,[11]

9 OJ L 190, 18 July 2002, p. 34–51.

10 Act of 29 August 1997; consolidated text: Journal of Laws 2022, item 2324, as amended; thereafter referred to as „BL".

11 Incidentally, it should be noted that Aricle 105 and Aricle 106a of the BL refer to the obligation to notify about the possibility of committing a crime especially in connection with the justified suspicion that the bank's activity is being taken advantage of for

in the preparatory proceedings, the prosecutor conducting criminal proceedings in the case of an offence or fiscal offence may request that the bank, persons employed in the bank or persons through whom the bank performs banking operations provide information entailing banking secrecy. However, the basis for such a demand is the decision of the locally competent regional court issued upon a motion of the prosecutor.

Hence, it may be doubtful whether the competence of the regional court to exempt from banking secrecy coincides with the power of this authority to issue the EIO, or whether in the preparatory proceedings the prosecutor will be competent to decide on the EIO. Considering this issue, Andrzej Sakowicz expresses the opinion, that the lack of the possibility for the prosecutor to obtain the information covered by banking secrecy without a prior decision of the competent regional court means that the possibility of issuing the EIO by the prosecutor is also excluded. The aforementioned author argues, *inter alia*, that if the action demanded by the prosecutor is dependent of the court's decision under the domestic law, then the functional competence of the court also includes the issuance of the EIO.[12] Barbara Augustyniak and Hanna Kuczyńska, in turn, have a different view on the problem under consideration, recognising that the decision on the EIO is issued by the prosecutor, but only after the exemption from banking secrecy by the locally competent regional court.[13]

It is reasonable to agree with the view of Barbara Augustyniak and Hanna Kuczyńska when making a general analysis of the provisions of the CCP and the EIO Directive. In relation to Aricle 2(c) of the EIO Directive by the issuing authority is understood as, *inter alia*, court, where EIO Directive refers to the court competent in the case concerned. On

the purpose of concealing criminal actions or for the purposes connected with a fiscal offence. See: Jan Byrski, „Komentarz do Aricle 106b ustawy – Prawo bankowe," in *Prawo bankowe. Komentarz*, eds. Konrad Osajda and Jacek Dybiński (Warsaw: C.H. Beck, 2023).

12 Andrzej Sakowicz, „Komentarz do Aricle 589w Kodeksu postępowania karnego, in *Kodeks postępowania karnego. Komentarz*, ed. Andrzej Sakowicz (Warsaw: C.H. Beck, Legalis, Legalis, 2023).

13 Barbara Augustyniak, „Komentarz do Aricle 589w Kodeksu postępowania karnego," in *Kodeks postępowania karnego. Komentarz aktualizowany*, vol. II, ed. Dariusz Świecki, LEX/el.; Hanna Kuczyńska, „Komentarz do Aricle 589w Kodeksu postępowania karnego," in *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka (Warsaw: C.H. Beck, Legalis, 2023).

the other hand, the locally competent regional court will not often be the court before which the case is pending, but only the court competent to release from banking secrecy pursuant to Aricle 106b of the BL. Under the preparatory proceedings – in particular in Aricle 589w § 1–2 of the CCP – the prosecutor is expressly provided for as the authority issuing or approving the EIO. The opposite approach could be supported by Aricle 589w § 5 of the CCP, stipulating that the decision to issue the EIO concerning evidence, whose admission, obtaining or examination requires the issue of a decision, replaces that decision. However, the competent regional court has only the power to exempt from banking secrecy and not to issue the EIO. Such a statement is justified, since during the preparatory proceedings, the exclusive competence of its authorities to take decision on EIO is envisaged. At the same time, it is important to emphasise the lack of the special provision for the determination of the jurisdiction of such a court at the stage of the preparatory proceedings. Then, there are no sufficient grounds for a different interpretation. Appropriate conclusions can be drawn against the background of the provision of Aricle 589w § 4 of the CCP, from which – in the context of the so-called surveillance and telephone tapping or recording – it follows the competence of the court – at every stage of the proceedings – to make a decision on EIO replacing the court's decision as to the consent to the control and recording conversations, referred to in Aricle 237 § 1 of CCP. Nonetheless, such a statement cannot be formulated in consideration of Aricle 237 § 5 of the CCP. For this reason, the prosecutor will be competent to issue the EIO, but after obtaining the prior exemption from banking secrecy, and thus after performing an act that determines the admissibility of demanding under EIO the information covered by the indicated secrecy legally protected under the national law.

The considered problem turned out to be so debatable that it became the subject of divergent interpretations in case-law. Differences in the sphere of interpretation concern not only which authority is competent to issue the EIO aimed at obtaining confidential banking information, but also whether it is necessary to release from the banking secrecy before issuing the EIO, since the Polish authority is not able to decide on a direct exemption from the secrecy in relation to a bank from another EU Member State. In the jurisprudence, four positions can be distinguished regarding

the determination of the authority competent to issue the EIO at the preparatory proceedings, when the subject of the EIO is information entailing banking secrecy.

In the first of the presented approaches, it was assumed that the authority competent to issue the EIO – pursuant to Aricle 106b(1) of the BL – is the locally competent regional court, which is at the same time authorised to exempt from the obligation to maintain confidential information constituting bank secrecy. This concept was adopted by the Court of Appeal in Gdańsk in its decision of 23 May 2018, expressing the acceptance of the direction of interpretation of Aricle 589w § 1 of the CCP, according to which, if the conduct of the action postulated by the prosecutor depends in domestic law on the decision of the competent regional court, then it is also the issuance of the EIO that falls under the competence of the given court.[14]

The second out of the positions expressed in the decision of the Court of Appeal in Katowice of 29 January 2019 boils down to the recognition that, since in order to obtain evidence covered by bank secrecy, it is necessary for the competent regional court to issue a prior decision to exempt it, the issuance of such a decision does not additionally result in the need to obtain a separate decision on the issuance of the EIO by the prosecutor. The Court of Appeal found that the exemption from banking secrecy granted by the competent regional court replaces the decision on the EIO.[15]

As part of the next direction of interpretation, the assumption was made, that at the stage of the preparatory proceedings, the prosecutor is authorised to issue the EIO concerning banking information. In this context, it is stated that the prosecutor does not have to apply to the regional court, before taking the decision on the EIO, with a motion to exempt from banking secrecy. Such a pattern of conduct is adopted by the courts, taking into account the fact that exemption from legally protected secrecy pursuant to Aricle 106b(1) of the BL does not affect banks that are not within the jurisdiction of the Polish courts. National courts do not have

[14] See: Appellate Court in Gdańsk, Decision of 23 May 2018, Ref. No. II AKz 4018/18, LEX no. 2553721; see also in this context: Regional Court in Łomża, Decision of 11 June 2019, Ref. No. II Kop 15/19, LEX no. 2717015; Regional Court in Łomża, Decision of 11 June 2019, Ref. No. II Kop 16/19, LEX no. 2717011.

[15] See: Appellate Court in Katowice, Decision of 29 January 2019, Ref. No. II AKz 53/19, LEX no. 2728416.

the power to release banks operating in another EU Member State from banking secrecy.[16] Therefore, it is sometimes argued that the prosecutor, in order to obtain evidence covered by banking secrecy, should apply directly with EIO to the competent authorities of another Member State, which have the exclusive competence to decide on a possible exemption and on the collection and sending of the requested information in the preparatory proceedings.[17]

Within the last of the concepts, there is the assumption that in the scope of the procedure for obtaining the information covered by banking secrecy through EIO, the prosecutor is competent to issue the EIO decision after obtaining the decision on the exemption issued by a locally competent regional court pursuant Aricle 106b of the BL. This approach was initially expressed in the decision of the Court of Appeal in Katowice of 4 September 2018.[18] Currently, it is confirmed by the latest jurisprudence of common courts[19] and, most importantly, the Supreme Court.[20] The presented position seems to be justified in the very essence of the EIO and in reference to Aricle 6(1b) of the EIO Directive. The condition for the issuance of the EIO is the admissibility of ordering an investigative measure under the same conditions as part of the national procedure. It should therefore be emphasised that in order to request for the bank information covered by banking secrecy through EIO, the prosecutor must first obtain the exemption from the obligation to maintain it. It is not important that this exemption will not affect the authority executing the EIO. It is made only for the purposes

16 See: Appellate Court in Łódź, Decision of 19 September 2018, Ref. No. II AKz 496/18, LEX no. 2601868; Appellate Court in Kraków, Decision of 23 October 2018, Ref. No. II AKz 524/18, LEX no. 2645341; Regional Court in Łomża, Decision of 25 January 2019, Ref. No. II Kop 42/18, LEX no. 2717014; Regional Court in Łomża, Decision of 28 March 2019, Ref. No. II Kop 7/19, Legalis no. 2238242; Regional Court in Łomża, Decision of 28 March 2019, Ref. No. II Kop 10/19, Legalis no. 2238562.

17 Cf. Regional Court in Warsaw, Decision of 29 June 2018, Ref. No. VIII Kop 77/18, LEX no. 2729919.

18 See: Appellate Court in Katowice, Decision of 4 September 2018, Ref. No. II AKz 645/18, LEX no. 2615563.

19 See: Appellate Court in Kraków, Decision of 13 July 2022, Ref. No. II AKz 424/22, LEX no. 3389923.

20 See: Polish Supreme Court, Decision of 2 June 2022, Ref. No. I KZP 17/21, Legalis no. 2707936.

of the procedure before the issuing authority and is *sine qua non* condition for issuing the EIO. At the same time, however, the compliance with the national procedures required to obtain a given evidence may turn out to be crucial for assessing whether the condition of equivalence of an investigative measure is fulfilled in the executing State.[21] The Supreme Court rightly pointed out in its decision of 2 June 2022 that the regional court, under the procedure set out in Aricle 106 of the BL, is not entitled to decide on admissibility of evidence or to examine it. Its role is limited to determining whether and, if so, to what extent a given evidence concerning bank information can be gathered by the prosecutor. Therefore, it is the prosecutor, subject to the relevant consent of the national court, who decides to apply to the executing authority with a request contained in EIO to obtain evidence covered by banking secrecy.

4. Effectiveness of Obtaining Evidence Covered by Banking Secrecy through European Investigation Order Procedure

It seems justified to put forward the thesis that the effectiveness of the EIO may be conditioned by the proper conduct of the procedure aimed at obtaining banking information already in the issuing country. Recognition of the EIO by the competent authority of the executing State does not, in principle, requires any additional formalities. According to the EIO Directive, its execution should be ensured in the same way and under the same modalities as if the given investigative measure had been ordered by an authority of the executing state. Exceptions to this rule occur when the executing authority invokes one of the grounds for non-recognition or non-execution or one of the grounds to postponement (Aricle 9(1) of the EIO Directive).

It has already been established that the issuance of the EIO in order to obtain evidence, the content of which is banking information, will most often depend on a release from secrecy by the competent regional court, and the decision on the EIO itself is issued by the prosecutor. It is important from the perspective of Aricle 9(3) of EIO Directive, since it is envisaged that the EIO shall be returned to the issuing state in the case of

[21] Cf. Ariadna Ochnio, „Glosa do postanowienia Sądu Apelacyjnego w Katowicach – Wydział II Karny z dnia 4 września 2018 r., II AKz 645/18," *Orzecznictwo Sądów Polskich*, no. 7–8 (2021): 109–110.

transmission to the executing authority of the EIO that has not been issued by the issuing authority within the meaning of Aricle 2(c) of the EIO Directive. In addition, the completion of the national procedure is a key issue in the context of possible further examination of the so-called "double admissibility" of a given evidence by the EIO executing authority, taking into account the guarantee in the issuing state when assessing evidence obtained through EIO of the exercise of the rights of defence and the fairness of the proceedings (Aricle 14(7) of the EIO Directive).[22]

For this reason, the reference should be made to the grounds for the exemption from banking secrecy under Aricle 106b of the BL. It must be borne in mind that pursuant to Aricle 589x of the CCP, the issuance of the EIO is inadmissible, both when it is not required by the interest of the administration of justice and when the examination or obtaining evidence is not permissible under the Polish law. As part of the abstract model, it is therefore necessary first for the regional court to examine *casu ad casum* the grounds for the exemption from banking secrecy and to make a positive decision in this respect. Only then it is possible for the prosecutor to assess the premises for issuing the EIO regarding bank information, to the extent to which the exemption took place and within the limits set by the application of Aricle 589w and Aricle 589x of the CCP.[23]

Determining the reasons justifying the decision on the exemption from the obligation to maintain banking secrecy is important because in Aricle 106b(1) of the BL, the Act does not directly address to the court the prerequisites for obtaining bank information for the purposes of a criminal trial. According to Aricle 106b(1) in connection with Aricle 106b(2) of the BL, the prosecutor's motion containing the demand to provide information entailing banking secrecy should include the following items: a description number or docket number of a case; a description of the offence, together with its legal qualification; the circumstances justifying the need to make the information available; an indication of the person

22 Cf. Hanna Kuczyńska, "Admissibility of Evidence Obtained as a Result of Issuing an European Investigation Order in Polish Criminal Trial," *Review of European and Comparative Law* 46, no. 3 (2021): 74; Martyna Kusak, "Mutual Admissibility of Evidence and the European Investigation Order: Aspirations Lost in Reality," *ERA Forum*, no. 19 (2019): 399.

23 Cf. Krzysztof Woźniewski, "European Investigation Order – Selected Problems on Polish Implementation," *Review of European and Comparative Law* 46, no. 3 (2021): 152–157.

or organisational unit that the information concerns; specification of the entity obliged to provide information and related data; specification of the type and scope of information. It can be concluded that the legitimacy of the request in question depends on the prosecutor's demonstrating the existence of circumstances justifying the need to disclose information. Therefore, the decision to release from confidentiality should be conditional on the face that is taken in specific preparatory proceedings and it is to refer to the specific type and scope of information requested. This means that the consent cannot be general and blank and must be justified in the circumstances of a given case.[24] Thus, the prosecutor's motion seems to be justified only when it is impossible to obtain certain information entailing banking secrecy in any other way, and at the same time there is a real need to disclose the demanded information, necessary to achieve the objectives of the proceedings.[25]

Based on Aricle 106(3) of the BL the regional court, in the case of the positive recognition of the motion, issues the decision, expressing the consent for the confidential banking information to be available, specifying the kind and scope thereof, the person or organisational unit that it concerns, as well as the subject obliged to make it available. It is important insofar as the decision on the exemption from banking secrecy determines the subjective and objective scope of the related EIO. However, doubts may arise as to the manner in which the fact of issuing the decision on the exemption from banking secrecy under the EIO procedure should be formally reflected. It seems that as part of the EIO form attached to

[24] Appellate Court in Katowice, Decision of 6 April 2011, Ref. No. II AKz 202/11, Legalis no. 340396; Appellate Court in Kraków, Decision of 7 January 2019, Ref. No. II AKz 673/18, Legalis no. 2233126; Anna Błachnio-Parzych, „Organ uprawniony do wydania europejskiego nakazu dochodzeniowego w celu uzyskania informacji stanowiących tajemnicę bankową na podstawie Aricle 106b ust. 1 Prawa bankowego – glosa do postanowienia Sądu Apelacyjnego w Łodzi z 19.09.2018 r., II AKz 496/18," *Glosa*, no. 3 (2022): 36.

[25] Marcin Przestrzelski, „Postępowanie w sprawie wyrażenia zgody na udostępnienie informacji stanowiących tajemnicę bankową," *Prokurator* 47, no. 3 (2011): 93; see also: Appellate Court in Kraków, Decision of 14 August 2018, Ref. No. II AKz 403/18, Legalis no. 1892295; Appellate Court in Wrocław, Decision of 22 February 2017, Ref. No. II AKz 70/17, LEX no. 2250041; Appellate Court in Rzeszów, Decision of 3 December 2013, Ref. No. II AKz 219/13, LEX no. 1400405; Appellate Court in Lublin, Decision of 22 October 2008, Ref. No. II AKz 508/08, LEX no. 477843.

the Regulation of the Minister of Justice of 8 February 2018 on specifying the template of the European Investigation Order form,[26] the relevant mention should be included in section C in the place devoted to describing the required assistance or investigative measures or in section G1 dedicated to a summary of the facts justifying the issuance of the EIO. It could also be considered whether the decision on the exemption from banking secrecy translated into the language of the executing state or another official language determined by that State should not be annexed to the EIO. It seems, however, that the notification of such a decision translated into a given language may become relevant only at the stage of possible consultations between the executing authority and the authority issuing the EIO.

Against this background, an important question arises about the role of the decision of the competent regional court on the determination of the grounds for the exemption from banking secrecy under the domestic law, namely whether it has, and if so, what significance, for example in the perspective of assessing the fulfilment of the conditions for the admissibility of the EIO, in accordance with Aricle 6 of the EIO Directive. As it has already been indicated, when granting permission to waive banking secrecy, the national court, as part of recognising the existence of conditions of Aricle 106b of the BL, states both the necessity and the proportionality of the exemption from the secrecy to a certain extent for the purposes of the proceedings. In relation to the outstanding issue formulated in this way, one can refer to the axiological foundations of the functioning of the EIO, i.e. the principle of mutual recognition, as well as to the trust in relations between Member States, which is necessary for the effectiveness of the EIO. The principle of mutual trust should, as a rule, result in the acceptance that the requirements for the execution of the EIO are met, provided that the EIO fulfils the formal conditions and there are no legal reasons for refusing its recognition or execution. Such an approach is rationally justified from a legal and practical perspective. It should be noted that formally there is a possibility of requesting the state issuing the EIO for appropriate explanations or supplementing information, as part of the consultations referred to in Aricle 6(3) of the EIO Directive,

[26] Journal of Laws 2018, item 366.

if the information available so far is not sufficient to make a decision on executing the EIO. Consequently, if the essence of the EIO aimed at obtaining legally protected banking information is the existence of a prior court's decision exempting from the obligation to keep it, this means that, on the basis of the mutual recognition and mutual trust, executing authorities may in principle state the existence of factual grounds for the admissibility of the EIO.[27]

It seems justified to state that as regards the assessment of admissibility by the executing state, the EIO should function relatively automatically, bearing in mind the need to execute it as soon as possible. Exceptions may

[27] See with reference to the mutual recognition of the decision on detention in the context of the EAW procedure: Polish Supreme Court, Decision of 26 June 2014, Ref No. I KZP 9/14, Legalis no. 966597. In this context it should be noted that in accordance with the forum *regit actum* principle regulated in Aricle 9(2) of the EIO Directive, the EIO executing authority shall comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in the EIO Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State. In order to outline a broader context, it is necessary to consider the doubts raised in the doctrine as to whether the principle of forum *regit actum* remains consistent with the philosophy based on the mutual trust. Differences between the procedures of individual EU Member States may result, first of all, in situations where, even if the state executing the EIO complies with the requests of the issuing state, the evidence requested for gathering may turn out to be inadmissible in the issuing state. Moreover, the forum *regit actum* principle applies only in the relationship between the issuing State and the executing State. See: Martyna Kusak, "Common EU Minimum Standards for Enhancing Mutual Admissibility of Evidence Gathered in Criminal Matters," *European Journal on Criminal Policy Research*, no. 23 (2017): 338–339; Martyna Kusak, „Reguły forum regit actum, locus regit actum oraz zasada specjalności," in *Dowody zagraniczne. Gromadzenie i dopuszczalność w polskim procesie karnym. Przewodnik z wzorami* (Warsaw: Wolters Kluwer Polska, 2019), LEX/el.; Gert Vermeulen, *Free Gathering and Movement of Evidence in Criminal Matters in the EU. Thinking beyond Borders, Striving for Balance, in Search of Coherence* (Antwerp–Apeldoorn–Portland: Maklu, 2011), 41–43. The solution to the existing problems in the indicated scope could be the introduction of common standards for the admissibility of evidence in the European Union. See in this context: *ELI Proposal for a Directive of the European Parliament and the Council on Mutual Admissibility of Evidence and Electronic Evidence in Criminal Proceedings. Draft Legislative Proposal of the European Law Institute* (Austria: European Law Institute, 2023), accessed August 30, 2023, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Proposal_for_a_Directive_on_Mutual_Admissibility_of_Evidence_and_Electronic_Evidence_in_Criminal_Proceedings_in_the_EU.pdf.

be generated in situations where there are grounds for the refusal to recognise or execute the EIO listed in Aricle 11(1) of the EIO Directive. In the context of the analyses of the information entailed bank secrecy, noting that in this respect it is the prosecutor who is the authority issuing the EIO, the potential impact of this circumstance on the effectiveness of the cooperation should be considered. In particular, pursuant to Aricle 11(1)(f) of the EIO Directive, the recognition or execution of the EIO may be refused if there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Aricle 6 of the Treaty on European Union[28] and the Charter of Fundamental Rights of the European Union.[29]

The problem arose in the connection with the procedure for execution of the German EIO – containing a request for the transfer of copies of various documents relating to a bank account for a specified period – by Austria. The Regional Court for Criminal Matters in Vienna, examining the issue of granting access to the requested information, noted that the German Public Prosecutor's Office is at risk of being subject, directly or indirectly, to instructions or individual orders from the executive and, according to the position of the CJEU, it could not be considered as a judicial authority under the EAW.[30] The Austrian court argued that the same kind of reasons could be made in order to refuse the execution of the EIO issued by the German Public Prosecutor's Office. The court further clarified that the requirement of independence of the authority issuing the EIO is important because the EIO often entails interference with fundamental rights when it covers all investigative measures. The doubts raised by the executing authority resulted in the request to the CJEU for a preliminary ruling regarding the possibility of treating the German Public Prosecutor's Office as an authority within the meaning of Aricle 1 (1) and Aricle 2 (c) of the EIO Directive due to the risk of being subordinated to the Minister of Justice. The CJEU responded to the question, ruling that the notion of a judicial authority and an issuing authority in the EIO Directive should

28 Official Journal of the European Union, C 202, 7 June 2016, p. 1–388.

29 Official Journal of the European Union, C 326, 26 October 2012, p. 391–407.

30 CJEU Judgement of 27 May 2019, Case C-508/18 OG and C-82/19 PI, ECLI:EU:C:2019:456.

be interpreted as included the public prosecutor of the Member State or the public prosecutor's office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting EIO.[31]

It is indisputable that the cited CJEU judgement is also important from the Polish perspective. However, in the light of the concept already presented – approved by the Supreme Court – regarding the procedure related to the decision on the determination of the grounds for the exemption from banking secrecy by the competent regional court, before issuing a decision on the EIO by the prosecutor, it should be noted that this perspective is different that the German one. The main difference lies in the fact that the jurisprudence has prevailed the approach guaranteeing the participation of the court in determining the existence of the grounds for the exemption from banking secrecy. The court's decision thus allows us to conclude that the condition of the possibility of obtaining such evidence under the Polish law is met.

The last problematic issue that may affect the assessment of the effectiveness of the EIO is the possibility of evidentiary use of the information obtained through EIO covered by banking secrecy for the purpose of the proceedings other than the one for which the EIO was executed. It is debatable whether the specialty rule applies in EIO proceedings. It should be emphasised that the decision to waive banking secrecy, whether for the purposes of the procedure in the issuing State or already in the executing State, is taken in the context of and for the purposes of the criminal proceedings in question. Consequently, it is made against the background of a specific factual state, because in the realities of a given case, and besides, it refers to specific offences. It should be noted that the EIO Directive does not regulate the principle of specialty. Nevertheless, there are voices in the doctrine that this principle applies to the cooperation within the framework of the EIO, as well as opposing opinions that are in favour of excluding the application of this rule in the analysed scope. Ultimately, a binding

[31] CJEU Judgement of 8 December 2020, Case C-584/19, ECLI:EU:C:2020:1002.

resolution of the raised issue does not seem possible. However, it would not be right to completely exclude the application of this principle. It is possible to imagine using the lack of regulation to abuse cooperation in such a way that, for example, the requested evidence obtained through EIO for a given proceedings would be used in a way that contradicts the grounds for refusing recognition or execution of EIO. In similar cases, the principle of specialty should undoubtedly apply, and evidence in the context of these proceedings could be questioned.[32]

5. Conclusions

The EIO is one of the key legal remedies for the purposes of the criminal proceedings, in those cases where significant arrangements and activities must be made in cooperation with other EU Member States. The EIO, at least from a legal theoretical perspective, is an instrument that allows for the effective obtaining of evidence, even in the face of a perceived crisis in the mutual trust and mutual recognition of judgements. This is largely due to the positioning of the EIO in the horizontal model as an intermediate mechanism between the traditional international cooperation and the automatism resulting from the principle of mutual recognition.[33]

The main advantage of the EIO is the fundamental possibility of its use by the authorities conducting the proceedings at a given stage, which are to the greatest extent able to identify the steps necessary to make the relevant findings. In addition, it is plausible to state that the EIO procedure seems to be sufficiently guaranteeing, since it refers to the examination of proportionality and the admissibility of carrying out a given investigative measure both in national law and in the executing state. In the context of

[32] Cf. Júlio Barbosa e Silva, "The Speciality Rule in Cross-Border Evidence Gathering and in the European Investigation Order – Let's Clear the Air," *ERA Forum*, no. 19 (2019): 492–499. In the practice of cooperation within EIO, there have been cases where the executing state required an additional declaration that the documents or evidence provided under EIO will be used only for a given proceedings. Joanna Klimczak, Dominik Wzorek, Eleonora Zielińska, *Europejski nakaz dochodzeniowy w praktyce sądowej i prokuratorskiej – ujawnione problemy i perspektywy rozwoju* (Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2022), 172.

[33] András Csúri, "Towards and Inconsistent European Regime of Cross-Border Evidence: The EPPO and the European Investigation Order," in *Shifting Perspectives on the European Public Prosecutor's Office*, eds. Willem Geelhoed, Leendert H. Erkelens, and Arjen W.H. Meij (Hague: Springer, 2018), 146.

the decision on the recognition or execution of the EIO, it is also important to evaluate it from the point of view of, *inter alia*, respect for fundamental rights.[34]

Against this background, one may wonder whether the approach to the proceedings in order to obtain evidence covered by banking secrecy through EIO, shaped in the case-law of the Supreme Court, is optimal. Prior to the issuance of the EIO, the need to consent to the exemption from banking secrecy by the competent regional court extends the path to obtaining evidence. Sometimes, in such cases, quick action can be crucial. Therefore, the question may be raised whether it would not be preferable to have the prosecutor issue the EIO without the prior authorisation of the court. When addressing the outstanding issue presented in this way, it is necessary to take into account the issues related to the assessment of the admissibility of evidence from the perspective of the competent authority within the national procedure, and, on the other hand, the fact that it is the decision of the judicial authority that determines the limits of the request contained in the EIO. The concept, which found its support in the decision of the Supreme Court of 2 June 2022 appears to be correct, as it is an expression of a guarantee approach. This seems particularly important for assessing the fairness of the proceedings in the issuing state.[35]

In conclusion, it should be emphasised that at the stage of the preparatory proceedings, obtaining banking information is one of the most frequently undertaken investigative measures within the EIO. The conducted research shows that the activities of prosecutors aimed at obtaining bank documentation, determining financial flows or the link between entities in Poland and abroad are important particularly in matters relating to the so-called VAT carousels.[36] Taking into account the specificity of today's crime, including the often occurring cross-border factor in the scope of trading

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34 Cf. Fabrizio Siracusano, "The European Investigation Order for Evidence Gathering Abroad," in *EU Criminal Justice*, eds. Tommaso Rafaraci and Rossana Belfiore (Cham: Springer, 2019), 98.

35 Cf. Tomasz Stępień, „Organ właściwy do wydania europejskiego nakazu dochodzeniowego w postepowaniu przygotowawczym w fazie in rem w zakresie informacji objętych tajemnicą bankową. Uwagi na tle postanowienia Sądu Najwyższego z 02.06.2022 r., I KZP 17/21, OSNKW 2022/7/26," *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 50, no. 2 (2023): 56–60.

36 See: Klimczak, Wzorek, Zielińska, *Europejski nakaz dochodzeniowy*, 141–142.

funds as part of or in connection with criminal activity, it should be assumed that obtaining information entailing banking secrecy through EIO will often be the key evidentiary activity in individual proceedings for making significant factual findings. For these reasons, it is necessary to improve and deepen the cooperation in the analysed scope.

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The Obligation to Report Cases of Child Sexual Abuse – Comparison of Legal Regulations in Poland, Austria, and the Federal Republic of Germany

Ewa Tuora-Schwierskott
Dr. habil., Associate Professor, Faculty of Social and Human Sciences, Witelon Collegium. State University, correspondence address: ul. Sejmowa 5A, 59-220 Legnica, Poland, e-mail: schwierskott@dpjv.de
https://orcid.org/0000-0003-0926-2173

Iwona Bień-Węgłowska
Dr., Assistant Professor, Faculty of Law, Canon Law and Administration, The John Paul II Catholic University of Lublin, correspondence address: Al. Racławickie 14, 20-950 Lublin, Poland, e-mail: iweglowska@kul.pl
https://orcid.org/0000-0002-8575-8085

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Abstract: The subject matter of this work constitutes the comparison of the legal regulations governing the obligation to report cases of child sexual abuse in Poland, Austria, and the Federal Republic of Germany. The authors have focused on the analysis of the method of reporting the crime of paedophilia, the legal and social consequences of the failure to notify of that kind of offence, and the differences in the legislative, administrative, social, and educational measures taken to protect a child's welfare.

1. Introduction

Sexual abuse of children has occurred and will continue to occur in different times and cultures. Child sexual abuse is one of the most serious crimes committed against the welfare of a child. Victims of sexual abuse can be found in all age groups, starting from infancy. In order to prevent child sexual abuse, protective measures are taken, including legislative, administrative as well as social initiatives by creating social programs aimed at children and their guardians, the requirement for any information on cases of mistreatment of children, and effective prosecution of paedophilia perpetrators. The aim

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of this paper is to analysed and compare the legal regulations governing the obligation to report cases of child sexual abuse in Poland, Austria, and the Federal Republic of Germany in terms of the nature of the obligation to report, the categories of persons obligated to report the relevant information to law enforcement authorities, the time frame within which the report must be made, the social and legal consequences of failing to report, and the required form of reporting.

2. The Extent of the Obligation to Report Paedophilia Offences in Poland

The obligation to report cases of child sexual abuse has been set forth in Article 240[1] § 1 of the Polish Criminal Code, which stipulates that anyone who has reliable information concerning the commission of a prohibited act specified in Article 200[2] of the Polish Criminal Code, that is a paedophilia offence, but does not promptly inform an authority responsible for

[1] The Act of June 6, 1997 – Criminal Code, consolidated text: Journal of Laws of 2022, item 1138, as amended. Art. 240 of the Criminal Code reads as follows: "§ 1. Anyone who has reliable information concerning a punishable preparation or attempt, or the commission of a prohibited act specified in Articles 118, 118a, 120–124, 127, 128, 130, 134, 140, 148, 156, 163, 166, 189, 197 § 3 or 4, 198, 200, 252 or a terrorist offense, but does not promptly inform an agency responsible for prosecuting such offences is liable to imprisonment for up to three years. § 2. Anyone who has sufficient knowledge to assume that an agency competent to prosecute, knew of the prohibited act specified in § 1 being planned, attempted or committed but fails to report it, has not committed the offence specified in § 1; anyone who prevents a prepared or attempted prohibited act from being carried out has also not committed the offence specified in § 1. § 3. Anyone who failed to report it out of fear of a criminal liability threatening him or herself or a next of kin will also not be liable to a penalty."

[2] Art. 200 of the Criminal Code reads as follows: "§ 1. Anyone who has sexual intercourse with a minor under the age of 15, or commits any other sexual act, or leads him or her to undergo such an act or to execute such an act, is liable to imprisonment from two to 12 years. § 2. (repealed). § 3. Anyone who presents pornographic material to a minor under the age of 15, or makes available items of this nature to him or her, or distributes pornographic material in the way allowing him or her to become familiar with such material is liable to a fine, the restriction of liberty or imprisonment for up to three years. § 4. Anyone who, for their own sexual satisfaction or that of another person, presents a minor under the age of 15 with the performance of a sexual act shall be subject to the penalty specified in § 3. § 5. Anyone who advertises or promotes activities involving the distribution of pornographic material in the way allowing a minor under the age of 15 to become familiar with it shall be subject to the penalty specified in § 3."

prosecuting such offences is liable to imprisonment for up to three years. This universal and legal duty of denunciation serves the purpose of exposing an attack on the interests protected by Article 200 of the Criminal Code and apprehending its perpetrator, or, if that is not possible, preventing the offences specified therein. According to the doctrine and case law, it is accepted that the interest protected by Article 200 of the Polish Criminal Code is the proper physical and mental development of a minor up to the age of 15, which may be violated by too early sexual initiation and may lead to his or her demoralisation. It is recognised that due to their immaturity, children at this age are not able to properly assess the danger and make a binding decision regarding their sexual life. Therefore, the provision comes forward with an absolute prohibition on any sexual acts with a child under the age of 15.[3]

The obligation to report to law enforcement authorities rests on every person who has reliable information concerning a punishable preparation or attempt, or the commission of a prohibited act defined in Article 200[4] of the Criminal Code, provided that this concerns persons who have in no way participated in the commission of this prohibited act. The criminal liability under Article 240 of the Criminal Code cannot apply to the perpetrator of the primary offence or to perpetrators who have informed law enforcement authorities of the committed offence, and their acts remain closely related to the primary offence.[5]

According to the content of the provision of § 2a, a victim of the crime of paedophilia who refrains from reporting the offence is not subject to punishment. It should not be a matter of doubt that this regulation aims to protect the victim from negative consequences of the offence and is also justified by the need to avoid double victimisation of the victim.[6] Article 240 of the Polish Criminal Code does not aim at penalising the victim

3 See Sławomir Hypś, „Komentarz do art. 200 k.k.," in *Kodeks karny. Komentarz*, 7th ed., eds. Alicja Grześkowiak and Krzysztof Wiak (Warsaw: C.H. Beck 2021), 1196–1197.

4 See: Krzysztof Wiak, "Komentarz do art. 240 k.k.," in *Kodeks karny. Komentarz*, 7th ed., eds. Alicja Grześkowiak and Krzysztof Wiak (Warsaw: C.H. Beck, 2021), 1373.

5 Appellate Court in Lublin, Judgement of 5 February 2009, Ref. No. II AKa 3/09, KZS 2009, No. 5, item 59. Cf. S. Cora, "Notification of a Crime as an Obligation and Right," *Państwo i Prawo* 2011, No. 6 (2011): 79–80.

6 Cf. Wiak, "Komentarz do art. 240 k.k.," 1374.

but other persons who have learned about the commission of the offence specified in Article 200 of the Criminal Code, that is, witnesses of the act.[7]

The doctrine lacks a clear position on the implementation of Article 240 of the Criminal Code, namely the obligation of reporting by individuals who, due to their profession, should keep confidential the circumstances they have learned about while performing their professional activities. In the substantive discussion, priority is given to the so called absolute professional secrecy over the duty of denunciation under Article 240 § 1 of the Criminal Code, and it is emphasised that exclusions in this regard should be clear and unambiguous.[8] It should be highlighted that the current normative framework is incorrect and leads to a collision of those important legal goods.

In the related literature, it is emphasised that pursuant to Article 178 of the Polish Code of Criminal Procedure,[9] defence attorneys, lawyers or legal advisers acting under Article 245 § 1 of the Polish Code of Criminal Procedure cannot be interviewed as witnesses regarding the facts they have learned while providing legal advice or handling a case. It does not matter where the information falling within the scope of defensive or non-defensive attorney-client privilege has been obtained.[10] Prohibition under Article 178 the Polish Code of Criminal Procedure is addressed to the judicial bodies, as it expressly prohibits interrogating the advocate-defender on the circumstance indicated therein. This means that it is inadmissible to

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7 Cf. Katarzyna Dudka, „Prawny obowiązek zawiadomienia o przestępstwie a odpowiedzialność pokrzywdzonego z art. 240 k.k.," *Czasopismo Prawa Karnego i Nauk Penalnych*, no. 1 (2005): 110. In the doctrine, one can come across the position that anyone except for perpetrators of crimes listed in this provision can commit the offence under Art. 240 § 1 of the Criminal Code, including the victim. However, it should be emphasised that from an axiological perspective, this view is often difficult to accept. See: Tomasz Razowski, "Komentarz do art. 240 k.k.," in *Kodeks karny. Część szczególna. Komentarz*, ed. Jacek Giezek, LEX/el. 2023, thesis 4. Compare also Justyna Żulińska, „Prawny obowiązek zawiadomienia o niektórych przestępstwach (art. 240 k.k.)," *Prokuratura i Prawo*, no. 10 (2015): 51.

8 See: Michał Królikowski, „Problemy z nowym zakresem obowiązku powiadomienia o przestępstwie," *Forum Prawnicze*, no. 4 (2021): 10.

9 Act of 6 June 1997 – Code of Criminal Procedure, consolidated text: Journal of Laws 2022, item 1375, as amended [hereinafter: the Code of Criminal Procedure].

10 See: Michał Kurowski, „Komentarz do art. 178 k.p.k.," in *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, ed. Dariusz Świecki, LEX/el. 2023, thesis 2.

summon them and question them as a witness. Therefore, such a lawyer or legal adviser is not even required to appear when summoned, if the summons itself states that they will be questioned about those matters.[11] The absolute inadmissibility in evidence also applies to clergy members of religions that are legally recognised and that provide for individual confession, which is confidential. Clergy members who are no longer performing their priestly service[12] are also bound by the seal of confession. Those individuals, who share an absolute duty of confidentiality, are exempt from the obligation specified in Article 240 § 1 of the Criminal Code.[13] On the other hand, it is emphasised that in cases where there is suspicion of the commission of a crime against a minor, the hierarchy of values adopted by the legislature is of significant importance. The legislature places a higher value on protecting the victim's interests, when it is a child, over the right to privacy and requires individuals who obtain reliable information concerning the commission of a crime within the scope of their professional secrecy, but associated with less significant legal interests,[14] to report such information. Therefore, the professional secrecy of doctors and journalists does not free them from the obligation specified in Article 240 of the Polish Criminal Code.[15]

It should be emphasised that medical confidentiality is not absolute and there are special circumstances in which disclosure of confidential information is possible. The act on the profession of doctor and dentist proves that the obligation to maintain professional secrecy does not apply if maintaining confidentiality may pose a danger to the life or health of

11 See: Jacek Izydorczyk, „Tajemnica obrończa a tajemnica adwokacka," in *Etyka adwokacka a kontradyktoryjny proces karny*, eds. Jacek Giezek and Piotr Kardas (Warsaw: Wolters Kluwer 2015), 300; see also: Jarosław Zagrodnik, *Obrońca i pełnomocnik w procesie karnym i karnym skarbowym* (Warsaw: Wolters Kluwer, 2020), 77.

12 See: Michał Błoński, „Zakazy dowodowe," in *Meritum. Postępowanie karne*, ed. Dariusz Świecki (Warsaw: Wolters Kluwer, 2019), 509.

13 See: Maria Szewczyk, Adam Wojtaszczyk, and Witold Zontek, „Komentarz do art. 240 k.k.," in *Kodeks karny. Część szczególna. Tom II. Część II. Komentarz do art. 212–277d*, eds. Włodzimierz Wróbel and Andrzej Zoll, LEX/el. 2023, thesis 16.

14 See: Królikowski, „Problemy z nowym zakresem obowiązku powiadomienia o przestępstwie," 10.

15 See: Szewczyk, Wojtaszczyk, and Zontek, „Komentarz do art. 240 k.k.," thesis 16; Razowski, "Komentarz do art. 240 k.k.," thesis 8.

the patient or other individuals.[16] There is no doubt that the crime of child's sexual abuse threatens his or her health and life, so if the information held by a doctor gives grounds for such a belief (certainty of the commission of the offence does not have to be 100% but its occurrence must be significant), invoking the danger to the child's health to waive medical confidentiality is justified. According to Article 240 § 1 of the Polish Criminal Code, a doctor who has the relevant knowledge of the symptoms of sexual abuse of a child has a legal obligation to report the offence to law enforcement authorities under Article 200 of the Polish Criminal Code because of the literal wording of Article 40 § 2 item 1 of the act on the profession of doctor and dentist.[17]

In the case of journalists, the grounds for exemption from the obligation to maintain professional secrecy under Article 240 of the Polish Criminal Code are provided for in Article 16 item 1 of the Act of 26 January 1984 – Press Law, clearly indicating that a journalist is exempt from the obligation to maintain professional secrecy when the information, press material, letter to the editorial office, or other content of this nature concerns the offence specified in Article 240 § 1 of the Criminal Code or the author or person providing such content exclusively to the journalist agrees to disclose his on her name or the content itself.[18] In addition, when there is a suspicion of violence against a child or child abuse, the "Blue Cards" procedure also applies, according to which a medical professional, including a doctor, nurse, midwife and paramedic, is obliged to provide the child with information about the possibilities of obtaining assistance and support, and about the right to obtain a free medical certificate on determining the causes and types of bodily injuries related to the use of domestic violence.[19]

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16 Art. 40 sec. 2 point 3 of the Act of December 5, 1996 on the profession of doctor and dentist, consolidated text: Journal of Laws of 2022, item 1731, as amended [hereinafter: The Act on the Profession of Doctor and Dentist].

17 See: Piotr Bogacki, „Problematyka wykorzystania seksualnego dziecka w kontekście odpowiedzialności karnej lekarza za niezawiadomienie o przestępstwie," *Wojskowy Przegląd Prawniczy*, no. 2 (2021): 133.

18 Consolidated text: Journal of Laws of 2018, item 1914, as amended.

19 § 14 sec. 1–3 of the Ordinance of the Council of Ministers of September 13, 2011 on the "Blue Cards" procedure and templates of the "Blue Card" forms, Journal of Laws 2011 No. 209, item 1245.

Actions involving a child who is suspected of being affected by domestic violence should, if possible, be conducted in the presence of a psychologist.[20]

In the related literature, it is emphasised that the offence under Article 240 of the Polish Criminal Code is a common but also individualised offence,[21] which means that the obligation to make a report arises only when the information about the offence obtained by a person is reliable.[22] The message must be reliable objectively and subjectively as well as impartially. The potential informant's own belief that the finding deserves recognition and is convincing is not sufficient. It is necessary to relate the finding to objective factual circumstances. The subjective condition is closely related to the denouncer and is based on the internal conviction that an offence has been committed, which is based on existing evidence.[23] After obtaining reliable information about the prohibited act, the obligation under Article 240 § 1 of the Criminal Code should be fulfilled immediately. The term "immediately" should be understood as "without undue delay" and the determination of the specific temporal scope of this obligation will depend on the situation in which the perpetrator is found.[24]

It should be noted that the obligation to immediately report the commission of a paedophilia offence under Article 200 of the Polish Criminal Code, which applies to any person who has information concerning a punishable preparation or attempt or the commission of a prohibited act, was established upon the entry into force of the Act of 23 March 2017 amending the Criminal Code, i.e. the Act on Juvenile Delinquency Proceedings and the Code of Criminal Procedure.[25] However, the legislator did not include any special intertemporal provision in the amended Article 240 of the Criminal Code, which would allow to directly determine that the amended provision applies to persons who receive such information after the entry into force of this provision.

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20 § 5 sec. 3 of the Ordinance of the Council of Ministers of September 13, 2011.

21 See: Razowski, „Komentarz do art. 240 k.k.," thesis 3 and 4.

22 See: Marek Mozgawa, „Komentarz do art. 240 k.k." in *Kodeks karny komenatrz aktualizowany*, ed. Marek Mozgawa, LEX/el. 2023, thesis 5.

23 See: Królikowski, „Problemy z nowym zakresem obowiązku powiadomienia o przestępstwie," 17–18.

24 See: Wiak, „Komentarz do art. 240 k.k.," 1373–1374.

25 Journal of Laws 2017, item 773.

In practice, this has led to many interpretative difficulties, especially on the part of those appointed to deal with cases of paedophilia offences. This could be exemplified by the actions taken by the State Committee for the investigation of cases of acts against sexual freedom and morality committed against persons under the age of fifteen,[26] following the receipt of a report regarding commission of the offences by two bishops, governed under Article 240 § 1 of the Criminal Code (the clergy's failure to report offences under Article 200 of the Criminal Code), that the State Committee on Paedophilia then forwarded to the competent district prosecutor's office. However, the prosecutor refused to institute an investigation due to the lack of elements of a prohibited act, taking the position expressed in the statement of reasons, that the obligation to make an immediate report must always be related to the moment of obtaining reliable information about a prohibited act. The State Committee on Paedophilia expressed a different view, arguing that the term "immediately" should be related not to the day of obtaining information about the prohibited act but to the day of imposing criminal liability for the failure to report such an act. Due to the emergence of divergent views on the interpretation of the amended provision of Article 240 § 1 of the Criminal Code, the State Committee on Paedophilia submitted requests to the courts examining the case to consider the need to refer to the Supreme Court in order to resolve a legal issue requiring a fundamental interpretation of the act.[27]

Considering the above issue, the Supreme Court stated that:

> The phrase "having reliable information" used in Article 240 § 1 of the Criminal Code should be understood as the state of knowledge of the entity at the time of committing the act; the term "immediately" refers not to the time of obtaining information about the prohibited act added to the catalog of offenses listed in Article 240 § 1 of the Criminal Code by the Act of March 23, 2017 amending the Criminal Code, the Act on Juvenile Delinquency Proceedings

[26] The State Committee on Paedophilia operates on the basis of the Act of 30 August 2019 on the State Committee for the Prevention of Sexual Abuse of Minors under 15 years of age, consolidated text: Journal of Laws 2020, item 2219, as amended [hereinafter: the Act on the State Committee on Paedophilia].

[27] The second report of the State Committee for Clarifying Cases of Actions Against the Sexual Freedom and Morality of Minors under 15 years of age, 26–29, accessed March 10, 2023, https://pkdp.gov.pl/wp-content/uploads/2022/12/raport-drugi-www-1.pdf.

and the Code of Criminal Procedure (Journal of Laws of 2017, item 773), but to the moment when the obligation to denounce was updated, which occurred on July 13, 2017; the only causative act of the act prohibited under Article 240 § 1 of the Criminal Code defines the verb "not reporting".[28]

In the cited resolution, the Supreme Court expressed the view that individuals who had reliable information about the sexual abuse of a child and did not report it to law enforcement authorities were also subject to punishment if they had obtained the information before July 13, 2017 (the entry into force of the amendment to Article 240 of the Criminal Code), thus resolving the intertemporal issue and precisely defining when the obligation to denounce arises, which is significant from the point of view of actions taken by the individuals appointed to deal with cases of paedophilia. The interpretation of the definition of the offence under Article 240 § 1 of the Criminal Code adopted by the Supreme Court means that the application of this provision to persons who obtained reliable information about the offence under Article 200 of the Polish Criminal Code before July 13, 2017 does not violate the *lex retro non agit* principle because the obligation to report is not imposed earlier than the date on which the amendment entered into force. Michał Królikowski, in the context of the amendment to Article 240 of the Polish Criminal Code, has pointed out one important issue, namely that having detailed knowledge on the subject matter at issue, which may require to be precisely recollected and the very fact of possessing such knowledge may even require to be recollected, is the precondition for holding a person accountable who has reliable information about a crime committed before the amended version of Article 240 of the Criminal Code came into force.[29] However, the Supreme Court emphasised in the substantiation of the resolution that such a position was groundless, especially in the situations where the information about the prohibited act under Article 200 of the Polish Criminal Code had reached the person

[28] Polish Supreme Court, Judgement of July 1, 2022, Ref. No. I KZP 5/22, OSNK 2022/9/32, LEX No. 3361947.

[29] Królikowski, „Problemy z nowym zakresem obowiązku powiadomienia o przestępstwie," 19–20.

responsible for the offence under Article 240 § 1 of the Polish Criminal Code shortly before July 13, 2017.[30]

The notification of an offence under Article 200 of the Polish Criminal Code can be submitted to any law enforcement authority (police, prosecutor's office, Internal Security Agency, Customs Service, Central Anti-Corruption Bureau, Military Gendarmerie, and other authorities provided for in specific provisions referred to in Article 312 of the Polish Code of Criminal Procedure). The notification does not require any specific form (it can be verbal, written, submitted over the telephone, via electronic mail or even in the form of a message). It is not necessary for the notification to be addressed to the exact authority that is objectively competent to run the case, either (the perpetrator may therefore, for example, notify the police instead of the Military Gendarmerie).[31] As of 26 September 2019[32] suspicion of an offence under Article 200 of the Polish Criminal Code can also be reported to the State Committee on Paedophilia, that is obliged to refer the case to the prosecutor's office.[33] Information can be submitted in writing or in person during the so-called "hearing" at the Commission's headquarters. Reporting to the State Committee on Paedophilia is equivalent to informing law enforcement authorities.[34]

In addition to the injunction specified in Article 240 of the Polish Criminal Code, there is also a social obligation to report a crime, as governed by Article 304 §1 of the Code of Criminal Procedure, that states: "Anyone who learns of a crime prosecuted ex officio has a social obligation to report it to the prosecutor or the police. The provisions of Article 148a and Article 156a shall apply accordingly."[35] This is a classic *lex imperfecta*, as its implementation is not guaranteed by any criminal sanction but is subject

30 Cf. Anna Wilk, „Skutki nowelizacji art. 240 k.k. dla odpowiedzialności karnej za niezawiadomienie o przestępstwach seksualnych. Glosa do uchwały Sądu Najwyższego – Izba Karna z dnia 1 lipca 2022 r., I KZP 5/22," *Orzecznictwo Sądów Polskich*, no. 1 (2023): 52–54.

31 See: Mozgawa, „Komentarz do art. 240 k.k.," thesis 7.

32 From the date of entry into force of the Act on the State Committee on Paedophilia.

33 Art. 3 section 2 item 1 of the Act on the State Committee on Paedophilia.

34 Tasks of the State Commission against the sexual exploitation of minors under the age of 15, accessed March 10, 2023, https://pkdp.gov.pl/o-komisji/zadania/.

35 Consolidated text: Journal of Laws 2022, item 1375, as amended.

only to the judgement in terms of the moral and ethical aspect.[36] The failure to fulfil the above obligation may result in social responsibility associated with stigmatisation of behavior, which may be particularly important in the era of mass media influence and in the reality of the uncensored Internet.[37] However, Article 304 § 2 of the Code of Criminal Procedure contains a legal obligation to report a crime, limited in relation to the social obligation by indicating the categories of bodies on which it rests. The legislator has assumed that the reporting obligation rests on the State and local government institutions. Additionally, information about the commission of an offence prosecuted *ex officio* must be obtained in connection with their activity. The obligation that accompanies the reporting imperative is the obligation to take (necessary) measures aimed at preventing the erasure of traces and evidence of the crime, which must be ensured until the arrival of the authority appointed to prosecute crimes or until the authorised person issues an appropriate decision. The obligation to report a crime rests on the persons authorised to represent the State and local government institutions, e.g. this obligation does not rest on a school guidance counsellor but on the school principal. The failure to fulfil the institutional obligation to report a crime is penalised by law under Article 231 of the Criminal Code.[38]

3. The Extent of the Obligation to Report Cases of Child Sexual Abuse in Austria

The obligation to report cases of child sexual abuse in Austria has been governed by the provisions of the Code of Criminal Procedure and the Child and Youth Protection Act.[39] This obligation applies to certain professional groups and institutions working with children and young people. The obligation is stipulated by § 78 section 1 of the Austrian Code of Criminal Procedure, and the report is submitted to law enforcement authorities:

36 See: Wiak, „Komentarz do art. 240 k.k.," 1372.

37 See: Kurowski, „Komentarz do art. 178 k.p.k.," thesis 2.

38 Cf. Alfred Staszak, „Komentarz do art. 304 k.p.k.," in *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, ed. Dobrosława Szumiło-Kulczycka. LEX/el. 2022, thesis 8.

39 Mitteilungspflicht an die Kinder- und Jugendhilfe, accessed March 3, 2023, https://www.gewaltinfo.at/recht/mitteilungspflicht/.

the police or the prosecutor's office.[40] The obligation to submit this report is imposed on: courts, authorities, other public supervisory bodies (such as family and juvenile courts, school authorities, federal police) as well as child and youth care or educational institutions (such as kindergartens, nurseries, schools, day-care centres, after-school care facilities), individuals who care for and educate children and young people on a freelance basis, e.g. babysitters, psychosocial counselling facilities such as an ombudsman for children and the youth, family, women's or parenting counselling facilities, child protection and violence facilities, shelters for women, and private child and youth care facilities, freelancers hired to care for children and young people. The obligation to report is also imposed on the individuals who deal with children in their workplace: hospitals and health resorts, home care facilities, members of legally regulated medical professions (such as doctors, dentists, clinical psychologists, health psychologists, psychotherapists, midwives, occupational therapists, speech therapists, qualified nurses, massage therapists, and music therapists).[41] They are all set forth in the provisions of the Code of Criminal Procedure, not the Criminal Code. Therefore, the failure to submit the report must be treated as the violation of a legal obligation, that is not subject to criminal sanctions, rather than a criminal offence.

According to the provisions of the Austrian Child and Youth Protection Act,[42] the report must include the name or other personal data of the abused person, a description of the case along with the substantiation why the informant considers the particular case to be a case of sexual abuse.[43]

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40 § 78 section 1 of the Austrian Code of Criminal Procedure Strafprozeßordnung 1975 (StPO): „Wird einer Behörde oder öffentlichen Dienststelle der Verdacht einer Straftat bekannt, die ihren gesetzmäßigen Wirkungsbereich betrifft, so ist sie zur Anzeige an Kriminalpolisei oder Staatsanwaltschaft verpflichtet".

41 § 37 section 1, 1–6 of Bundesgesetz über die Grundsätze für Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche (Bundes-Kinder- und Jugendhilfegesetz 2013 – B-KJHG 2013), accessed November 29, 2022, https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008375.

42 Bundesgesetz über die Grundsätze für Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche (Bundes-Kinder- und Jugendhilfegesetz 2013 – B-KJHG 2013), https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008375.

43 § 34 section 4 of Bundesgesetz über die Grundsätze für Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche (Bundes-Kinder- und Jugendhilfegesetz

The report must also specify the data of the potential perpetrator.[44] Furthermore, the Child and Youth Protection Act contains the provision that the obligation to submit the report waives the obligation of confidentiality contained in other specific regulations.[45] An identical provision is also provided for in § 79 sentence 2 of the Austrian Code of Criminal Procedure.[46]

The obligation to report the suspicion or the fact of committing an act of sexual abuse is always imposed on institutions, as long as the persons accountable for such reporting do not perform their activities independently. Which specific person is to submit the report should be assessed in accordance with the organisation's internal bylaws and communication principles. Therefore, it is not an individual obligation that is imposed on a natural person but an obligation of the organisational unit. In the event of disagreement within the organisation as to the existence of a suspected threat, the right to inform the Office for Children and Youth remains. Natural persons are not obliged to submit the report. However, if a natural person reports the offence of child sexual abuse, there is no possibility for such a report to be ignored by law enforcement authorities – they must take action to clarify the circumstances of the case.[47]

The obligation to report arises if there is reasonable suspicion that a child is or has been sexually abused, neglected, or otherwise seriously endangered, and such a danger has been observed in the course of professional

2013 – B-KJHG 2013), https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008375, accessed November 29, 2022.

44 § 34 section 4 of Bundesgesetz über die Grundsätze für Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche (Bundes-Kinder- und Jugendhilfegesetz 2013 – B-KJHG 2013), https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20008375.

45 § 34 § 5 of Bundesgesetz über die Grundsätze für Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche (Bundes-Kinder- und Jugendhilfegesetz 2013 – B-KJHG 2013) „Berufsrechtliche Vorschriften zur Verschwiegenheit stehen der Erfüllung der Mitteilungspflicht gemäß Abs. 1 und Abs. 3 nicht entgegen."

46 The Austrian Code of Criminal Procedure Strafprozeßordnung 1975 (StPO) StF: BGBl. Nr. 631/1975 (WV) „Eine Berufung auf bestehende gesetzliche Verschwiegenheitspflichten ist insoweit unzulässig".

47 Gewalt an Kindern und Jugendlichen, Information – Hilfsangebote – Prävention. Kinder- und Jugendanwaltschaft Tirol, 2019, p. 39.

activity.[48] The territorial jurisdiction depends on the child's place of residence, not on the registered seat or principal office of the facility. The offence of child sexual abuse must be reported immediately after assessing the existence of a specific suspicion and the report must be submitted in a written form.

The report must include the following information: personal observations, the victim's history, professional conclusions as the reasons and grounds for the suspicion of the child's exposure to danger, names and personal identity particulars of the child and parents as well as contact details of those obligated to report – any anonymous reporting is not possible.

4. The Lack of the Obligation to Report Child Sexual Abuse in the Legislation of the Federal Republic of Germany

The German legislator has not resolved to govern the failure to report the sexual abuse of children and adolescents in the criminal law. However, there are specifically other provisions governing – in a number of ways – the obligation to report such cases. Pursuant to § 294a of the Fifth Book of the German Social Code (SGB V),[49] doctors are obliged to provide health insurance companies with the necessary data, including information on the causes and possible perpetrators, if there are signs of health hazards caused by third parties. This also includes the obligation to report acts and perpetrators of child abuse or sexual abuse. It is recognised that the doctor is obliged to report such cases, as otherwise the doctor may be held criminally liable for bodily injury caused by omission – this is § 323c of the German Criminal Code (the failure to provide assistance in the event of danger).[50]

48 § 79 section 2 of the Austrian Code of Criminal Procedure Strafprozeßordnung 1975 (StPO).

49 Sozialgesetzbuch (SGB) Fünftes Buch (V) - Gesetzliche Krankenversicherung - (Artikel 1 des Gesetzes v. 20. Dezember 1988, BGBl. I S. 2477.

50 Prof. Dr. jur. Julia Zinsmeister, Rechtliche Handlungsmöglichkeiten und -pflichten der Einrichtungsleitungen bei Verdacht auf sexualisierte Gewalt in Institutionen, zKK-Nachrichten 1/2007: Sexualisierte Gewalt durch Professionelle in Institutionen, pp. 17–20.

5. The Obligation to Report the Crime of Child Sexual Abuse and Canon Law

It should be emphasised that the obligation to report such crimes was set forth in canon law by Pope Francis. Additionally, the tort of "concealment" was also implemented therein. The Pope demanded specific measures from bishops: "The crimes of sexual abuse offend Our Lord; cause physical, mental and spiritual damage to the victims; and harm the community of the faithful."[51] In a few words, Pope Francis indicated how terrible sexual abuse by clergy was for those affected by it. In this way, he put forward new standards for the internal church procedure. This applies primarily to the practice of reporting in dioceses all around the world: since 2019 priests and monks have been required to fully and immediately report suspected cases to the competent church authorities. Each diocese was obliged to establish one or more "easily accessible" reporting points within a year, where the suspicion of child sexual abuse could be reported.

6. Conclusions

It should be emphasised that neither in Austria nor in Germany has a criminal sanction been set forth for the failure to report child sexual abuse crimes. This is different in the Polish law in which the Criminal Code explicitly provides for such a sanction. The Polish legislator, by stipulating the criminal liability for the failure to report the commission of a paedophilia crime, has assumed that the primary task of criminal law is to protect the child's welfare. The welfare of the child is one of the most important constitutional principles of the Republic of Poland, directly resulting from the principle of the common good and the principle of human dignity. By sanctioning the failure to report the commission of a paedophilia crime to law enforcement authorities, the legislator has secured the welfare of the child by countering sexual abuse of minors. Moreover, guided by the need to avoid double victimisation of the victim, it has also excluded the criminal liability for the failure to report the crime by its victim, which is governed by Article 240 § 1 of the Criminal Code.

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[51] Überfällig, aber nicht genug, accessed March 3, 2023, https://www.dw.com/de/kommentar-kirchliche-meldepflicht-bei-missbrauch-%C3%BCberf%C3%A4llig-aber-nicht-genug/a-48676708.

In Austrian and German law, it is possible to be prosecuted for sexual abuse of children under the provisions governing the failure to provide assistance, although the Austrian legislation provides for the obligation to report such crimes, which stems from the Austrian Code of Criminal Procedure and the Child and Youth Protection Act. In contrast, the German legislator has set forth those provisions in the Fifth Book of the German Social Code, while also specifying the limited extent of that obligation. The moment at which the obligation to report the crime of paedophilia arises is also different – in Poland it comes about whenever the information is obtained and should be fulfilled immediately, while in Austrian law it arises from obtaining the information about such a crime in connection with professional duties, and in the German legal system, there is no such a obligation.

The Austrian and German legislators are cautiously restrained, arguing that the obligation to report such crimes may lead to lower detection rates or even the concealment of the victimised child by those close to them, resulting in even greater harm caused to the child. The legislator aims to take into account the concern, expressed by doctors and psychotherapists who work with children and adolescents, that reporting a crime and taking legal measures could create conflicts or have other consequences that could jeopardise the success of the child's treatment. It should also be emphasised that in both countries, important roles in preventing this type of crime are played by training educators, parents, and children (teaching children assertive behavior and to say "no") raising awareness among children about how to recognise dangers online and how to deal with them.

In the analysed legal systems, the required form of reporting also varies. In the Polish legal system, it is completely optional – such a report can be submitted even by means of a text message sent by phone (text message), while in the Austrian legal system, it is a formalised and elaborate form – specific suspicion must be indicated, at least a brief description of why such suspicion has arisen, and the person to whom the matter relates must be identified.

To sum up, it should be noted that the Polish, Austrian, and German legislators have aimed to fully implement the provision of Article 19

of the Convention on the Rights of the Child,[52] according to which the State authorities shall take all appropriate legislative, administrative, social, and educational steps to protect the child against any forms of physical or mental violence, including sexual abuse. In the Polish legal system, fulfilling the convention requirement involves securing the child's welfare by sanctioning the failure to report by anyone with reliable information about the commission of a paedophilia crime to law enforcement authorities. However, in Austria and the Federal Republic of Germany, the emphasis is primarily on implementing various preventive measures that include victim prevention, which involves early detection of children affected by sexual violence, preventing further sexual assaults, and providing supportive therapies as well as precluding perpetrators from relapsing into crime, which involves providing them with psychological or criminological therapy.

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[52] Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989, Journal of Laws 1991, No. 120, item 526.

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A Double-Edged-Sword Approach to Fighting Pandemics: Patent Waivers and Incentives to Innovate

Katarzyna Kostka
M.A., Legal Consultant at Timelex, Brussels, correspondence address: Rue Joseph Stevens 7, 1000 Bruxelles, Belgium, e-mail: katarzyna.kostka@emle.eu

Mitja Kovač
Prof. Dr., University of Ljubljana, School of Economics and Business, correspondence address: Kardeljeva ploscad 17, 1000 Ljubljana, Slovenia, e-mail: mitja.kovac@ef.uni-lj.si
https://orcid.org/0000-0003-0308-1865

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Abstract: Although continents recently experienced an apocalyptic pandemic that posed a mortal danger to millions of people, a new, even deadlier pandemic could soon emerge… The paper seeks to address the role played by patent waivers and current contractual arrangements in the pharmaceutical industry in addressing the dangers caused by the current and future pandemics. The process of waiving patents is explored where it is argued that it sadly cannot amount to the knight in shining armour that everyone has been expecting. Due to the lack of coordination, the tremendously long process, and the potential block in innovation arising from pharmaceutical companies having smaller incentives, more attention must be paid to other alternative institutional solutions. Drawing from the economics literature on innovation in the pharmaceutical sector, a conceptual framework is proposed for improved legal intervention in the case of patent waivers in international intellectual property law instruments. In addition, the paper provides a comparative law and economics treatment of current patent waivers in US, EU, and international law instruments.

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1. Introduction

Even though the COVID-19 pandemic might seem less relevant in the light of the successful mitigation policies and Russia's current invasion of Ukraine, thus becoming a non-significant, outdated, and minor topic, virologists are warning that a more deadly pandemic could be coming. Namely, H5N1, known more formally as avian influenza, has long been on the horizon of scientists' fears, with an outbreak of it on a Spanish mink farm having triggered fears of another pandemic. While it is fortunate that this pathogen has thus far not infected many humans when it has, 56% of those known to have contracted it died.[1] Its inability to spread easily, if at all, from one person to another has kept it from leading to a pandemic. However, as the virologist Peacock suggests, this is no longer the case.[2] Having long caused outbreaks among poultry, the virus is infecting ever more migratory birds, allowing it to spread more widely, even to various mammals, raising the risk that a new variant could spread to and among people.[3] At a time when this new pathogen threatens to spread, we lawyers must harness the lessons learned from the COVID outbreak.

The coronavirus disease pandemic created unprecedented demand for a new type of medicine. Pharmaceutical companies worked around the clock to come up with state-of-the-art inventions, gaining a temporary, legal monopoly position in return. Such a position allows a company to charge above its marginal costs, which might limit some states' ability to purchase vaccines. The ensuing system has led to rising inequality in how the vaccines are administered, with low-income countries being particularly affected.

To address the increasing inequality in administering vaccines, Costa Rica for example proposed the creation of a voluntary emergency

1 Agüero Montserrat et al., "Highly Pathogenic Avian Influenza A(H5N1) Virus Infection in Farmed Minks, Spain, October 2022," *Eurosurveillance* 28, no. 3 (2023), https://doi.org/10.2807/1560–7917.es.2023.28.3.2300001.

2 Kai Kupferschmidt, "'Incredibly Concerning': Bird Flu Outbreak at Spanish Mink Farm Triggers Pandemic Fears," *Science*, January 24, 2023, https://www.science.org/content/article/incredibly-concerning-bird-flu-outbreak-spanish-mink-farm-triggers-pandemic-fears.

3 Ibid.

Technology Intellectual Property Pool.[4] Along this line of reasoning, Rutschman states that less property-like protection could effectively remove some of the most salient transactional obstacles to the development and commercialisation of new and better COVID-19 vaccines.[5] Further, while examining the market dynamics of infectious disease products Darow, Sinha and Kesselheim claim that the "legislative initiatives launched over the past 15 years to overcome the shortcomings of the patent system have had limited success, in part because they do not adequately address the reasons underlying the disconnect between patents and the antimicrobial market."[6] Johnson and Bailey contend the current US patent law acts to limit the free flow of scientific research findings, and suggest a government-funded rewards system as an adjunct to the patent system to incentivise pandemic-relevant research and its rapid publication.[7] Rimmer notes the constant external and internal pressure on pharmaceutical companies to view the coronavirus pandemic as a profit-making opportunity.[8] Further, in excess of 140 other organisations and individuals established an initiative calling on the WIPO to ensure that intellectual property (IP) regimes support, namely do not impede, efforts to both fight new coronavirus outbreaks and their consequences.[9] Roy advocates a waiver of IP rights on COVID-19 vaccines, arguing that market failure and underinvestment in research and development arguments do not hold when granting

4 James Love, "President and Minister of Health of Costa Rica Ask Who to Create Global Pool for Rights in COVID-19 Related Technologies," *Knowledge Ecology International*, March 24, 2020, https://www.keionline.org/32556.

5 Ana Santos Rutschman, "Property and Intellectual Property in Vaccine Markets," *Texas A&M Journal of Property Law* 7, no. 1 (2019): 110–32, https://doi.org/https://doi.org/10.37419/JPL.V7.I1.4.

6 Jonathan J. Darrow, Michael S. Sinha, and Aaron S. Kesselheim, "When Markets Fail: Patents and Infectious Disease Products," *Food & Drug L J* 73, no. 3 (2018): 361. See also: Ana Santos Rutschman, "IP Preparedness for Outbreak Diseases," *UCLA Law Review* 65 (2018): 1200.

7 Eric E. Johnson and Theodore C. Bailey, "Urgent Legal Lessons from a Very Fast Problem: COVID-19," *Stanford Law Review* 73 (2020), https://doi.org/https://ssrn.com/abstract=3567412.

8 Matthew Rimmer, "The Race to Patent the SARS Virus: The TRIPS Agreement and Access to Essential Medicines," *Melbourne Journal of International Law 5,* no. 2 (2004): 335–74.

9 Teresa Nobre, "Open Letter to WIPO: Intellectual Property and COVID-19," COMMUNIA Association, April 16, 2020, https://communia-association.org/2020/04/03/open-letter-wipo-intellectual-property-covid-19/.

a patent to COVID vaccines.[10] Thambisetty et al. argue that a waiver under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement is first a necessary and proportionate legal measure for overcoming IP barriers in a direct, consistent and efficient fashion, enabling more companies to freely produce COVID-19 vaccines and other health technologies without fear of infringing another party's IP rights and the attendant threat of litigation. Second, the TRIPS waiver acts as an important political, moral, and economic lever for encouraging solutions aimed at global equitable access to vaccines, which is in the broader interest of the global public.[11]

Moreover, the World Health Organisation, India, South Africa and 60 other states put forward a "TRIPS waiver" proposal.[12] At a meeting of the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS) on 6 May 2022, WTO members additionally discussed the recent document that had emerged from the informal process conducted with the Quad (European Union, India, South Africa, United States) for an IP response to COVID-19 and adopted an oral status report that was to be submitted by the chair of the TRIPS Council.[13]

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10 Gopal Krishna Roy, "An Economic Case for Waiving Intellectual Property Rights on Covid Vaccines," *India Quarterly: A Journal of International Affairs* 78, no. 1 (2022): 143–47, https://doi.org/10.1177/09749284221078463. See also: "A Patent Waiver on Covid Vaccines Is Right and Fair," *Nature* 593, no. 7860 (2021): 478, https://doi.org/https://doi.org/10.1038/d41586-021-01242-1.; Guido Cozzi, "Shall We Fear a Covid-19 Patent Waiver?," *SSRN Electronic Journal*, 2022, https://doi.org/10.2139/ssrn.4015067.

11 Siva Thambisetty et al., "The Trips Intellectual Property Waiver Proposal: Creating the Right Incentives in Patent Law and Politics to End the Covid-19 Pandemic," *SSRN Electronic Journal*, 2021, https://doi.org/10.2139/ssrn.3851737.

12 In October 2020, India and South Africa led a group of LMICs requesting the WTO to waive certain TRIPS provisions. The request, modified on 25 May 2021, asks for a 3-year waiver of IP protection for products and technologies related to COVID-19 prevention, treatment and containment. Normally, WTO protections for IP last around 20 years.

13 The Quad actually adopted a problem-solving approach aimed at identifying practical ways of clarifying, streamlining and simplifying how governments can override patent rights, in certain conditions, to enable diversification of the production of COVID-19 vaccines. However, this also means that the TRIPS Council has not yet completed its consideration of the revised waiver request and will therefore continue its consideration and report back to the General Council as stipulated in Article IX:3 of the Marrakesh Agreement; World Trade Organisation, "TRIPS Council Hears Initial Reactions to Quad's Outcome Document on IP COVID-19 Response," May 6, 2022, https://www.wto.org/english/news_e/news22_e/trip_06may22_e.htm.

Finally, some EU countries have been more reluctant and sceptical of a complete waiver of IP rights and offered an alternative focused on export restrictions, pledges by vaccine developers, and the flexibility of the existing World Trade Organisation rules (i.e., by relying on an existing compulsory licensing instrument).[14] Namely, during the worst phases of the COVID-19 pandemic and even now, several changes were suggested for the policy toolkit, and one of them concerns (temporary and/or partial) waivers and exemptions of relevant medical products (vaccines, diagnostic, therapeutic) from the reach of IP rights, notably the patent rights of the pharmaceutical companies responsible for the corresponding inventions.

This paper joins in this critical debate by attempting to show that the intertwined static and dynamic efficiency and the *ex ante* vs. *ex post* optimal innovation incentive stream may be a source of additional, insightful guidance for structuring the current discussion on IP rights and potential future pandemics. The paper also seeks to outline ways to ensure the most efficient outcome for all contracting parties in future cases. That is, when a health emergency arises it is crucial to have policy instruments (legal or otherwise) in place that encourage research, development, production, timely distribution, and equal and general access to effective medical tools, for vaccination against and the diagnosis and treatment of pathogens.

This contribution adds to the IP literature and previous work of the authors in several noteworthy respects.[15] First, the best way of tackling contractual bottlenecks in the event of a pandemic or other health emergency is analysed, largely based on the ongoing coronavirus disease outbreak. Ways of striking a balance between incentivising big pharma to make quick and large investments in research and development and making it accessible to

[14] In its recent report, the EU pledges its commitment to the TRIPS Agreement, affirming that the agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to vaccines and medicines for all. In this connection, we reaffirm the right of WTO members to use the provisions of the TRIPS Agreement, which provide flexibility for this purpose, including those relating to compulsory licensing in Articles 31 and 31bis; European Union, "Urgent Trade Policy Responses to the COVID-19 Crisis: Intellectual Property," IP/C/W/680 and IP/C/W/681.

[15] Mitja Kovac and Lana Rakovec, "The COVID-19 Pandemic and Long-term Incentives for Developing Vaccines: Patent Law under Stress," *The Journal of World Intellectual Property* 25, no. 2 (2022): 292–316, https://doi.org/10.1111/jwip.12223.

wider society. The analysis considers the question of whether patent waivers are indeed the most efficient way of balancing innovation and the equal distribution of vaccines (or whether other more efficient mechanisms exist); and the most efficient institutional arrangement for dealing with current and future health-related emergencies. Thus, the paper aims to fill the gap in the literature by providing European and international lawmakers with policy recommendations on any future potential health threats.

The analysis in this article is simultaneously positive and normative. The interdisciplinary methodology[16] employed can enrich a theoretical and comparative study of this kind by helping to draft better rules in the day-to-day making of law and policy. However, several caveats are appropriate. First, the situation concerning developing COVID-19-related medicine is unprecedented in human history, meaning that any inferences derived from the recent pandemic may not be accurately extrapolated when it comes to developing future vaccines in non-pandemic times. Second, pharmaceutical firms may instead of patent protection rely on trade secrets and confidential know-how to protect their vaccines and production.[17] Third, potential infringements of, for instance, mRNA vaccines may not be very likely to occur.[18] Fourth, the enforcement of patent rights by pharmaceutical firms for various strategic reasons is not very likely. Although the paper is therefore unable to conclusively identify an appropriate IP law regime, the foundations are laid to better guide the ongoing debate.

This paper is organised as follows. In section 2, the general conceptual framework and current contractual and institutional arrangements are outlined. Section 3 examines the roles of patent waivers and focuses on

16 Mark Beuker, "Combining Legal and Economic Theory. An Interdisciplinary Approach to Dutch and Polish Family Provisions in Succession Law," *Review of European and Comparative Law* 47, no. 4 (2021): 49–65, https://doi.org/10.31743/recl.12840. For a synthesis of law and economics scholarship, see Gerrit De Geest, *Contract Law and Economics – Encyclopaedia of Law and Economics*, vol. 6, 2 ed. (Edward Elgar Cheltenham, 2011). See also: Richard A. Posner, *Economic Analysis of Law*, 8 ed. (Wolters Kluwer Law & Business, 2011).

17 Hence, there might not be any IP rights issues arising over the most critical parts involved in COVID-19 vaccine manufacturing.

18 Assuming that patents are filed and granted over a specific COVID-19 vaccine and the manufacturing process thereof, only certain countries with a substantial pharma/generics presence, such as India and Korea, may possess the relevant infrastructure and human expertise to infringe such patents, making such infringement unlikely.

the ways incentives given to firms distort innovation and the fragile balance with the incentives for diffusion. Section 4 provides several, economically-inspired, instrumental insights and a set of recommendations for more sensible EU-wide, supra-national intervention. Section 5 concludes.

2. General Conceptual Framework

Much research in innovation economics is occupied with a basic understanding of the importance of internally generated economic change for the progress of the economy and the weaknesses of static economic analysis in the face of this phenomenon.[19] The first and perhaps most important insight from the economics of innovation is the recognition of the essential dynamism of the innovative process. Knowledge, inventions, and innovations created today build on those created in the past, while the benefits of an innovation are often not felt until it has undergone a dynamic, cumulative learning and diffusion process.[20]

Hodge et al. show that the COVID-19 pandemic created extreme levels of stress on local health and care systems and describe examples where they have flourished and led to new models of care or new services for rural communities.[21] Rural organisations are well-accustomed to uncertainty given their often limited and temporary funding, the high turnover of staff, and the shifting priorities of regional and state and/or provincial governments. As such, these organisations have developed a considerable absorptive capacity stemming from the need to adapt to frequent change.[22]

Operationally, they identify three key features proven to be paramount for successful innovation and response in rural communities and care systems, captured in their "what" and "how" frameworks.[23] First, a high degree

19 Bronwyn H. Hall and Nathan Rosenberg, *Handbook of the Economics of Innovation* (Amsterdam: North Holland, 2010).

20 Ibid. See also: Carolina Machado, J. Paulo Davim, and T.T. Benavides, "Social Media and Innovation: Opportunities and Challenges for Organisations," in *Organisational Innovation in the Digital Age* (Springer, 2022).

21 Samuel Petrie et al., "What a Pandemic Has Taught Us about the Potential for Innovation in Rural Health: Commencing an Ethnography in Canada, the United States, Sweden, and Australia," *Frontiers in Public Health* 9 (2021), https://doi.org/10.3389/fpubh.2021.768624.

22 Ibid.

23 Ibid.

of collaboration and connection must exist. This collaboration is not only internal to the communities themselves, but also with the government on higher levels, private businesses, and social enterprises. Many of these connections already exist in the small places we studied, but our examples of success all included collaboration by numerous stakeholders. Second, a high level of familiarity and knowledge of *local* environments must be present. The axiom that all rural communities are unique appears to hold true, whereby knowing how services are used, who provides them, and who uses which services are essential to a programme's success and adaptation. Third, there must be creativity in how limited resources can be managed and adapted, including with the use of new technologies. The most successful examples we identified responded to a resource shortage with new technologies and an adaptation to the local community context.[24]

In addition, their investigation shows the potential for innovation in rural communities and rural health and care systems.[25] Rural health and care systems can be loci of adaptation and innovation given their appropriate mix of local autonomy, strong service–community connections, high absorptive capacity, and evidence of organisational long-term stability.[26]

Moreover, in a recent paper, Frankel et al. examine the role of spill-over learning in shaping the value of exploratory vs. incremental R&D.[27] Using data from the pharmaceutical industry, they show that novel drug candidates generate more dynamic spill-overs than incremental ones. That is, despite being more likely to fail in the development process, novel drugs are more likely to inspire the development of subsequent successful drugs.[28]

Motivated by this fact, they develop a model where firms are better able to evaluate the viability of incremental drugs, but where investing in novel drugs helps firms learn about future related projects.[29] Their model provides an empirical diagnostic for assessing the relative value of evaluation

24 Ibid.

25 Ibid.

26 Ibid.

27 Alexander Frankel et al., *Evaluation and Learning in R&D Investment*, 2023, https://doi.org/10.3386/w31290.

28 Ibid.

29 Ibid.

vs. learning, namely that if firms place greater value on learning, they should then set a lower revenue threshold for investing in novel drugs relative to incremental ones.[30] Finally, they provide evidence suggesting that some of these patterns are driven by concerns about the appropriability of any spill-over knowledge.[31]

Patents exist to reward inventors for their new products and services and it is hence no surprise that pharmaceutical industries are highly oriented to profit, as reflected in the agreements they enter into. Inequalities in vaccine distribution were visible at the outset of the pandemic when those wealthier (like the USA, UK, or the EU) entered into advance purchase agreements with the jab developers.[32] Agreements with individual vaccine producers guaranteed a number of vaccines to be delivered within a specific timeframe at an already agreed price. The contracting parties agreed to a down payment, which would then partially fund the research and development of the vaccines.

For instance, on the EU level it was decided to agree as a whole to ensure "a better hedging of bets, sharing of risks and pooling of investments to achieve economies of scale, scope and speed."[33] The European Commission approved multiple advance purchase agreements to ensure its adaptiveness to new variant strains and preparedness for potential orders of additional doses in years to come.[34] It also called for a possibility to donate or re-direct vaccines to other counties within and outside Europe.[35] Nevertheless, the negotiations were not held public and all contracts (except for three

30 Ibid. They in fact find that firms place less value on learning: they are less likely to invest in novel drugs and in turn, novel drugs have higher revenues on approval.

31 Ibid.

32 Olga Gurgula and Wen Hwa Lee, "Covid-19, IP and Access: Will the Current System of Medical Innovation and Access to Medicines Meet Global Expectations?," *SSRN Electronic Journal* (2021): 61–70, https://doi.org/10.2139/ssrn.3771935.

33 European Commission, "Questions and Answers: Coronavirus and the EU Vaccines Strategy," September 24, 2020, accessed March 20, 2022, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_1662.

34 "Coronavirus: Commission Approves Contract with Valneva to Secure a New Potential Vaccine," European Commission, September 22, 2020, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_1662.

35 Ibid.

since leaked online) are available only in redacted versions, which makes analysing them challenging.[36]

Consequently, partly due to panic and partly the unprecedented scale of the situation, several privileged countries aimed to hoard the doses available for their citisens, forgetting that during a pandemic no one is safe unless everyone is safe.[37] Several academics have sought to explain such phenomena using behavioural science and, while not the focus of this paper, it provides a useful lesson for the future. Sibony underlines the issue of the lack of data surrounding the virus and the time-sensitivity of the issue, which prevented policymakers from conducting a proper cost-benefit analysis.[38] This merely added to the conflict between longer-term collective interest and short-term self-interests,[39] which many countries opted for – either individually or as part of the European community, separate from the low-income counties.

In addition, regulators must deal with the trade-offs between societal values (like health and privacy) and, simultaneously, pressure from future electoral voters.[40] The reasons stated above, according to Sibony, contributed to behavioural policymaking not based on evidence.[41]

By prioritising the immunisation of more privileged citisens, the chances of fulfilling the WHO goals of global herd immunity have declined significantly.[42] Even though the agreements did allow for intellectual property

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36 The European Consumer Organisation, "Making the Most of EU Advance Purchase of Medicines," 2021.

37 "A Global Pandemic Requires a World Effort to End It – None of Us Will Be Safe until Everyone Is Safe," World Health Organisation, September 30, 2020, https://www.who.int/news-room/commentaries/detail/a-global-pandemic-requires-a-world-effort-to-end-it-none-of-us-will-be-safe-until-everyone-is-safe.

38 Anne-Lise Sibony, "The UK COVID-19 Response: A Behavioural Irony?," *European Journal of Risk Regulation* 11, no. 2 (2020): 350–57, https://doi.org/10.1017/err.2020.22.

39 Paul A. Van Lange, Jeff Joireman, and Manfred Milinski, "Climate Change: What Psychology Can Offer in Terms of Insights and Solutions," *Current Directions in Psychological Science* 27, no. 4 (2018): 269–74, https://doi.org/10.1177/0963721417753945.

40 Ibid.

41 Ibid.

42 "Strategy to Achieve Global Covid-19 Vaccination by Mid-2022," World Health Organisation, 2021.

sharing,[43] they do not specify any other obligations of the pharmaceutical industries in this regard. As explained above, the solutions were, therefore, rushed and lacking in substance.

2.1. Consequences on the Global Level

The situation described above has led to the situation today: 73% of people are vaccinated in the EU or 66% in the USA, compared to only 14.5% of the citisens of low-income countries who have received at least one dose.[44] Vaccines have been wasted worldwide[45] and complaints have been made about the lack of transparency on the pricing point.[46] With headlines like "AstraZeneca did 'not even try' to meet Covid vaccine contract,"[47] one may deduce that the negotiations did not maximise the public's return on the advance investment.

Danish Member of the Parliament Margrete Auken highlighted "The vaccine development is a success but pre-purchase agreements are not like a gift card for the industry to use without conditions."[48] The pharmaceutical companies ultimately managed to shift the negotiations in their favour from liability exemptions for safety incidents to a lack of specific contractual clauses concerning the delivery schedules.[49] According

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43 "Advance Purchase Agreement ('APA')1 for the Development, Production, Advance Purchase and Supply of a COVID-19 Vaccine for EU Member States (SANTE/2020/C3/049)," European Commission, Directorate-General for Health and Food Safety, 2020.

44 Edouard Mathieu et al., "Coronavirus (COVID-19) Vaccinations," Our World in Data, March 5, 2020, https://ourworldindata.org/covid-vaccinations?country=OWID_WRL.

45 Anne Damiani and Giedre Peseckyte, "EU Countries Are Throwing Away Expired Vaccine Doses," EURACTIV, July 29, 2021, https://www.euractiv.com/section/coronavirus/news/eu-countries-are-throwing-away-expired-vaccine-doses/.

46 Salvatore Sciacchitano and Armando Bartolazzi, "Transparency in Negotiation of European Union with Big Pharma on COVID-19 Vaccines," *Frontiers in Public Health* 9 (2021), https://doi.org/10.3389/fpubh.2021.647955.

47 Jon Henley, "AstraZeneca Did 'not Even Try' to Meet Covid Vaccine Contract, EU Tells Court," *The Guardian*, May 26, 2021, https://www.theguardian.com/world/2021/may/26/eu-seeks-court-order-for-astrazeneca-to-supply-vaccine-doses.

48 Giedre Peseckyte, "MEPs vs Commission in Court over Vaccine Contracts," EURACTIV, October 29, 2021, https://www.euractiv.com/section/coronavirus/news/meps-vs-commission-in-court-over-vaccine-contracts/.

49 The European Consumer Organisation, "Making the Most of EU Advance Purchase of Medicines," 2021.

to the BEUC European Consumer Organisation, there is an urgent need for greater transparency of such discussions, with any exceptions being properly justified and assessed independently. There should also be more liability on the companies' shoulders for failing to meet the agreed production and distribution deadlines in the case of disrupted supply chains.[50]

As may be observed, by co-funding the development of medicines and contributing to the extraordinary profit made by pharmaceutical companies, citisens of the world have not received that much in return. Due to inefficiently allocated resources, a lack of precedents, and questionable governmental intervention, we encountered a crisis within a crisis.

3. Patent Waivers and Incentives to Innovate

Notwithstanding that the COVID pandemic is of an unprecedented scale, there were already instances of smaller health emergencies where high-income countries hoarded the available medicines (e.g., the 2009 H1N1 influenza pandemic).[51] As is widely known, we have not learned our lesson, inefficiently balancing the short- and long-term interests.[52] Such inefficiency of the international health crisis management regime have encouraged ongoing discussions on other possible solutions – for both the current pandemic and future health emergencies. One of the most prominent voices suggested the temporary introduction of a patent waiver under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, initially introduced by South Africa and India in early October 2020.[53] TRIPS is probably the most comprehensive international legal agreement on intellectual property rights, applying to World Trade Organisation (WTO) member states. Its main aims are to allocate international transfers, ensure the uniformity

50 Ibid.

51 David Brown, "Vaccine Would Be Spoken for; Rich Nations Have Pre-Existing Contracts," *The Washington Post*, May 7, 2019, https://www.washingtonpost.com/wp-dyn/content/article/2009/05/06/AR2009050603760.html.

52 Jay J. Bavel et al., "Using Social and Behavioural Science to Support COVID-19 Pandemic Response," *Nature Human Behaviour* 4, no. 5 (2020): 460–71, https://doi.org/10.1038/s41562–020–0884-z.

53 Council for TRIPS, "Waiver from Certain Provision of the TRIPS Agreement for the Prevention, Containment, and Treatment of COVID-19 (IP/C/W/669)," World Trade Organisation, 2020.

of intellectual rights regulation, and promote access to medicines for all.[54] The latter was exactly what India and South Africa aimed to accomplish – in a landmark proposal, they enquired to suspend the IP rights linked to the COVID-19 inventions to balance the vaccine rollouts around the globe. The waiver was to cover all sorts of IP rights related to tackling the pandemic for, at least, the duration of the health crisis. According to both India and South Africa, a patent waiver would aid with the manufacturing, research and development, and distribution of the vaccines, in the end benefitting us all.[55]

What explains why the patent waiver has been so heavily relied on as the best possible solution? Such a technology transfer allows for the sharing of innovative products, processes, and additional, otherwise protected, intellectual property goods. Under TRIPS, on the international level, a waiver would prevent countries from suing other countries over TRIPS non-compliance in instances where they have ceded their IP property rights at the national level.[56]

Yet, it would also affect third parties and the unenforceability of intellectual property rights once implemented in domestic regulations.[57] COVID-19 would not be the first instance of using patent waivers – among the most popular examples, the United States Department of Energy often enforces patent waivers on products or processes that it has funded.[58] In the solution proposed by South Africa and India, the patent waiver would work similarly.

The reasoning behind introducing patent waivers in relation to COVID-19 is as follows: due to governments' contribution to developing the vaccine it should regarded as a common good for the overall wealth of society.[59] In addition, with transborder issues such as a pandemic, as already mentioned, no one is safe unless everyone is safe. As stated in a key principle of economics, trade can make everyone better off, and at times

54 Doha Declaration § (2005).

55 Thambisetty et al., "The Trips Intellectual Property Waiver Proposal."

56 Johnson and Bailey, "Urgent Legal Lessons."

57 Ibid.

58 35 U.S. Code § 202.

59 "4 Reasons Why Waiving Trips Is the Best Way to Beat COVID-19," The Left, March 10, 2021, https://left.eu/4-reasons-why-waiving-trips-is-the-best-way-to-beat-covid-19/.

of scarce resources like a limited number of vaccines available (especially given their expiry date), the adequate distribution of the resource is crucial.

This means it would only be sensible to make it as accessible as possible, especially for low and middle-income countries otherwise unable to afford their batch of vaccines. As mentioned, the contract between the European Commission and the pharmaceutical companies also gives the latter free will to establish the prices, leaving already disadvantaged countries in a much worse position – a patent waiver is asserted to be able to solve this issue.[60]

Pharmaceutical companies claim that patents are critical for them to make a profit, particularly when huge, rapid investments are needed in the research and development of a new type of medicine.[61] As already outlined previously in this paper, big pharma had the upper hand when negotiating the contracts and managed to secure a very profitable and safe agreement. According to the European Commission, currently, only eight pharmaceutical companies have signed a contract (with not all vaccines yet approved for the general public or still being developed).[62] This elite, closed group hands these organisations great oligopolistic power over the vaccine market in the European Union. From a Samaritan's point of view, health is not optional – it is a basic right and thus allowing big pharma to benefit from people's suffering is simply inhumane.

Prioritising the private interests of corporations over low- and middle-income countries, notably if the pandemic provides the former with astronomical sums of profit, does not make sense for most. Sadly, it does make sense to those who benefit from the present system and are actually controlling the market. This also largely explains why a patent waiver would not be suitable for fighting the ongoing pandemic as well as any future ones.

3.1. Patents and the Incentive to Innovate

In legal and economic terms, patent protection is an extremely powerful, sophisticated mechanism for providing incentives, and motives for creating

60 Ibid.

61 European Commission, "Pharmaceutical Sector Inquiry Final Report," 2019.

62 "EU Vaccine Strategy," accessed March 21, 2022, https://commission.europa.eu/live-work-travel-eu_en.

new ideas, products, inventions, designs, and designs. Analytically speaking, a patent is a monopoly, a grant of exclusive rights in rem over intellectual creations, technical solutions, and inventions.[63] According to Douglas North (Nobel Prise winner for Economics), the establishing of these rights (patents) is also one of the most important foundations and reasons for Western civilisation's unparalleled success and prosperity.[64]

Moreover, the adoption of the "Statute of Monopolies of 1623" (1623 c. 3, Regnal. 21 Ja 1) in Britain in 1623[65] is considered one of the core enablers of the Industrial Revolution and hence the unheard of economic growth, a real explosion of economic activity and the continuous increase in social well-being.[66] The granting of an exclusive right in rem (a monopoly) permits the creator of an idea to enjoy a large part of its social value.[67] This right in rem (assuming the strict and objective exercise of such rights) and the ensuing certainty that, if its technical invention is accepted by the market and economically viable, the inventor will be able to recover not only their initial "relation-specific" development costs, and the costs of manufacturing the product or invention, but also that they will be able to reap the benefits (if any) brought by that the product/invention – this ex ante opportunity for cost recovery and participation in potential profits are outstanding motivational mechanisms that act as incentives to potential inventors for their productive behaviour and innovation (which in the long run all increase economic activity, economic growth, and social well-being).

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63 Posner, *Economic Analysis of Law*.

64 Douglass Cecil North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990). See also: Douglass Cecil North, *Understanding the Process of Economic Change* (Princeton, NJ: Princeton Univ. Press, 2010).

65 Harold G. Fox, *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (Toronto: University of Toronto Pres, 1947).

66 Robert Cooter and Hans-Bernd Schäfer, *Solomon's Knot: How Law Can End the Poverty of Nations* (Princeton: Princeton University Press, 2012). See also: *Douglass Cecil North, Institutions, Institutional Change and Economic Performance* (New York: Cambridge University Press, 2017); North, *Understanding the Process of Economic Change*; Mancar Olson, *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships* (New York: Basic Books, 2000).

67 Ejan Mackaay, *Law and Economics for Civil Law Systems* (Cheltenham, UK: Edward Elgar Publishing, 2021).

The granting of patent protection is, analytically speaking, through the grant of a title to a particular invention, in fact the grant of a monopoly over it.[68] Yet, since according to economic science every monopoly is theoretically and empirically (of course, except for a natural monopoly): extremely harmful, dangerous, a source of inefficiency, destructive of economic and economic activity, inhibitive/inhibits innovation, facilitates the appropriation of unjustified monopoly rents, enables moral hazard, opportunism and nepotism, and thereby directly reduces social well-being,[69] IP law must strike a balance between fostering innovation and the dissemination of ideas. This trade-off between providing incentives to innovate and preventing monopolies is also the main justification for the strictly limited time of patent protection (up to 20 years) and the evident rise in patent protection maintenance costs.[70]

The legal and economic analysis therefore enables an understanding of the analytical reasons for granting these (otherwise economically damaging) time-limited monopolies since providing incentives for innovative and productive creation is so important that it also outweighs (for a short period of up to 20 years) the negative impacts of such a monopoly (monopoly annuity, reduced use and dissemination of such knowledge, possible opportunism and appropriation of unjustified annuities etc.). Monopolists accordingly enjoy annuities, profits over a normal return on investment, while the monopolies thus granted cause social costs by producing too few monopolised goods at an excessive cost.[71] It also follows that the granting of patents – monopolies for "inventions" that are not true inventions, but merely blueprints of real inventions – is legally and economically unacceptable.

The granting of patents (monopolies) for such blueprints is a direct source of inefficiency, moral hazard and opportunism, transaction costs, and the adverse selection problem and in fact allows the rent-seeking behaviour to remain unjustified. In these cases, this amounts to a complete redistribution, re-distributive behaviour (and not the desirable productive

68 Posner, *Economic Analysis of Law*; Cooter Robert and Thomas Ulen, *Law and Economics*, 6 ed. (Harlow: Pearson, 2016).

69 Ibid.

70 Mackaay, *Law and Economics for Civil Law System*; Cooter and Ulen, *Law and Economics*.

71 Posner, *Economic Analysis of Law*.

behaviour, like with "real" patents, which are genuinely new technological, innovative, and industrially applicable inventions that enhance social well-being) that directly reduce economic activity and social well-being. The granting of national patents, which are merely a copy, an imitation of some other foreign technical invention (thereby creating small national monopolies for which all incentives for creative, productive behaviour and investment are eliminated), is hence extremely damaging and devastating for the economy and the welfare of a given nation in the long run.

Finally, in an experimental study Vanneste, Van Hiel, Parisi, and Depoorter show that "anti-commons situations generate greater opportunistic behaviour than an equivalent commons dilemma, and anti-commons dilemmas yield a greater risk for underuse compared to commons dilemmas."[72] In other words, their behavioural and empirical study shows that the "tragedy of the anti-commons presents a greater social threat (underuse from blocking the use of resources by posting very high selling prices) than the commons dilemma (overuse of resources)."[73] They also argue that the anti-commons might be considered as holding even more serious and problematic consequences than the commons dilemma.[74]

3.2. Patent Waivers as a Solution to Unequal Global Vaccine Distribution

Following the South African and Indian proposal, the G7 countries initially rejected the above approach, quoting several reasons.[75] The self-labelled "call

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72 Sven Vanneste et al., "From 'Tragedy' to 'Disaster': Welfare Effects of Commons and Anti-commons Dilemmas," *SSRN Electronic Journal*, 2004, https://doi.org/10.2139/ssrn.548622. See also: Francesco Parisi, Norbert Schulz, and Ben Depoorter, "Duality in Property: Commons and Anticommons," *SSRN Electronic Journal*, 2003, https://doi.org/10.2139/ssrn.224844.

73 Ibid.

74 As they report, these results were obtained with "different methodologies (i.e., lab experiment versus scenario experiment), different research designs (i.e., simultaneous presentation of the two types of dilemma resulting in a within-subjects design versus presentation of different dilemmas in a between-subjects design), and different modalities (e.g., free bidding versus the use of a pay-off scheme), attesting to the stability of these findings and their broad generality"; Vanneste et al., "From 'Tagedy' to 'Disaster.'"

75 "G7 Leaders Are Failing to Tackle Global Vaccine Access," Amnesty International, August 8, 2022, https://www.amnesty.org/en/latest/news/2021/02/g7-leaders-are-shooting-themselves-in-the-foot-by-failing-to-tackle-global-vaccine-access.

for global solidarity"[76] has faced criticism from the high-income countries, first due to concerns over the potential lack of quality of the new products – with the developer having no to little supervision over the manufacturing, there could be a potential risk of error or deficiencies.[77]

Second, there is no sufficient proof that it is actually the intellectual property rights that have blocked the vaccine distribution – instead, it is more of an issue with other aspects such as politics and management overdoses, particularly those close to their expiry date. Third, and most importantly for the pharmaceutical companies, it would negatively affect innovation and block future life-saving inventions in the future.

To answer the first concern, even with the patent waiver, new manufacturers would still need to adhere to a strict regime and regulations on medical production. The lack of direct supervision by the developer would not mean complete freedom over the manufacturing conditions and not anyone off the street could simply obtain permission to start production.[78] Nevertheless, the G7 counties might be right when saying that there are more costs to allowing patent waivers than there are benefits. The European Federation of Academies of Sciences and Humanities released a statement pointing out that there are, indeed, other, faster ways of tackling the ongoing crisis. The core of the problem is not who and where owns a patent but the manufacturing capacities of low- and middle-income countries. For instance, even Moderna promised not to sue anyone for any breaches of its patent and there have indeed been developments based on its invention, sadly, with little manufacturing hitherto.[79] This might indicate that a problem graver than IP agreements is unequal financial and manufacturing capacities.

The above also provides an answer regarding the second criticism. The waste of expired vaccines in high-income countries[80] indicates although companies like Moderna or BioNTech have the manufacturing capacities

76 Thambisetty et al., "The Trips Intellectual Property Waiver Proposal."

77 Santos Rutschman, "Property and Intellectual Property," 110–32.

78 Ibid.

79 "Moderna's Updated Patent Pledge," Moderna, accessed September 15, 2023, https://investors.modernatx.com/Statements--Perspectives/Statements--Perspectives-Details/2022/Modernas-Updated-Patent-Pledge/default.aspx.

80 Johnson and Bailey, "Urgent Legal Lessons."

they lack the support and coordination needed to distribute them to other countries. It has been suggested that what is needed is not an IP law revolution but aid in establishing new plants, ensuring the proper availability of raw materials, and incentivising cooperation between companies and governmental agencies to stimulate even the dispensing of resources.[81] The answer for such supply in low- and middle-income countries is observable in recent decisions by Moderna or BioNTech to build manufacturing plants in Africa.[82]

Another argument for why waiving patents is no answer is the fact that we actually face an oversupply of doses – as mentioned, a huge number of them have been wasted since the original rollout, even in low- and middle-income countries.[83] What we need is not only smoother coordination but also better awareness among citisens to actually accept the medicine. Such hesitancy is also a problem in poorer regions where disinformation prevents people from accessing the resources available.[84] It has been stated that, instead of changes in TRIPS, public resources would benefit more if invested in public campaigns and information initiatives.[85]

One might also argue that the waiver proposal before the WTO is not well-tailored to the urgent vaccine problem and would require further national legislation to have any effect in practice. A waiver of this nature also raises questions about optimal statutory ex ante design of such a patent waiver.

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81 The ALLEA statement on vaccination bottlenecks in the Global South and a patent waiver for the COVID-19 vaccines, accessed September 14, 2023, https://www.wto.org/english/tratop_e/covid19_e/allea_letter_e.pdf.

82 Kyle LaHucik, "BioNTech to Start Building Mrna Vaccine Manufacturing Plant in Africa in Mid-2022," Fierce Pharma, October 26 2021, https://www.fiercepharma.com/manufacturing/biontech-to-build-mrna-vaccine-manufacturing-plant-africa-mid-2022-plans-finalised.

83 Edward Mcallister, Libby George and Stephanie Nebehay, "Exclusive: Up to 1 million COVID vaccines expired in Nigeria last month," Reuters, December 8, 2021, https://www.reuters.com/business/healthcare-pharmaceuticals/exclusive-up-1-million-covid-vaccines-wasted-nigeria-last-month-2021–12–08/.

84 Olivier J. Wouters et al., "Challenges in Ensuring Global Access to COVID-19 Vaccines: Production, Affordability, Allocation, and Deployment," *The Lancet* 397, no. 10278 (2021): 1023–34, https://doi.org/10.1016/s0140–6736(21)00306–8.

85 Frankel et al., *Evaluation and Learning in R&D Investment*.

Namely, the current waiver proposal might undermine the predictability and legal certainty of current IP rights. An arbitrary waiver of a patent right (where it is uncertain for which kinds of situations such a waiver might again be invoked) could induce uncertainty to such an extent that it implies a regulatory risk for pharmaceutical companies (direct and indirect costs), which in turn might deter the innovation and research activities of such companies.

3.3. Ongoing Developments

It is important to note that while this paper later analyses potentially more effective alternatives to tackling health emergencies the patent waiver talks are still underway. Just recently, a consensus was reached between the EU, USA, UK, and India on a waiver much more limited than what was originally proposed.[86] Instead of all innovations, the newest proposal would apply solely to vaccines – which holds the potential to work in the short-term with the COVID-19 pandemic; still, it does not solve any urgent future needs for other health crisis-related medicines.

The sole fact that such an agreement was made (still not officially approved yet) nearly half a year after the first talks about the patent waiver started indicates that the negotiating of patent waivers has not occurred fast enough to keep up with the pandemic. Even though the solution might bring some benefits, it is simply inadequate for dealing with such a fast-paced and urgent problem. The wording also still faces objections from countries with strong pharmaceutical sectors (such as Switzerland and the UK) and many vital elements (like the length of the waiver) have yet to be finalised[87] – and the clock is ticking. Since WTO proposals require the unanimity of all 164 members, it is likely that we are still a long way from seeing a widely accepted solution.[88] Even though in theory Article IX(3) of the WTO agreement

86 Andrea Shalal and Emma Farge, "U.S., EU, India, S. Africa Reach Compromise on COVID Vaccine IP Waiver Text," Reuters, March 16, 2022, https://www.reuters.com/business/healthcare-pharmaceuticals/us-eu-india-s-africa-reach-tentative-pact-covid-vaccine-ip-waiver-sources-2022–03–15/.

87 Ibid.

88 Frankel et al., *Evaluation and Learning in R&D Investment*.

permits decisions to be made with a three-quarters majority in exceptional circumstances,[89] in practice this is unlikely to happen.[90]

4. Towards an Improved Regulatory Regime

As argued, the proposed patent waiver under discussion since 2020 within the World Trade Organisation (WTO) might not resolve these vaccination bottlenecks in the short term. Instead, additional measures should be adopted to accelerate the local manufacturing and distribution of vaccines in low- and middle-income countries, ramp up investment in vaccination campaigns, and facilitate the compulsory licensing of patents and transfer of know-how.

The conclusion that a TRIPS patent waiver is not an efficient solution means there is a need to consider other possibilities for fighting the pandemic. As mentioned, there is an urgent requirement to facilitate better coordination, raise overall awareness, and increase preparedness for coming health crises. The problem at the heart of the current crisis is the uneven concentration of manufacturing and research in high-income countries. The factor common to all of these suggested solutions is collaboration – there are few if any legal documents or agencies coordinating a pandemic on a global scale and everyone is therefore left on their own. This creates further economic inequalities, the uneven distribution of medical supplies, and a lack of fact-checked information. While the COVID-19 pandemic is truly on an unprecedented scale, it has shown us more than ever that it is better to be safe than sorry. Having experienced great losses, it is now the moment to think ahead of time and coordinate global actions in the event of a future global-wide health crisis. Bellow, the article first discusses potential contractual solutions in future negotiations before moving on to organised collective actions and compulsory licencing.

4.1. Enhanced Contract Negotiations

Especially in the advance purchase agreement between the European Commission and the pharmaceutical companies, there is a need for more concrete

89 WTO Analytical Index, WTO Agreement – Article IX(3).

90 Simon Lester, Bryan Mercurio, and Arwel Davies, *World Trade Law Text, Materials and Commentary* (Oxford, London, New York, New Delhi, Sydney: Hart Publishing, 2018).

and better-defined contractual obligations. The EU unified the actions of the Member States to do something that should have been done similarly on the global level – to assist poorer countries in the community to access the necessary medications by contracting as a single unity. Nevertheless, partially due to the unparalleled and rapidly developing situation, such agreements were not drafted as well as they should have been. By agreeing to co-fund, the vaccine developments as a pre-payment the European Commission sped up the process by compromising the negotiating power it could have. The agreements only provide very vague terms as to the sharing of spare vaccines, only broadly mentioning "intellectual property sharing".[91]

This allowed the European Commission to make the purchased doses available to the global solidarity effort, yet it imposed no obligations on developers to aid with research and development or licence sharing with others.[92] Although renegotiating and thus aiding in the current pandemic is highly unlikely now (despite a need to extend the agreements with some companies), regaining the negotiating power in future agreements would be vital. Given the considerable involvement of public funds, society should have the right to benefit from the medicines so funded. In the event of future health emergencies, governmental agencies should ensure that the public interest is satisfied and focus on greater transparency and vaccine sharing already included in the agreement.[93]

4.2. International Response Mechanisms and Legislation

Several attempts have been made to assist the collaboration during the ongoing crisis and facilitate common information and cash flow. A new COVAX mechanism has been set up to aid with facilitating the export of spare vaccines, albeit donations are too small at the current moment.[94] This indicates the need for an organised mechanism and not a contribution based on free will. Thus far, two important developments have occurred in this area: the suggestion of a new, international treaty, and the newly

91 Love, "President and Minister of Health of Costa Rica."

92 Frankel et al., *Evaluation and Learning in R&D Investment*.

93 Ibid.

94 The ALLEA statement on vaccination bottlenecks in the Global South and a patent waiver for the COVID-19 vaccines, accessed September 14, 2023, https://www.wto.org/english/tratop_e/covid19_e/allea_letter_e.pdf.

funded European Health Emergency preparedness and Response Authority (HERA). The "pandemic treaty" has been suggested by both the WHO and the European agencies. On the global level, such a treaty would be almost unmatched, with only the WHO's Framework Convention on Tobacco Control (FCTC) having previously been used in international health cooperation.[95] The aforementioned document has become one of the widest treaties in the history of multinational collaboration,[96] possibly indicating the chances of success of a pandemic-oriented document.

According to Moon and Kickbusch, a successful international contractual agreement should have three implications. First, it must meet the self-interest goals of all countries involved.[97] With a pandemic knowing no borders and holding broad implications for international trade and travel, self-interest becomes the interest of us all. Therefore, such a mutually beneficial agreement has a probability of being respected by a broader community. Second, a treaty should be flexible enough to accommodate various levels of ambitions and willingness to share sovereignty.[98] The fact that enforcement on the international level can be tricky makes it hard to enforce certain provisions and, indeed, everything depends on a state's willingness to obey the contractual agreement. It has been suggested that the treaty, instead of regulating the ongoing actions, should concentrate on deep prevention of the pandemic.[99] Since COVID-19 caused indescribable losses for the global economy, one can hope that countries will be willing to invest in preventing the next health crisis.

Yet, this would depend greatly on the specific wording of the treaty, still in the very early stages of its creation. Finally, a pandemic treaty must address the material conditions able to facilitate adherence, and not rely solely on the normative power of international rules alone.[100] As mentioned,

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95 Haik Nikogosian and Ilona Kickbusch, "The Case for an International Pandemic Treaty," *BMJ*, 2021, https://doi.org/10.1136/bmj.n527.

96 Ibid.

97 Suerie Moon and Ilona Kickbusch, "A Pandemic Treaty for a Fragmented Global Polity," *The Lancet Public Health* 6, no. 6 (2021), https://doi.org/10.1016/s2468–2667(21)00103-1.

98 Ibid.

99 Jorge Vinuales et al., "A Global Pandemic Treaty Should Aim for Deep Prevention," *The Lancet* 397, no. 10287 (2021): 1791–92, https://doi.org/10.1016/s0140-6736(21)00948-x.

100 Sciacchitano and Bartolazzi, "Transparency in Negotiation of European Union."

the pharmaceutical companies may have benefited from the panic surrounding the race to obtain the vaccines for citisens. So long as the treaty also includes provisions for quiet times, not only times of crisis, it has prospects of creating effective preventative measures in the future.

One can also consider the logic behind the creation of HERA. Since "no country can effectively prevent or tackle a cross-border public health crisis on its own"[101], the European Commission has created a new body aimed at managing health emergencies before they develop and when they are underway. According to Stella Kyriakides, the Commissioner for Health and Food Safety, HERA will be a valuable centrepiece of the European pandemic defence, enabling an organised, joint response to the crisis.[102] With a budget of EUR 5.3 million, the agency will allow for a centralised response from the European Commission. There has been criticism that in fact the Commission already has plenty of agencies that could undertake such a mission.[103] Indeed, responsibility for the pandemic has thus far been taken over by multiple departments within the Commission; nevertheless, it has not been efficient and has led to organisational disorder.[104] Now, with a dedicated budget and team, more thought can be put into the future contractual negotiations.

4.3. Compulsory Licensing and March-in Rights

A less extreme version of a technology transfer should be considered: compulsory licensing.[105] A compulsory license is granted by a government and allows the use of an invention without the agreement of the patent holder.[106]

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101 The territorial impact of Covid-19: Managing the crisis across ... – OECD, accessed September 14, 2023, https://www.oecd.org/coronavirus/policy-responses/the-territorial-impact-of-covid-19-managing-the-crisis-across-levels-of-government-d3e314e1/.

102 Sciacchitano and Bartolazzi, "Transparency in Negotiation of European Union."

103 Miriam Reiss, "High Hopes for Europe's New Health Emergency and Response Authority," *BMJ*, 2022, https://doi.org/10.1136/bmj.o127.

104 Michael Anderson, Rebecca Forman, and Elias Mossialos, "Navigating the Role of the EU Health Emergency Preparedness and Response Authority (HERA) in Europe and Beyond," *The Lancet Regional Health – Europe* 9 (2021): 100203, https://doi.org/10.1016/j.lanepe.2021.100203.

105 Kovac and Rakovec, "The COVID-19 Pandemic and Long-term Incentives," 292–316.

106 "Medicines Law & Policy Research and Resources on Intellectual Property and Health," Medicines Law Policy, August 21, 2022, https://medicineslawandpolicy.org/.

Even though the current TRIPS provisions permit such a transfer,[107] the national laws often do not provide a straightforward way of obtaining them.[108] Further, the process has not been very popular as high-income countries like the USA or Japan have not supported the process to protect the interests of their pharmaceutical companies,[109] even though it is something already included in TRIPS and does not impose any additional drafting costs. Moreover, the following system has already been used by Israel, Russia, and Hungary during the ongoing pandemic.[110]

Nevertheless, to ensure smoother licensing a "Declaration on the TRIPS Agreement and Public Health in the Circumstances of a Pandemic" was suggested[111] to facilitate easier national regulation and incentivise the exchange of knowledge.[112] The following could complement the above solutions by enabling a case-by-case analysis of medicines needed on a national level, depending on the current need. It is also important to add that, apart from patents, more attention should be paid to the sharing of trade secrets – there is presently no agreement on compulsory trade secret transfers and the creation of one could allow for better transparency.[113]

Still, it has been stated that patent waivers or compulsory licensing are in any case unlikely to help countries lacking manufacturing capacity[114] – which is why it is crucial to first and foremost ensure the proper coordination of transfers between countries with better production facilities and

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107 The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) (1994), art. 30, 31 and 31.

108 Gurgula and Lee, "Covid-19, IP and Access," 61–70.

109 "Compulsory Licenses, the Trips Waiver, and Access to Covid-19 Medical Technologies," Médecins Sans Frontières Access Campaign, accessed September 15, 2023, https://msfaccess.org/compulsory-licenses-trips-waiver-and-access-covid-19-medical-technologies.

110 Ibid.

111 P/C/w/680 Council for trade-related aspects of intellectual property, accessed September 14, 2023, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W680.pdf&Open=True.

112 Gurgula and Lee, "Covid-19, IP and Access," 61–70.

113 Olga Gurgula and John Hull, "Compulsory Licensing of Trade Secrets: Ensuring Access to COVID-19 Vaccines via Involuntary Technology Transfer," *Journal of Intellectual Property Law & Practice* 16, no. 11 (2021): 1242–61, https://doi.org/10.1093/jiplp/jpab129.

114 "Interfering with Patent Protection Means Playing with Fire," Max-Planck-Gesellschaft, March 15, 2021, https://www.mpg.de/16579491/patent-protection-vaccines-covid-10-reto-hilty.

those with lesser abilities, on top of aiding the development of manufacturing in low and middle-income counties.

To sum up, there is a need for improved procedures and institutional design should help to streamline the process for the compulsory licensing of pharmaceutical products, including vaccines.

4.4. Trade Secrets, Market Exclusivity, Production Bottlenecks and Competition Law

The ultimate problem actually concerns how to make vaccines more available to non-developed nations around the globe. Namely, how to achieve the allocative efficiency of the COVID-19 vaccines. As argued, the waiver of patent rights might not solve the problem and, due to its adverse effects on innovative activity, actually be counterproductive. That is, what matters for vaccine availability and worldwide production is in fact not the "recipe" for the vaccine but the know-how for using it – that is more expensive and harder to imitate.[115] According to Stephane Bancel, Moderna's chief executive, "There is no mRNA in manufacturing capacity in the world. […] This is a new technology. You cannot go hire people who know how to make the mRNA. Those people don't exist"[116].

Alongside the issues of manufacturing capacity and scientific know-how, it is notable that it is not easy to make vaccines. Current anecdotal evidence shows that the barriers in terms of knowledge, experience, and money to producing vaccines, even if the recipe is freely available, are much more significant than patent waivers for enabling global vaccine availability. As Tabarrok shows, throughout the world wherever there is the capacity to produce vaccines licenses have been obtained and vaccines are being

115 For example, as far as Moderna is concerned, a patent waiver is irrelevant. Namely, on 8 October 2020 the company announced that "while the pandemic continues, Moderna will not enforce our COVID-19 related patents against those making vaccines intended to combat the pandemic"; Michele Boldrin and David K. Levine, "Should Patents on Covid-19 Vaccines Be Waived?," *Science, Technology and Innovation*, 2021.

116 Ibid. Duckett also argues that "If you're point one of a pH unit out, that can be enough to massively disrupt your productivity. Other factors can be cell culture medium, process timing, pH, carbon dioxide concentration, oxygen control, and mixing time to name a few. […] I worked with one process – if there was a slight overshoot on temperature because the PID loops [proportional–integral–derivative – a feedback control mechanism] weren't correctly tuned, the cells would stop producing"; Adam Duckett, "What Is Causing AstraZeneca's Vaccine Production Woes?," *The Chemical Engineer*, 2021.

produced the problem is not patents but that producing more takes real resources not waving magic patent wands.[117]

As he shows, the mRNA technology is new and has never been used before to produce at scale. Pfiser and Moderna had to build factories and distribution systems from scratch. There are no mRNA factories idling on the sidelines. If there were, Tabarrok argues, Moderna or Pfiser would be happy to license since they are producing in their factories 24 hours a day, 7 days a week.[118] Further, even Moderna and Pfiser do not yet fully understand their production technology, they are learning by doing every single day.[119] The patent (recipe) is hence only half the story and the know-how is also crucially important. This would not necessarily be transferred for free, nor is it at all obvious how this could be shared.[120]

In this respect, the EU Commission's argument that the single-most effective way to achieve universal access is to ramp up production, share more vaccines, and make them affordable[121] is in line with the law and economics argumentation. A waiver (in the sense of the co-sponsored proposal at the WTO) of IP protection, including of trade secrets, would never make this know-how publicly accessible, but only remove the possibility of companies enjoying confidentiality protection to sue for trade secret infringement.

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117 Alex Tabarrok, "Patents Are Not the Problem!," *Current Affairs, Economics, Law, Medicine*, 2021.

118 Ibid.

119 Moderna has said that they won't enforce their patents during the pandemic but no one has stepped up to produce because no one else can; ibid.

120 As Morgan Stanley analysts detailed in a research note, there is no mechanism "to force management to teach other manufacturers how to make their vaccine, suggesting no change to the status quo"; Carl O'Donnell and Manas Mishra, "Moderna Sees No Impact on COVID-19 Vaccine from Potential Patent Waiver," Reuters, May 6, 2021, https://www.reuters.com/business/healthcare-pharmaceuticals/moderna-raises-2021-sales-forecast-covid-19-vaccine-192-bln-2021–05–06/.

121 EU Commissioner Dombrovskis stated that the EU's plan had three elements: a) export restrictions should be kept to a minimum; b) vaccine producers and developers should also make concrete pledges to increase supply to vulnerable developing countries at production cost; and c) existing WTO rules – compulsory licences – already allow countries to grant licences to manufacturers even without the consent of the patent-holder.

Fixing the supply chain problems, increasing manufacturing capacity, and alleviating bottlenecks might thus prove to be crucial instruments for ensuring global vaccine availability. The problem of production and supply chains is currently a global one and finding solutions to improve the production and distribution (and not the "magic patent waiver") both in the present crisis and beyond may be one of the most important tasks that international stakeholders face.

The direct or indirect exchange of information between competitors under the EU's competition rules is a particularly controversial issue, raising one of the most challenging competition law questions.[122] The biggest change here is the replacement of the centralised notification system with a "legal exemption system".[123] The horizontal effect of the EU's new legal exemption system upon the provision of stable and optimal incentives (dynamic efficiency) to innovate has largely been left out of the current scholarly debate.

Namely, the legal exemption system and the associated threat of *ex post* punishments may introduce *ex ante* uncertainty and generate negative effects in terms of information production and innovation as concerns the COVID-19 vaccine. The fact that firms can no longer apply for a negative clearance and must self-assess the legality of their cooperation

122 Matthew Bennett and Philip Collins, "The Law and Economics of Information Sharing: The Good, the Bad and the Ugly," *European Competition Journal* 6, no. 2 (2010): 311–37, https://doi.org/10.5235/174410510792283754; Antonio Capobianco, "Information Exchange under EC Competition Law," *Common Market Law Review* 41, no. 5 (2004): 1247–76, https://doi.org/10.54648/cola2004047; Information Exchanges Between Competitors under Competition Law, DAF/COMP (2010)26: OECD; Okeoghene Odudu, "Indirect Information Exchange: The Constituent Elements of Hub and Spoke Collusion," *European Competition Journal* 7, no. 2 (2011): 205–42, https://doi.org/10.5235/174410511797248324.

123 Council Regulation no. 1/2003 on the implementation of the rules of competition laid down in Articles 101 and 102 of the TFEU (the 'Modernisation Regulation'). The new Council Regulation, which came into effect on 1 May 2004, replaces Council Regulation No. 17 which had been in force for over 40 years and been the key to the enforcement of Community competition law (for a synthesis, see Müller, 2004). New Regulation No. 1/2003 thus replaces the centralised notification and authorisation system with an enforcement system based on the direct application of Articles 101 and 102.

introduces the risk that they might refrain from engaging in efficient forms of information exchange.[124]

Further, the block exemptions introduced to categories of research and development indeed reduce the uncertainty for some firms, but not for all given that legal uncertainty remains high as the existing market share threshold and definition of the relevant market are difficult to determine *ex ante*. The present case law on information sharing may itself also increase *ex ante* uncertainty and thus produce a chilling effect on entrepreneurial activity because any information sharing might, in certain circumstances, infringe the EU's competition rules.[125]

Information that is not historical and relates to matters like price, capacity, and cost is commercially sensitive and its exchange is therefore more likely to infringe than other types of information. The exchange of individual data about particular undertakings is more problematic than aggregated data. Another relevant factor is the frequency of any information exchange. A survey of several landmark decisions shows that practically any type of information directly or indirectly capable of being seen as collusive behaviour cannot be exchanged without causing concerns for the EU's competition authorities.

Obviously, the application of such wide, all-inclusive, and vague criteria concerning when an exchange of information between undertakings may be regarded as an infringement of Article 101 TFEU may be a source of uncertainty and a needless rise in transaction costs.

The second source of uncertainty, as already stressed, arises from the adoption of the new "self-assessment system", which in reality has exacerbated the problem. This self-assessment system could, as already noted, actually be the most problematic for horizontal entrepreneurial activity because firms face a high level of uncertainty.

One should also mention the overlooked problem of "market exclusivity" under which orphan medicines in addition to the awarded patent

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124 The horizontal sharing of knowledge (information), and enhancement of information flows between undertakings and cooperation appear to be fundamental for creating the dynamic evolution of markets, improving cost-efficient processes, and enhancing social welfare.

125 Mitja Kovac and Patricia Kotnik, "Self-Assessment System: Detrimental Effects upon Entrepreneurial and Innovative Activity," *SSRN Electronic Journal*, 2013, https://doi.org/10.2139/ssrn.2221811.

protection benefit also from 10 years of market exclusivity once they receive marketing authorisation in the EU.[126] This measure is intended to induce the development of medicines for rare diseases by protecting them from competition from similar medicines with comparable indications, which cannot be marketed during the exclusivity period.[127] Peabody et al. argue that such market exclusivity is the key incentive for orphan drug research, and should be retained.[128]

They also suggest that in the future exceptionally high profits could be limited by a more precise evaluation of disease prevalence, the elasticity of demand, and the other uses of orphan compounds.[129] The mentioned authors further recommend an expansion of the tax credits and research grants programme and the targeting of "priority" diseases.[130] They conclude that while market exclusivity has been a valuable legislative initiative, it could be strengthened with some simple extensions of the current incentives that it contains. However, such market exclusivity should never be awarded for medicines (vaccines) developed to tackle outbreaks of pandemics since such diseases are not rare and hence market forces and patent protection provide effective incentives to innovate. In other words, extending such market exclusivity to pandemic-related vaccines will indeed provide an obstacle to such vaccines being generally and rapidly available.

Finally, it is hard to imagine that one policy lever would be sufficient or indeed minimally capable of inducing the desired outcomes. Instead, a combination of instruments in various legal fields (and even

126 Regulation (EC) No 141/2000 of the European Parliament and of the Council of 16 December 1999 on orphan medicinal products (OJ L 18, 22.1.2000, p. 1), last amended by Regulation (EC) No 596/2009 (OJ L 188, 18.07.2009, p. 14). See also: Laura Fregonese et al., "Demonstrating Significant Benefit of Orphan Medicines: Analysis of 15 Years of Experience in Europe," *Drug Discovery Today* 23, no. 1 (2018): 90–100, https://doi.org/10.1016/j.drudis.2017.09.010.

127 Todd Gammie, Christine Y. Lu, and Zaheer Ud-Din Babar, "Access to Orphan Drugs: A Comprehensive Review of Legislations, Regulations and Policies in 35 Countries," *PLOS ONE* 10, no. 10 (2015), https://doi.org/10.1371/journal.pone.0140002.

128 John W. Peabody, Allen Ruby, and Peter Cannon, "The Economics of Orphan Drug Policy in the US," *PharmacoEconomics* 8, no. 5 (1995): 374–84, https://doi.org/10.2165/00019053-199508050-00002.

129 Ibid.

130 Ibid.

non-legal instruments such as direct expenditures to subsidise certain stages in the process) is likely to be a more appealing strategy. Namely, as shown, a patent waiver in isolation is very unlikely to prove effective since a reduction in the price for final buyers (governments, most likely) or even for potential competitors (e.g., generic drug producers with manufacturing capabilities), although helpful, probably will not be enough to provide timely and effective access to relevant medical products.

Perhaps it is even not the most powerful instrument in the short run. One may think of public prises and subsidies to successful inventors, coupled with risk coverage of potential litigation by the government and with a targeted industrial policy focusing on having capabilities for drug manufacturing at short notice as tools that may bring more powerful effects in the short run.

We accordingly suggest that the pace and reach of vaccines in the COVID-19 pandemic have not been solely influenced – perhaps negatively – by the exclusive rights of patent holders and the current IP law should thus not be seen as an obstacle or cause of the limited availability of relevant medical products.

Other factors may have been equally or even more important in slowing down the vaccination process in many countries, taking as a given the time in which the vaccines were scientifically available such as, for example: a) capacity constraints in the production of dosages; b) costs of coordinating the production processes in various plants; c) costs of coordinating the vaccination campaigns, or opposition to them; d) and the lack of effective redistribution of excess production in certain locations. In the face of a new pandemic disease, in terms of incentives for inventing vaccines and therapies, and having them ready for production and distribution, societies would ideally desire: a) very powerful and quick incentives for obtaining the invention; b) legal mechanisms to circumvent the disincentives to prompt availability arising from concerns with side effects and liability; and e) and legal rules that speed up and facilitate access to the products on a large scale.

5. Conclusion

The COVID-19 pandemic was both unexpected and expected. Although we have faced similar health emergencies in the past, this one was of a truly unprecedented scale and impacted not only the developing countries but also their richer neighbours. Contract law can be a powerful weapon in fighting a pandemic if used wisely, especially given the transborder nature of the issue in question. Citisens can only hope that the contracting governmental agencies have learned from their mistakes and will aim to not only ensure a proper mechanism for the future but also enter into agreements that benefit both sides of the table. Namely, as the world is just beginning to recover from the devastation of COVID-19, the possibility of a pandemic of a far more deadly pathogen is looming.

This paper has examined whether other effects may be associated with the patent waiver, if other problems arise concerning having fast and widespread access to vaccines and therapies unrelated to patent protection, and investigated some alternative or complementary instruments that could be considered to improve outcomes in a health emergency and prepare better for future emergencies. It was suggested that effective procurement contracting by governments, the narrow application of market exclusivity rights, compulsory patent licences, avoidance of bottlenecks in production, and facilitation of information exchange by potential inventors through relaxed antitrust rules on this matter might be effective tools that preserve the dynamic incentives to innovate and secure timely availability and access to relevant medical products. Moreover, patent waivers may not be an effective policy tool for accomplishing the desired goals in the face of pandemics and related emergencies.

Further, the paper has also looked at the current contractual agreements in place and critically assessed them. The findings demonstrate that the intertwined static, dynamic efficiency and the *ex ante* vs. *ex post* optimal incentive stream can contribute to the ongoing discussion surrounding IP rights with regard to current and future outbreaks of dangerous pathogens. Insightfully, it has been suggested in the paper that the patent waiver is sadly not the knight in shining armour that everyone has been expecting. Due to the lack of coordination, the tremendously long process, and the potential block in innovation caused by the smaller incentives to

pharmaceutical companies, more attention should be given to other alternative solutions.

In addition, the biggest challenge facing governmental organisations is the absence of unified resources and power to ensure the smooth transfer of vaccines between those with enough resources to manufacture them and those who cannot afford to do so. Emphasis should also be given to aiding the manufacturing process in such low- and middle-income countries. Solutions like COVAX or HERA are a step forward in tackling future pandemics and other health emergencies. "Pandemic treaties" could also facilitate smoother collaboration and assure that agencies are prepared for future crises. The above could be complemented by compulsory patent and trade secrets licensing, with the former already being put in place via the TRIPS agreement. In the event of transborder issues, greater emphasis should be given to collective, long-term solutions rather than individual short-term gains.

The above nonetheless does not mean that certain exceptional and temporary adjustments of IP laws could not form part of the policy toolbox deployed to achieve health goals. Still, it is clear that changes in IP laws should not be left to ex post adoption once a health emergency is knocking on the door, especially if such adoption requires consensus or faces important administrative costs. Informed lawmakers would prefer instruments that can operate automatically to "reduce" the exclusionary rights of patent holders and lower prices for increasing production to reach populations in need of vaccines and therapies as soon as possible: replacing property-rule protection with liability-rule protection, in the form of compulsory licenses and temporary takings of the IP rights against fair compensation may seem more appropriate.

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Mediation as Means of Communication for Public Administration in Settling Administrative Disputes

Katarzyna Kułak-Krzysiak
Dr., Assistant Professor, Faculty of Law, Canon Law and Administration, John Paul II Catholic University of Lublin, correspondence address: ul. Aleje Racławickie 14, 20–950 Lublin, e-mail: katarzyna.kulak-krzysiak@kul.pl
https://orcid.org/0000-0001-6771-4188

Paweł Świtał
Dr., Assistant Professor, Faculty of Law and Administration, Kazimierz Pułaski University in Radom, correspondence address: ul. Bolesława Chrobrego 31, 26–600 Radom, e-mail: p.swital@uthrad.pl
https://orcid.org/0000-0002-7404-5143

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Abstract: Nowadays solutions are sought for public administration to involve citisens in decision-making as one of the ways of promoting the development of civil society and thus to foster democratic forms of government. Public administration is looking for efficient methods of resolving administrative disputes. Administrative mediation serving the purpose of ensuring proper communication between the parties to administrative proceedings is one of such methods. Mediation in public administration hinges upon the definition of communication rules. The aim of this paper is to define communication from the perspective of legal science and discuss its application in the administrative mediation proceedings. In this article, we discuss the essence, the subject matter and the object of mediation as well as the legal regulations governing the mediation procedure and consider the possibility of applying mediation to the administrative procedure, as exemplified by the related case law. The study has been conducted by means of the legal research methods, in particular the legal-dogmatic approach and the legal functionalism approach.

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1. Introduction

When considering the issue of resolving administrative disputes, it is worth noting that in addition to the authoritative way of settling such cases, public administration bodies seek solutions that would allow them to resolve disputes through mediation. The use of mediation has been extensively described in the doctrine.[1] Various forms of public consultation are becoming more and more common. Referring to the principles of the administrative law, it is worth pointing out that they provide for the involvement of citisens in compliance with the political system of the state. The key principles of the administrative law include social dialogue, decentralisation, subsidiarity, and a democratic state of law. Those principles provide for the foundations and create opportunities for the engagement of citisens and other entities in public life. This idea has also been applied to the Code of Administrative Procedure[2] by implementing the process of mediation.

The doctrine indicates that in public administration, mediation is appropriate whenever there is a discrepancy of positions, and the law creates room for manoeuvre through the exchange of arguments, verification of one's own assessments and statements as well as concessions or corrections of previous decisions.[3] The large variety of types of cases that public administration bodies have to hear has forced the legislator to analyse the possibility of applying alternative dispute resolution methods. This need was reflected in the Recommendation Rec (2001)9 of the Committee of Ministers to the Member States adopted on 5 September 2001 on alternatives

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1 See, among others: Wojciech Federczyk, *Mediacja w postępowaniu administracyjnym i sądowoadministracyjnym* (Warsaw: Wolters Kluwer Polska, 2013); Agnieszka Kocot-Łaszczyca and Grzegorz Łaszczyca, *Mediacja w ogólnym postępowaniu administracyjnym* (Warsaw: Wolters Kluwer Polska, 2018); Leszek Stadniczeńko, „Negocjacje i mediacje jako proces społeczny – instytucja społeczna," in *Prawnopsychologiczne uwarunkowania mediacji i negocjacji*, ed. Leszek Stadniczeńko (Opole: Wydawnictwo Uniwersytetu Opolskiego, 2006); Magdalena Tabernacka, *Negocjacje i mediacje w sferze publicznej* (Warsaw: Wolters Kluwer Polska, 2009).

2 The Act of 14 June 1960 Code of Administrative Procedure (Journal of Laws 2022, item 2000, as amended), hereinafter CAP.

3 Zbigniew Kmieciak, „Mediacja w polskim prawie administracyjnym," in *Mediacja w sprawach administracyjnych*, ed. Hanna Machińska (Warsaw: Wydział Prawa i Administracji Uniwersytet Warszawski: Biuro Informacji Rady Europy, 2007), 40.

to litigation between administrative authorities and private parties.[4] This European soft act of law lists several mechanisms for the amicable settlement of administrative cases, including internal reviews, and in the strict sense – conciliation, mediation, negotiated settlement, and arbitration. There is also an opposing view according to which the use of mediation in administrative procedure raises doubts due to the nature of the proceedings.[5] An important role in this respect is also played by the general rules of the administrative procedure, such as the rule of law, which does not allow for communication (arrangements to be made) between an administrative authority and the party to the proceedings.[6] The divergence of positions, including the administrative practice, indicates that mediation is not commonly used for the administrative procedure purposes. It may be presumed that this is related to the low social awareness of the possibility of using mediation to settle cases amicably as well as to the legal solutions adopted in this regard. As noted by Przylepa-Lewak, "owing to the development of civil society institutions, the relations of individuals with public authorities can be described as equivalent, which calls for close cooperation that, in turn, entails the need for effective communication."[7]

It should be noted that in the systems of other countries, mediation has become a popular process that allows for the amicable settlement of a dispute between an individual and the state administration. It is used in both continental-type systems (e.g. the Netherlands, Switzerland, Germany or Spain) and common law systems.[8] The objective of the mediation proceedings is to bring administrative authorities closer to the public, to ensure that relations under the administrative law are shaped in a way that

4 Joanna Wegner-Kowalska, „Mediacja w sprawach administracyjnych – pytania i wątpliwości," *Zeszyty Naukowe Sądownictwa Administracyjnego*, no. 6 (2017), LEX/el.

5 See, among others, Jan Paweł Tarno, *Postępowanie sądowoadministracyjne. Komentarz* (Warsaw: LexisNexis, 2004), 173.

6 D. Rejowski, „Zastosowanie mediacji w prawie administracyjnym," in *Mediacja – nowa przestrzeń zarządzania konfliktem wyzwania, strategie, rozwiązania*, eds. Sebastian Morgała and Edyta Stopyra (Warsaw: Wydział Prawa i Administracji Uniwersytet Warszawski, 2014), 158.

7 Agata Przylepak-Lewak, „Mediacja jako forma komunikacji w postępowaniu administracyjnym," *Annales Universatis Mariae Curie-Skłodowska Lublin – Polonia, Sectio G* 69, no. 2 (2022): 65.

8 Wegner-Kowalska, „Mediacja w sprawach administracyjnych," LEX/el.

increases the influence of the parties to the proceedings on their own affairs as well as on matters that are important to the society in which they live (participation of the public in the administrative power).[9] The participatory model is also noticeable in the Polish legal system in which the public administration sees the need to involve citisens in public affairs. However, this is a long-term and complex process that requires the legal education to be increased and the awareness, ensuing from the powers vested by the law, to be raised.

Article 13 of the Code of Administrative Procedure stipulates an administrative culture principle which imposes on public administration bodies the obligation to seek amicable settlement of disputes and to determine the rights and obligations constituting the subject matter of the proceedings under cases falling within their jurisdiction, in particular, by taking actions that, firstly, encourage the parties to conclude a settlement under cases in which the parties have conflicting interests, and secondly, are necessary for mediation purposes. According to the authors of the amending bill, the main objective of the amendments has been to bring the public administration closer to the civil society and to ensure that relations under the administrative law are shaped in a way that strengthens the influence of the parties to the proceedings on their own affairs and affairs important to the public, i.e. to improve the participation of the civil society in the public administration.[10] Those regulations are also similar to the provisions on mediation set forth in the Act – Code of Civil Procedure.[11] The explanatory memorandum to the amending bill under consideration indicates that the provisions of the Act should create the possibility and legal grounds for using mediation at an earlier stage than before, i.e. during the administrative proceedings, so that the differences of views on the manner of settling the case between the party to the proceedings and the administrative

9 Wojciech Sawczyn, „Mediacja," in *Postępowanie administracyjne i sądowoadministracyjne*, eds. Roman Hauser and Andrzej Skoczylas (Warsaw: Wolters Kluwer Polska, 2021), LEX/el.

10 Explanatory memorandum to the Act amending the Act – Code of Administrative Procedure and some other acts, Sejm of the 8th term, Parliamentary printed paper no. 1183, accessed March 21, 2023, https://www.sejm.gov.pl/ sejm8.nsf/PrzebiegProc.xsp?nr=1183.

11 The Act of 17 November 1964 – Code of Civil Procedure (Journal of Law 2021, item 1805, as amended), Art. 183 to 183^{15}.

authority can be explained in an amicable way already at that stage, without the need to institute the judicial administrative proceedings.[12]

2. Around the Communication Conceptual Framework

Public administration today faces the challenge of ensuring effective communication. To address this challenge, it uses specific types of solutions proposed by communication sciences, psychology and sociology, but also concepts grounded in legal sciences. Wódz and Wódz define communication as:

> an intentional exchange of verbal and non-verbal signs (symbols) aimed at improving cooperation or sharing meanings between partners. Sharing of meanings is understood as producing a consistent interpretation of elements of social culture. The essence of acts of communication is therefore the intentionality of behaviour – the intention to send a certain message encoded in a system of conventional signs, symbols with a conventionalised meaning, which, however, are also largely underspecified and require contextual redefinition in specific interpersonal situations.[13]

Understood in this way, the communication process requires the participation of at least two subjects. By definition, this process is conceptually similar to mediation, which should additionally be based on specific legal principles. In this type of communication, there are also two subjects whose intentions are defined by the law, i.e. the law determines a certain scope of communication.

The communication conceptual framework can be found in a number of legal acts, in which communication refers to the provision of services, contact with citisens, public consultations or the provision of electronic services (the so-called electronic communication). All those categories are examples of social communication. As noted by Dudek, social communication is understood as a mechanism through which human relations come into existence and develop as do all the symbols of the mind together with

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12 Agnieszka Dauter-Kozłowska, „Stosowanie mediacji w postępowaniu administracyjnym i sądowoadministracyjnym," *Przegląd Prawa Publicznego*, no. 1 (2020).

13 Kazimiera Wódz and Jacek Wódz, *Funkcje komunikacji społecznej* (Dąbrowa Górnicza: Wyższa Szkoła Biznesu w Dąbrowie Górniczej, 2003), 7.

the means of transmitting them in space and preserving them in time.[14] Zarzycka aptly notes that "communication, contrary to appearances, is an intricate and rather complicated process that requires constant control of the content and the method of transmitting it, as well as the recipient's response to a given message."[15] This statement also applies quite adequately to the legal arrangement arising from the general principles of the administrative procedure, such as the obligation to notify a party to administrative proceedings. The process of communication within the framework of the public administration is also related to ensuring access to public information, i.e. all the information on public affairs. Access to information is provided in the fulfilment of the obligation to inform. When discussing communication, it is worth noting that a citisen must be guaranteed the right to information, as provided for, among others, in Article 61 of the Constitution of the Republic of Poland[16] or the Act on access to public information.[17] Those provisions also create specific obligations.

It should be noted that the process of communication involves people. Understanding it, then, depends on comprehending mutual relations between people. Secondly, communicating consists in sharing meanings. Accordingly, people who want to communicate with one another should agree in advance on the terms and definitions they will be using.[18] Those are also important determinants of mediation and setting its course. Mediation must also be based on the standards established for the communication process purposes. In this regard, several mediation models should be distinguished, such as facilitative mediation and evaluative mediation. As far as the former is concerned, the mediator's task is primarily to stimulate

14 Wiesława Dudka, ed., *Zarys teorii procesów i środków komunikowania masowego* (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 1985), 47.

15 Martyna Zarzycka, „Rola komunikacji w kształtowaniu wiserunku organizacji publicznej," *Zeszyty Naukowe Wydziału Zarządzania i Dowodzenia Akademii Obrony Narodowej* 14, no. 2 (2015): 140.

16 The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997, No. 78, item 483, as amended).

17 Act on access to public information of 6 September 2001, Journal of Laws 2022, item 902, as amended).

18 Stanisława Jung-Konstanty, „Zasady publicznego i organizacyjnego komunikowania się," in *Strategiczne zarządzanie miastem: w teorii i praktyce Urzędu Miasta Poznania*, eds. Barbara Kożuch and Cezary Kochalski (Kraków: Instytut Spraw Publicznych UJ, 2011), 97.

the exchange, facilitate communication between the parties and support them in looking for constructive solutions to their conflict. In the latter case, the mediator can also make non-committal suggestions as to how to resolve the dispute.[19] Those types of mediation determine/are determined by the model principles for the communication process.

It is worth noting that the concept of using plain language in communication is particularly important here. It assumes that communication in the public sphere should be simplified by adapting official texts (especially written ones) to the perceptual capabilities of the "average recipient".[20] One role of the public administration is to provide information in an accessible manner in the language that citisens will find easy to understand, and in this way to encourage citisens to participate in public life. The legislator has also assumed that the rules of communication should be simplified: one of the rules adopted as part of the Principles of Legislative Technique[21] is the use of non-specialist language, i.e. the language that would be understandable to the common recipient. This assumption can be treated as a standard of good communication, which ought to be relaid into the practice of mediation.

When discussing the communication conceptual framework in relation to mediation, it is worth paying attention to the international models of application of artificial intelligence in the mediation process. Of course, it is rather difficult to reconcile the use of artificial intelligence in mediation with the definitions of communication cited above, which assume the participation of two subjects (people). As noted by Flaga-Gieruszyńska, "the development of robotics for law enforcement and dispute resolution is one of the main postulates made with regard to the ethical aspects of the use of artificial intelligence in humans' everyday life."[22] It is

19 Ewa Gmurzyńska, „Rodzaje mediacji," in *Mediacja*, ed. Lidia Mazowiecka (Warsaw: Oficyna a Wolters Kluwer Business, 2009), 303.

20 Anna Burzyńska-Kamieniecka, „Wykorzystanie koncepcji *plain language* w upraszczaniu tekstów do testowania znajomości języka polskiego jako obcego," *Acta Universitatis Lodziensis. Kształcenie Polonistyczne Cudzoziemców*, no. 27 (2020): 527–528.

21 The Regulation of the Prime Minister of 20 June 2002 on the "Principles of Legislative Technique", Journal of Laws 2016, item 283.

22 Kinga Flaga-Gieruszyńska, „Zastosowanie sztucznej inteligencji w pozasądowym rozwiązywaniu sporów cywilnych," *Studia Prawnicze KUL* 79, no. 3 (2019): 92.

then difficult to consider communicating with an algorithm in the light of the definitions adopted here. Nevertheless, the experience of the judiciary worldwide shows that it is possible to use dedicated online platforms to resolve disputes. As Stępień and Kalicińska have observed:

> such solutions are gaining popularity especially in the United States of America. An example of an ODR-based court is an online court in Utah, which tested a pilot programme already at the end of 2018. It uses a communication platform through which parties try to resolve disputes (over smaller claims) without the participation of the court. The proceedings at this stage are moderated by facilitators who explain basic legal issues, make attempts at mediation and help prepare a draft settlement or procedural documents. If the facilitator decides to refer the case to a judge, then the judge decides if an in-person hearing is needed. If not, then, with the consent of the parties, the case is resolved online based on the documentation submitted earlier.[23]

The use of AI has not yet been considered in the Polish legal system. However, the idea of applying it both in the communication process and in mediation may become a challenge for the future.

3. The Essence, Concept and Subject Matter of Mediation in Administrative Proceedings

Mediation, as defined by the Polish Ministry of Justice, is currently understood as an attempt to secure an amicable and mutually satisfactory resolution of a dispute through voluntary negotiations conducted with the assistance of a third party who is neutral towards the parties. The mediator tries to mitigate any tensions and helps the parties to reach a consensus.[24] As Smarż rightly points out, "mediation is generally considered to be a special mechanism leading to dispute resolution, which is conducted with

[23] Adrian Stępień and Agnieszka Kalicińska, „Postępowania przyszłości. Ułatwi pracę sędziego czy go zastąpi?," accessed March 31, 2023, https://crido.pl/blog-taxes/postepowania-przyszlosci-sztuczna-inteligencja-ulatwi-prace-sedziego-czy-go-zastapi/.

[24] „Mediacje," Ministerstwo Sprawiedliwości, accessed March 16, 2023, https://www.ms.gov.pl/pl/dzialalnosc/mediacje/.

the participation of an impartial intermediary – the mediator – in order to reconcile the interests of the parties with social expectations."[25]

Administrative mediation was implemented into the general administrative jurisdictional proceedings by the Act of 7 April 2017 amending the Act – Code of Administrative Procedure and certain other acts.[26] In Article 13 of the Code of Administrative Procedure, that, before the amendment, had governed the principle of amicable settlement of disputes, a more broadly defined principle of amicable settlement of disputes was set forth. Pursuant to the aforementioned provision, public administration bodies, wherever possible, strive to resolve disputes amicably and to determine the rights and obligations constituting the subject matter of the proceedings under cases falling within their jurisdiction, in particular by taking actions that 1) encourage the parties to reach a settlement under cases involving parties with conflicting interests and 2) are necessary for mediation purposes. Public administration bodies take all the steps, justified at the given stage of the proceedings, to enable mediation or settlement, and in particular, they provide information on the possibility of amicable settlement and the benefits of such a solution. The main goal of mediation is to reach a compromise by making mutual concessions and to resolve the dispute, thus fending off the prospect of launching court proceedings.

Weitz rightly notes that there are three elements that are crucial for mediation in the traditional approach, i.e. the goal of striving to reach an agreement (settlement) resolving the dispute (a difference of opinion) between the parties, the assistance of a neutral third party – the mediator – in achieving this goal, and the use of negotiations as the main technique for reconciling the positions of the parties involved. It has been pointed out that mediation in the case of a dispute is the activity of any third party, i.e. any entity that is not party to the conflict, that entails creating conditions

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25 Joanna Smarż, „Instytucja mediacji w postępowaniu administracyjnym," *Opolskie Studia Administracyjno-Prawne* 16, no. 1(4) (2018): 62.

26 Hanna Knysiak-Sudyka, „Czynności procesowe w postępowaniu administracyjnym ogólnym," in *System Prawa Administracyjnego Procesowego*, eds. Grzegorz Łaszczyca and Andrzej Matan, vol. 2, part 3 (Warsaw: Wolters Kluwer Polska, 2021), LEX/el.; Hanna Knysiak-Sudyka, „Czynności procesowe stron w ramach mediacji administracyjnej," in *System Prawa Administracyjnego Procesowego*, vol. 2, part 3., eds. Grzegorz Łaszczyca and Andrzej Matan (Warsaw: Wolters Kluwer Polska, 2021), LEX/el.

for direct talks (negotiations) between the parties to the dispute and guiding them towards an amicable settlement of the dispute. Wach also emphasises that mediation means the use of an intermediary (third party) agent in resolving a dispute by the parties concerned.[27] Gmurzyńska, in turn, defines mediation as an agreed intervention of a third party in negotiations or a conflict between parties.[28]

The discussion so far shows that the most important structural element of mediation as an institution, and at the same time the key principle of mediation proceedings, is voluntary participation (voluntariness).[29] The voluntary will of the parties to the administrative proceedings can be viewed as a principle of mediation proceedings, that guarantees consensuality of mediation as an out-of-court method of dispute resolution. The voluntary nature of mediation does not imply that it is irrevocable. It is not admissible to irrevocably commit in advance to accepting the result of mediation (a settlement with specific terms).[30] It is always the parties who decide whether and under what conditions the dispute will be resolved, and the role of the mediator is only to facilitate this task.

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27 Andrzej Wach, *Alternatywne formy rozwiązywania sporów sądowych* (Warsaw: Liber, 2005), 223.

28 Ewa Gmurzyńska, *Mediacja w sprawach cywilnych w amerykańskim systemie prawnym – zastosowanie w Europie i Polsce* (Warsaw: C.H. Beck, 2007), 30 et seq.

29 Karol Weitz, „Mediacja w sprawach gospodarczych," in *Postępowanie sądowe w sprawach gospodarczych*, eds. Tadeusz Wiśniewski et al., vol. 7 (Warsaw: C.H. Beck, 2007), 225; Łukasz Błaszczak, „Charakter prawny umowy o mediację," *ADR. Arbitraż i mediacja*, no. 1 (2008): 11–12; Rafał Morek, „Dobrowolność mediacji i jej ograniczenia (prawo i praktyka)," *Studia Iuridica* 49 (2008): 141; Tadeusz Ereciński, in *Kodeks postępowania cywilnego. Komentarz. Część pierwsza i druga. Postępowanie rozpoznawcze*, ed. Tadeusz Ereciński, vol. 1 (Warsaw: Wolters Kluwer Polska, 2016), art. 1831, LEX/el.; Przemysław Telenga, in *Kodeks postępowania cywilnego. Komentarz*, ed. Andrzej Jakubecki (Warsaw: Wolters Kluwer Polska, 2010), 241. In the doctrine, the concept of the autonomy of will of the parties is used imprecisely and interchangeably with the concept of voluntariness – cf. Tadeusz Żyznowski, in *Kodeks postępowania cywilnego. Komentarz*, eds. Henryk Dolecki and Tadeusz Wiśniewski (Warsaw 2011: Wolters Kluwer Polska), 648, LEX/el. – who points out that the primary and elementary characteristic of the institution of mediation is the autonomy of the will of the parties.

30 Katarzyna Gajda-Roszczynialska, „Mediacja obligatoryjna," *Polski Proces Cywilny*, no. 3 (2012): 446.

4. The Use and Application of Mediation for Mediation Proceedings

The administrative mediation can be applied and conducted, pursuant to Article 96a § 1 of the Code of Administrative Procedure, if the nature of the case admits. This means that the provisions of Chapter 5a of the Code of Administrative Procedure are not necessarily applied to all administrative cases. It is the responsibility of the public administration authorities to determine whether there are grounds for using the option of mediation in the jurisdictional administrative proceedings and to facilitate the processing of the parties' request to use it. In the event the authority finds that the conditions for conducting mediation have not been met, this finding will constitute the basis for rejecting the request for mediation. In such a situation, the authority issues an unappealable decision to refuse to refer the case to mediation.

Mediation is useful in those cases where a conflict has emerged between an administrative body and a party or between parties. In this light, it seems reasonable to determine the scope of cases that may be referred to mediation. The premiss of Article 96a § 1 of the Code of Administrative Procedure "the nature of the case admits" should be associated with the norms of the substantive law, that raise interpretation doubts, with the norms that leave the decision to the discretional powers of the public administration body ("the body may"), and with undefined terms. In other words, the legitimacy of conducting mediation may be considered whenever it is necessary to determine the content of a legal norm in the complex process of interpretation, whenever a legal norm does not require the derivation of legal consequences or whenever a norm makes the derivation of legal consequences dependent on the fulfilment of values falling within an unspecified concept.[31] Therefore, to determine whether an administrative case has a potential to be settled by means of mediation, it is necessary to analyse (for each individual case) the provisions of the generally applicable law, that serve the legal basis for its settlement, i.e. the provisions of

[31] Barbara Adamiak and Janusz Borkowski, *Kodeks postępowania administracyjnego. Komentarz* (Warsaw: Wolters Kluwer Polska, 2017), 497; the Ruling of the Voivodeship Administrative Court in Rzeszów of 18 January 2018, II SA/Rz 1225/17, CBOSA [the Central Database of Rulings of Polish Administrative Courts]; Dauter-Kozłowska, „Stosowanie mediacji," 71–88.

the substantive law. This will make it possible to determine the nature of a right or an obligation.[32]

In the past, administrative courts have given their consent to conducting mediation proceedings, for example, in cases concerning determination of damages for the acquisition of real estate by operation of law[33] or violations of water relations.[34] Perhaps it would be sound to consider the need to distinguish the subtype of administrative cases – mediation cases, and thus also the subtype of respective qualified administrative acts – mediation decisions. The search for the characteristics of mediation cases should be primarily based on the analysis of the defining features provided for in Article 13 § 1 and Article 96a of the Code of Administrative Procedure. Their lack of specificity makes it difficult or even impossible to indicate the types of cases that may be legitimately referred to mediation.[35]

It seems that mediation may be conducted in cases, the object of which is to verify the acquisition and use of rights by an entity, rather than their legality, which should indeed be unquestionable. The administrative mediation is inadmissible in cases where there are premisses, in the form of general clauses, which provide grounds for repealing or changing the final decision to the extent necessary, and where the procedure has a subsidiary nature.

The administrative mediation is appropriate primarily for administrative cases aimed at establishing what specific rights or obligations an individual or individuals have, but in principle, not for cases, the focus of which is to verify, within the framework of extraordinary proceedings, the legality of previously issued acts.[36] Mediation should therefore be understood as an involvement of a third party in the resolution of a dispute that originates directly from the parties concerned. The mediator is a neutral entity

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32 Ibid.

33 The Ruling of the Provincial Administrative Court in Kielce of 20 February 2018, II SA/Ke 768/17, CBOSA; the Ruling of the Provincial Administrative Court in Kielce of 1 February 2018, II SAB/Ke 80/17, CBOSA.

34 The Ruling of the Provincial Administrative Court in Kraków of 6 December 2017, II SAB/Kr 139/17, CBOSA.

35 Kamil Klonowski, „Charakter administracyjnej sprawy mediacyjnej," *Przegląd Prawa Publicznego*, no. 6 (2020), LEX/el.

36 Ibid.

committed to creating conditions for the disputants to reach a settlement and to facilitating the procedure by means of various negotiation techniques.[37] The Code of Administrative Procedure does not provide for a legal definition of mediation. However, it is commonly assumed that mediation is one of the methods of alternative dispute resolution, the essence of which is to guide the parties towards an amicable settlement of the case through the involvement of a third party in the proceedings – a mediator who helps the disputants to reconcile their positions and come to a mutually agreeable solution.[38]

Pursuant to Article 96f of the Code of Administrative Procedure, a mediator may be a natural person who has full legal capacity and enjoys full public rights, in particular a mediator named on a list of permanent mediators or a list of institutions and persons authorised to provide mediation services kept by the president of the regional court or a list kept by a non-governmental organisation or a higher education institution of which the president of the regional court has been notified. Importantly, if the authority conducting the proceedings is a participant in the mediation, the mediator can only be a listed permanent mediator or a person named on the list of institutions and persons authorised to provide mediation services kept by the president of the regional court or a mediator named on the list kept by a non-governmental organisation or a higher education institution of which the president of the regional court has been notified. A characteristic feature of the administrative mediation is its confidentiality. In the case of mediation proceedings, there is a principle of confidentiality, as provided for in Article 96j § 2 of the Code of Administrative Procedure, pursuant to which the mediator, the parties, and other persons involved in mediation are obliged to keep confidential the facts they have learned about the mediation, unless the participants of the mediation

37 Wach, *Alternatywne metody*, 223.

38 Apart from mediation, alternative means for resolving disputes include internal reviews, conciliation, negotiated settlement and arbitration. See: Recommendation Rec (2001)9 of the Committee of Ministers to Member States adopted on 5 September 2001 on alternatives to litigation between administrative authorities and private parties, accessed 11 January 2023, https://rm.coe.int/16805e2b59. Cf.: Federczyk, *Mediacja w postępowaniu administracyjnym*, 103 et seq.; Zbigniew Kmieciak, *Mediacja i koncyliacja w prawie administracyjnym* (Kraków: Zakamycze, 2004), 129 et seq.

decide otherwise. The settlement proposals, the facts disclosed or the statements made in the course of the mediation proceedings may not be used after their conclusion, except for the results contained in the mediation proceedings report.

While trying to assess the functioning of mediation in the administrative proceedings on the basis of the analysis of the applicable regulations and the relevant court rulings, it would be advisable to indicate issues that could be taken into consideration in the legislative process in order to make the administrative mediation more effective and improve its compliance with the recommendations of the Council of Europe.[39] Pursuant to Article 96b § 3 of the Code of Administrative Procedure, before an authority issues the decision to refer a case to mediation, *ex officio* or upon request, it notifies in writing the parties to the proceedings and the authority referred to in Article 106 § 1 of the Code of Administrative Procedure, if the latter has not yet taken a position on the case, on the possibility of conducting mediation, at the same time requesting the parties to present their opinion on the consent to mediation, within fourteen days from the date of delivery of the notification – the consent of a party to mediation (voluntary participation). When the authority has referred the case to mediation, it postpones the hearing of the case for a period of up to two months, and if the mediation is not completed by that deadline (unless this period has been extended but by no longer than one month), it issues a decision on the termination of mediation and settles the case (Article 96e of the Code of Administrative Procedure) – the deadline stipulated in the Code of Administrative Procedure affects the speed of the proceedings as there is a specific time limit fixed for mediation. Mediation does not have to be conducted by professionals with an appropriate education and experience, either, which, were it not the case, would lead to the professionalisation of the institution of mediation in the administrative proceedings. The success of mediation largely depends on the positive approach of the public

[39] For more information, see the Recommendations of the Committee of Ministers of the Council of Europe: R (2001)9 of 5 September 2001 on alternatives to litigation between administrative authorities and private parties; R (81)7 of 14 May 1981 on measures facilitating access to justice; R (86)12 of 16 September 1986 concerning measures to prevent and reduce the excessive workload in the courts.

administration authorities. Not every administrative case is suitable for mediation (the habit of adjudication). Mediation has a number of other benefits, such as the reduced duration of the proceedings and the educational function, including mediation sessions providing the participants/parties with the opportunity to learn more about the given administrative case and, consequently, to understand the essence of the dispute and its relevant legal provisions that are often difficult to understand to an average person. It seems necessary for the authorities to change their mentality with regard to mediation – they should play an active role in it by informing parties about the possibility of conducting mediation and complying with the relevant guidelines of the European authorities. Procedures normally applied to disputes between equal entities cannot be used in proceedings in which parties have an unequal status. The objective of mediation, as provided for by the Code of Administrative Procedure, is not to resolve a dispute through mutual concessions but to work out a solution to an administrative case that the parties to the proceedings understand and accept. The belief that the costs of proceedings are significantly reduced when mediation is used seems to be false or largely oversimplified. An expertly conducted mediation with the participation of a professional mediator usually generates some costs. In some cases, mediation may speed up the administrative proceedings but this is not the rule as negotiations usually take time. The conclusion of an agreement usually eliminates the need for further proceedings under the case, including the need to institute a judicial review. The provisions on mediation turn out to be, in fact, a dead regulation. To determine the possibility of conducting the administrative mediation under a given administrative case, it is vital to first establish the nature of the case and the degree of advancement of the investigation proceedings conducted under a given case. Mediation is confidential.

The actual effectiveness of mediation will therefore depend on the degree of implementation of the principle of material truth and the principle of disposition but also on the freedom granted to the authority to shape an individual's rights and obligations.[40] The doctrine emphasises that the failure to notice the advantages of mediation and the reluctance to use it result from the fact that there is no tradition of mediation in the framework of

[40] Klonowski, „Charakter administracyjnej sprawy," LEX/el.

the public administration. Moreover, members of the general public believe in the stereotype that relations with the public administration are based on the latter's authority, which excludes any possibility of settling disputes with it or another party to the proceedings on equal terms.[41]

5. Nature of Administrative Mediation

When discussing the conduct of mediation, it is important to determine between whom the act of communication takes place. Pursuant to Article 96a § 4 of the Code of Administrative Procedure, the participants to mediation may include: 1) the authority conducting the proceedings and a party or parties to the proceedings, or 2) parties to the proceedings. This regulation allows one to distinguish two variants of mediation – the so-called vertical mediation, the participants of which are: the authority conducting the proceedings and the party or parties to those proceedings, and horizontal mediation, the participants of which are: the parties to the proceedings. With reference to the topic of communication, it bears noting that just as one can speak of communication plains, one can also speak of certain divisions of mediation. The administrative mediation can be conducted both between parties to the proceedings (horizontal mediation) and between a party or parties to the proceedings and the public administration authority before which the proceedings are pending (vertical mediation). This is a distinguishing feature since all other types of mediation are not multilevel processes.[42]

Horizontal mediation may culminate in an administrative agreement. The mediator conducting this type of mediation may be a natural person who has full legal capacity and enjoys full public rights, in particular a mediator named on a list of permanent mediators or a list of institutions and persons authorised to provide mediation services, kept by the president of the regional court or a list kept by a non-governmental organisation or a higher education institution of which the president of the regional court has been notified. The costs of horizontal mediation (i.e. the mediator's

41 More on this topic: Włodzimierz Broński, „Efektywność mediacji w postępowaniu administracyjnym," *Studia Prawnicze KUL* 79, no. 3 (2019): 64–65; Dauter-Kozłowska, „Stosowanie mediacji," 72, 86–87.

42 Dauter-Kozłowska, "Stosowanie mediacji".

remuneration and the reimbursement of the mediator's expenses incurred on mediation) are covered by the parties in equal parts, unless they agree otherwise.[43]

Vertical mediation culminates in issuing an administrative decision, as the Code of Administrative Procedure does not provide for an administrative contract. If, as a result of mediation, parties decide to settle the case within the limits of applicable law, the public administration body settles the case in accordance with this decision, as stated in the mediation session report. However, in the course of issuing the decision, the authority still uses an authoritative form of settling an administrative case. Vertical mediation may only be conducted by a listed permanent mediator or a person named on the list of institutions and persons authorised to provide mediation services kept by the president of the regional court or a mediator named on the list kept by a non-governmental organisation or a higher education institution of which the president of the regional court has been notified. The costs of this type of mediation are covered by the public administration authority.[44]

Importantly, in horizontal mediation, the mediator does not need to have professional qualifications; the mediator is only required to have full legal capacity and enjoy full public rights (Article 96f § 1 of the Code of Administrative Procedure). Other and stricter requirements regarding the mediator have been laid down for vertical mediation, where the mediator can only be a person named on the list of permanent mediators or a list of institutions and persons authorised to provide mediation services, kept by the president of the regional court or a list kept by a non-governmental organisation or a higher education institution of which the president of the regional court has been notified (Article 96f § 2 of the Code of Administrative Procedure).[45]

It seems that the legislator, outlining those two variants of mediation, has had in mind two types of situations: those in which the purpose of

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43 Hanna Knysiak-Sudyka, „Postępowanie mediacyjne," in *Ogólne postępowanie administracyjne jurysdykcyjne*, ed. Hanna Knysiak-Sudyka (Warsaw: Wolters Kluwer Polska, 2021), LEX/el.

44 Ibid.

45 Dauter-Kozłowska, „Stosowanie mediacji.

mediation is to determine how the case is to be settled by way of an administrative decision (vertical mediation) and those in which mediation leads to a settlement. The assumptions presented above serve the basis for rejecting the scheme in which mediation initiates the investigation proceedings, except for the situation in which mediation has been requested by the party who is the applicant, and the entire evidence necessary to determine the circumstances of the case has been collected by this party and attached to the application instituting the proceedings.[46]

Importantly, mediation may result in diverse outcomes. More precisely, (1) a settlement may be concluded between the parties to the proceedings (though it has to be emphasised that a settlement concluded before a mediator is not the same as a settlement concluded before a public administration body and with its participation, cf. Article 114 et seq. of the Code of Administrative Procedure); (2) a party may withdraw or modify its application/request; (3) a party may withdraw the appeal lodged or ultimately decide not to lodge it; finally, (4) the case may be settled by way of an administrative decision, and a successful mediation will mean that this decision has been accepted by the parties and will not be appealed to a provincial administrative court.[47]

If as a result of mediation parties decide to settle the case within the limits of applicable law, the public administration authority settles the case in accordance with this decision as stated in the mediation session report. In the event the objectives of mediation are not achieved within the fixed time limit, the public administration authority issues a decision on the termination of mediation and settles the matter by way of an administrative decision.[48] Even if no settlement is reached, mediation in administrative proceedings ensures – if this is possible at all – that the party has a greater influence on the content of the administrative decision, and may thus be a good instrument for protecting the rights of the party.[49] It should be emphasised that the legislative process of developing new, hybrid forms of

46 Klonowski, „Charakter administracyjnej sprawy," LEX/el.

47 Dauter-Kozłowska, „Stosowanie mediacji.

48 Paweł Rochowicz, „Klapa mediacji, ale uproszczenia działają – resort rozwoju ocenia wprowadzone procedury", accessed March 21, 2023, https://www.prawo.pl/samorzad/uproszczenia-procedur-administracyjnych-nie-zawsze-dzialaja,516368.html.

49 Knysiak-Sudyka, „Postępowanie mediacyjne," LEX/el.

legal action to be undertaken by the public administration is visibly underway. One can observe similarities to legal forms of a private nature.[50]

6. Conclusion

The analysis carried out in this paper leads to the conclusion that mediation is one of the forms of communication within the framework of the public administration. This is supported, among others, by the fact that the standards of proper communication are based on the principles that are applicable to mediation. Although the position of the doctrine on the use of mediation in the administrative proceedings in Poland is not clear-cut, models of other countries provide evidence for the feasibility of applying this process. Mediation should become an instrument that will allow for an amicable settlement of a dispute between an individual and the public administration. As already indicated, the objective of mediation is to bring the public administration closer to the civil society and to ensure that relations under the administrative law are shaped in a way that increases the influence of the parties to the proceedings on their cases. The active role of citisens is one of the foci of changes in the provisions of the systemic administrative law, such as the implementation of the institution of legal forms of public participation. In this light, it seems that the idea of mediation in the administrative proceedings should be strongly promoted. However, this requires a change in the approach to the formalised procedure of the administrative proceedings since mediation is an instrument for the implementation of the principle provided for in Article 13 of the Code of Administrative Procedure. The positive aspects of mediation demonstrated in this study indicate that mediation helps ensure that relations under the administrative law are shaped in a way that increases the influence of the parties on their own affairs as well as matters important to the public. Like any legal institution, mediation is not free from flaws. There are categories of administrative cases in which mediation is doomed to failure with regard to the objectives provided for in Article 13 and 96a § 3 of the Code of Administrative Procedure – such cases do not have the potential for mediation. It can therefore

[50] Paulina Bieś-Srokosz and Patryk Błasiak, „Ugoda administracyjna w świetle nowelizacji Kodeksu postępowania administracyjnego. Refleksje na temat konsensualnej formy działania w administracji publicznej," *Przegląd Prawa Publicznego*, no. 6 (2018): 104.

be concluded that the administrative mediation can be used primarily for the administrative cases aimed at establishing what specific rights or obligations an individual or individuals have. In this regard, attention can also be drawn to the provisions governing mediation under the private law, which could constitute a kind of a model for the mediation proceedings. In the context of communication, solutions should also be sought to popularise the use of mediation and change the approach of the administrative authorities to this institution. There is a growing need for educating the public and encouraging citisens to get involved in their disputes and try to resolve them amicably. Another challenge arises from the response to the changes in the surrounding environment and the new developments affecting this process, such as the use of means of remote communication or the use of artificial intelligence.

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Gloss on the Judgement of the Polish Supreme Court of 2 June 2022, I KZP 17/21[1]

Jakub Kosowski
Dr., Assistant Professor, Faculty of Law and Administration, University of Maria Curie-Skłodowska, correspondence address: Pl. Marii Curie-Skłodowskiej 5, 20-031 Lublin, Poland, email: jakub.kosowski@mail.umcs.pl
https://orcid.org/0000-0001-6888-5771

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legal question, European Investigation Order, issuing authority, EU Member State, bank secrecy

Abstract: The article discusses the decision of the Polish Supreme Court of 2 June 2022, I KZP 17/21. The ruling of the Supreme Court was issued based on a legal question submitted by a common court in relation to the European Investigation Order (EIO). The Author refers to the ruling by discussing broadly both the issues of the legal question and the authority issuing the European Investigation Order within the framework of pre-trial proceedings. Of paramount importance are the characteristics of the subjective sphere, i.e. the authority empowered to issue a European Investigation Order from the point of view of legally protected confidential information, in particular bank secrecy constituting the subject matter that served the basis for the ruling of the Supreme Court being commented herein.

1. Theses

1. The authority responsible for issuing a European Investigation Order (EIO) within the framework of pre-trial proceedings is the prosecutor in charge of that particular procedure (Article 589w § 1 of the Criminal Procedure Code in conjunction with Article 2(a)(i) of the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L from 2014 No. 130, p. 1; hereinafter referred to as Directive

[1] Polish Supreme Court, Judgement of 2 June 2022, Ref. No. I KZP 17/21, OSNK 2022/7/26, LEX no 3358653.

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2014/41/EU), unless the provisions of the Criminal Procedure Code or specific legal regulations reserve the right to admit or take evidence for the jurisdiction of the court as acts of the court in pre-trial proceedings. In such an event, it is only the court that is competent to issue a European Investigation Order.

2. During the *in rem* phase of the pre-trial procedure, the authority empowered to issue a European Investigation Order concerning the information covered by bank secrecy with regard to a bank established in another Member State of the European Union is the public prosecutor (Article 589w § 1 of the Criminal Procedure Code) who must obtain the consent of the competent district court to access such information before issuing the order (Article 106b (1) and (3) of the Banking Law applicable *mutatis mutandis* in conjunction with the second sentence of Article 589 § 5 of the Criminal Procedure Code).

2. Selected Factual and Legal Grounds

The Supreme Court examined the case regarding the legal question submitted by the Appeal Court in (...) covering the following subject matter:

> Is it the prosecutor or the district court that is the competent authority for the issuance of a European Investigation Order in the course of the pre-trial proceedings concerning disclosure of bank secrecy-covered information in respect of a bank established outside the territory of the Republic of Poland under Article 589w § 1 and § 5 of the Criminal Procedure Code?

The legal question was asked in connection with interpretation doubts raised by the Court of Appeal (…) in the course of examining the appeal subject matter by the Public Prosecutor who conducted proceedings in respect of the case of fraud (Article 286 §1 of the Criminal Code). The Public Prosecutor, acting under Article 589w § 1 and § 5 of the Criminal Procedure Code and Article 106b § 1 and § 2 of the Banking Law (Journal of Laws from 2021, item 2439), requested the District Court in Kielce to issue the European Investigation Order (EIO) for disclosure of information constituting a bank secrecy for the purpose of taking and examining evidence, in the form of personal data of the holder of the bank account and all the information concerning the opening and operation of the bank account, that is located and may be taken in Ireland.

When examining the prosecutor's request, the District Court in Kielce considered that although the request was based on two legal grounds, it ultimately only concerned the consent to the disclosure of the information covered by bank secrecy, and the content of the request thus understood became the basis for the decision by which the Court did not accept the prosecutor's request.

The Supreme Court noted that, due to the gravity of the subject matter and the possible practical consequences of misinterpretation of Article 589w § 1 of the Criminal Procedure Code, it should have been pointed out that the legislature, following the Directive 2014/41/EU, authorised the court, the public prosecutor and even, in certain cases, the police or bodies authorised to carry out investigation or verification proceedings (Article 589w § 1 and § 2 of the Criminal Procedure Code stipulated that in the two latter cases the issuing of the EIO required for the approval to be issued by a public prosecutor) in order for the European Investigation Order to be issued. Those authorities have such competence in connection with proceedings conducted before them (the court) or by them (the public prosecutor, the police, and other authorities), which, in principle, limits the competence of those authorities depending on the stage of criminal proceedings at which the case is being conducted. However, it will not always be possible for the public prosecutor conducting or supervising the investigation to issue (or approve) a European Investigation Order, which is the case when a decision is required to be made by a court in order to take evidence within the framework of pre-trial proceedings. This results, first of all, from the first sentence of Article 589w § 5 of the Criminal Procedure Code, according to which if the admission, acquisition or taking of evidence requires the issuance of a decision, the decision on issuing the EIO substitutes for the relevant evidence-taking decision. This is a consequence of Article 2(c)(i) of the Directive 2014/41/EU, which stipulates that the issuing authority of the EIO is a judge, a court, an investigating judge or a public prosecutor competent in the case concerned (with emphasis put on the Supreme Court). While decoding the content of the rule resulting from that provision, it must therefore be stated that a public prosecutor (a public prosecutor's office) may be the issuing authority for the European Investigation Order and that the order issued by it is, in its essence, of nature and effects equivalent to a judicial ruling. An important issue to

decide whether a particular public authority may be the issuing authority is the question if the authority concerned is empowered by the national law to undertake certain investigative measures.[2] In that judgement, the Court of Justice of the European Union has ruled that:

> Article 1(1) and Article 2(c) of Directive 2014/41/EU regarding the European Investigation Order in criminal matters must be interpreted as meaning that the concepts of 'judicial authority' and 'issuing authority', within the meaning of those provisions, include the public prosecutor of a Member State or, more generally, the public prosecutor's office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order.

To this end, as far as the question of issuing the European Investigation Order in respect of the information covered by bank secrecy as heard by common courts is concerned, it should be noted that four positions may be identified in the case law, which, albeit to a varied extent, divergently resolve the question of the authority's competence to issue the European Investigation Order and the need for obtaining – from a Polish court – a permission to disclose the information covered by bank secrecy if that information were to be obtained from a bank established in another EU Member State. According to the first view, the power to issue the EIO in this regard is vested in the district court as a body entitled under the national law to exempt from the bank secrecy requirement (e.g. the decision of the Appeal Court in Gdańsk of May 23, 2018, Ref. No. II AKz 408/18). According to the second view, a district court's decision made in the course of

[2] See the judgement of the Court of Justice of the European Union of 8 December 2020, C-584/19, Paragraphs 50 to 53 that govern the issue under consideration; by the way, under the case, that has given rise to the question that is referred to in respect of a preliminary ruling, the EIO had been issued by a public prosecutor's office to provide for the access to bank statements, but under the Austrian law such an investigative measure needs to be approved by a court, without which that measure may not be carried out Paragraphs 19 to 20 of the substantiation for that ruling.

pre-trial proceedings substitutes for a decision on issuing the EIO in so far as it states that the conditions for granting the exemption from bank secrecy are met. In such a case, there is no need to issue a separate prosecutor's decision on issuing the EIO (as argued by e.g. the decision of the Appeal Court in Katowice of 29 January 2019, Ref. No. II AKz 53/19). The third group of rulings point out that the prosecutor has the power to issue such a decision within the framework of pre-trial proceedings, even in the case of the EIO issued in order to obtain the information covered by bank secrecy, with no need for the prosecutor to obtain any exemption from bank secrecy because the Polish court does not have the power to exempt banks operating in the territory of another Member State of the European Union from bank secrecy (as argued by e.g. the decisions of: the Appeal Court in Kraków of 23 October 2018, Ref. No. II AKz 524/18 and the Appeal Court in Łódź of 19 September 2018, Ref. No. II AKz 496/18; this position having been presented by the District Court in Kielce which adjudicated under this case at first instance). According to the fourth view, when at the pre-trial stage there is a need to issue a decision on the issuance of the European Investigation Order in respect of the information constituting bank secrecy, the authority empowered to issue such a decision is the public prosecutor who must priorly apply for and obtain the consent of the court to disclose such information (e.g. the decision of the Appeal Court in Katowice of 4 September 2018, Ref. No. II Akz 645/18).

In view of the above, it should be acknowledged whose (prosecutor's or court's) decision serves the basis for obtaining and taking evidence concerning the information covered by bank secrecy in the course of pre-trial proceedings. Relevant in this respect is Article 106b(1) and (5) of the Banking Law in conjunction with Paragraph 3 of the same article. Pursuant to its content, it is solely the public prosecutor who is authorised in the *in rem* phase of pre-trial proceedings to demand from a bank, its employees and persons through whom the bank performs banking operations, to provide the information covered by bank secrecy. The Banking Law stipulates, however, that such a demand may be made only on the basis of a decision of a district court issued at the request of a public prosecutor, in which the court, giving its consent to provide the information, specifies its type and scope, the person or organisational unit to which it relates and the entity obliged to provide it (Article 106b (1) and (3) *in*

fine of the Banking Law). Neither the power to decide on the admission of evidence nor the power to take evidence has been included in the competence of the court, but only the power to find whether, and if so to what extent, it may be taken by a public prosecutor. Thus, it is still the prosecutor who decides whether to make a specific request to the bank after having obtained the court's consent (Article 106b(1) and (5) of the Banking Law) as well as on the scope of the requested information (although possibly only with the purpose of narrowing it in relation to the scope established in the court's decision). Thus a positive decision of the court has the dimension of authorising an action as well as determining its scope but the decision to take evidence (even upon the court's decision) is within the exclusive competence of the prosecutor.

There is a number of arguments for the competence (and obligation) to issue the European Investigation Order in respect of the information concerning specific bank accounts and bank transactions only upon a prior consent of a court. Firstly, since the Polish authority may only request for the measures permitted by the Polish law and only compliant with the applicable pre-conditions for carrying them out, the request for the access to bank information must also comply with the pre-conditions laid down in the Polish law. Requesting for the data covered by bank secrecy from another Member State without a prior consent of the court would be a case of "forum shopping", i.e. looking for a more lenient (for the competent authority) forum for obtaining evidence, which is not permitted by the Directive. Secondly, the Directive itself requires that the issuance of the EIO be carried out in accordance with the conditions required by the national legislation – the provision of Article 2(c) (ii) of the Directive 2014/41/EU cited above states that the issuing authority is the authority competent to order for the evidence to be gathered in accordance with the national law. The prosecutor is undoubtedly not entitled to independently order the measure to be conducted. Thirdly, the issuance of the EIO by a public prosecutor in contravention of the procedure required by the Polish law may cause the order to be overturned by the executing authority in accordance with Article 9(3) of the Directive in case the EIO, that has not been issued by the issuing authority referred to in Article 2(c), is submitted to the executing authority. Most countries have implemented this power of verifying the formal correctness of the issuance of the EIO in terms of

checking the competence of the issuing authority (in the case of the Polish legal order in Article 589ze § 6 of the Criminal Procedure Code). Nor is it an argument in favor of transferring that power to the public prosecutor that the Polish court cannot exempt from the bank secrecy in respect of a bank established in another Member State. The Polish court does not exempt from bank secrecy because this is done by a relevant authority implementing the order.

3. Commentary on Judicial Decision

The Supreme Court's decision in question relates to three fundamental legal issues. The first one concerns the legitimacy of submitting legal questions by the Appeal Court. The authority empowered to issue the EIO within the framework of pre-trial proceedings is another area of consideration. The third issue involves the problem of bank secrecy and the role of the court in issuing the EIO. As regards the first two issues, one has to agree with the decision of the Supreme Court, notwithstanding appropriately relevant comments. The issue of the role of the court and bank secrecy seems to be the most complicated one due to the inconsistent case law and doubts raised in the related literature. At this point, it is crucial to make polemical remarks to the ruling under review.

1. It is apparent from the facts presented above that the Appeal Court submitted a legal question in the context of determining which authority has the competence to issue the EIO for disclosure of the information constituting a bank secrecy in respect of a bank established outside the territory of the Republic of Poland within the framework of pre-trial proceedings. The Supreme Court based its opinion on arguments widely discussed in the related literature.[3] Given those arguments, it rightly pointed out that the procedure for issuing the EIO had been groundless from the outset, since the institution of the European Investigation Order (EIO), implemented into the Polish legal system in conjunction with the Directive 2014/41/EU, did not apply to Ireland. In accordance with Recital 44 of the Preamble to that Directive, and in accordance with Articles 1 and 2 and Article 4a (1) of

[3] For more detail, see: Ryszard A. Stefański, *Instytucja pytań prawnych do Sądu Najwyższego w sprawach karnych* (Kraków: Zakamycze, 2001), 254–261, 352–371.

Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, which is annexed to the Treaty of the European Union (TEU) and to the Treaty on the Functioning of the European Union (TFEU), Ireland is not taking part in the implementation of this Directive and is not bound by it or subject to its application. The position adopted must be accepted in its entirety. Therefore, the only way to obtain certain evidence will be to use the classical instruments of international legal assistance in criminal matters, broadly discussed in the substantiation of the decision being commented.

2. As regards the authority competent to issue the EIO within the framework of pre-trial proceedings, it should be pointed out to the clear linguistic interpretation of Article 589w § 1 of the Criminal Procedure Code in conjunction with Article 2(a)(i) of the Directive 2014/41/EU, which indicates the authority in charge of the pre-trial proceeding. As part of the implementation of that Directive into the Polish legal order, Article 589w § 1 of the Criminal Procedure Code points directly to the public prosecutor. This does not apply to a situation where a special provision confers powers on the court to conduct the measure in question within the framework of pre-trial proceedings. Then the court will be entitled to issue the EIO. However, the Supreme Court has pointed to the need for the court's consent to access to bank secrecy, which will be discussed later herein.

This position, which relates to the authority issuing the EIO at the pre-trial stage, deserves our full approval. This view is presented by most of the related literature on the subject[4] and the case law of the common

[4] See, among other things: Wojciech Kotowski, *Organ właściwy do wydania europejskiego nakazu dochodzeniowego (END)*, Legalis 2022, accessed July 10, 2023; Rafał Kierzynka, „Komentarz do art. 589w k.p.k.," in *Kodeks postępowania karnego. Komentarz*, ed. Dariusz Drajewicz, Legalis 2020, accessed July 10, 2023; Hanna Kuczyńska, „Komentarz do art. 589w k.p.k.," in *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka, Legalis 2023, accessed July 10, 2023; Barbara Augustyniak, „Komentarz do art. 589w k.p.k.," in *Kodeks postępowania karnego. Komentarz, tom II, Komentarz aktualizowany*, ed. Dariusz Świecki, Lex 2023, accessed July 10, 2023; Ariadna Ochnio, „Glosa do postanowienia Sądu Apelacyjnego w Katowicach z dnia 4 września 2018 r., II AKz 645/18," *Orzecznictwo Sądów*

courts.[5] The Appeal Court in Gdańsk, on the basis of the examination of the EIO case concerning bank information pointed out that, where the measure requested by the public prosecutor was subject to the decision of the competent district court under the national law, the possible issuance of the EIO also fell within the competence of that court.[6] It seems, however, that the Supreme Court in the decision being commented rightly pointed out that the power to issue the EIO within the framework of pre-trial proceedings was something else than the power to authorise access to banking information by the court before the EIO was issued. The decision of the Appeal Court in Gdańsk indirectly corresponds to the decision of the Appeal Court in Katowice[7] which has held that the decision of a district court, in so far as it states that there are pre-conditions for the exemption from bank secrecy, is replaced with the decision to issue the EIO and thus there is no power for the prosecutor to issue a separate decision to issue the EIO. This view contradicts the content of the Act on Banking Law.[8] According to Article 106b(1) and (5) of the Banking Law, it is the public prosecutor who is an exclusive authority authorised to demand from a bank, its employees and persons through whom the bank performs banking operations, to provide the information covered by bank secrecy within the framework of pre-trial proceedings. The Supreme Court has aptly observed, in the substantiation of the decision being commented, that the court's role is to focus on other issues, as the formula used in the Banking Law is of a two-stage nature, with a clearly defined competent authority.

The most controversial matter in this ruling of the Supreme Court is the question of bank secrecy and the court's involvement in this procedure.

Polskich, no. 7–8 (2021): 105–106. Cf. Andrzej Sakowicz, „Komentarz do art. 589w k.p.k.," in *Kodeks postępowania karnego. Komentarz*, ed. Andrzej Sakowicz, Legalis 2023, accessed July 10, 2023.

5 See, among other things: Appellate Court in Katowice, Decision of 4 September 2018, Ref. No. II AKz 645/18; Appellate Court in Katowice, Decision of 29 January 2019, Ref. No. II AKz 53/19, LEX; Appellate Court in Łódź, Decision of 19 September 2018, Ref. No. II AKz 496/18, Legalis.

6 Appellate Court in Gdańsk, Decision of 23 May 2018, Ref. No. II AKz 408/18, Lex.

7 Appellate Court in Katowice, Decision of 29 January 2019, Ref. No. II AKz 53/19. Similarly: Sakowicz, „Komentarz do art. 589w k.p.k.".

8 The Act of 29 August 1997 Banking Law, consolidated text: Journal of Laws 2022, item 2324, as amended.

Two contradictory positions can be distinguished in relation to that subject matter. The first, that has received the recognition of the vast majority of the scholarly opinion and case law, presupposes that the authority empowered to issue the EIO is a public prosecutor who, before making such a decision, must seek and obtain a prior consent from the court to disclose such information.[9] The opposite view presupposes that it is not necessary for a prosecutor to obtain a judicial exemption from bank secrecy since the Polish court has no power to exempt banks operating in the territory of another Member State of the European Union from bank secrecy.[10]

Article 106b (1) of the Banking Law, applicable *mutatis mutandis*, vesting the discretional power in the court to be invoked upon having obtained a request from a prosecutor, serves the legal basis for adopting the first conceptual framework as referred to above. However, a part of the case law and the related literature rightly highlight that the Banking Law has a strictly defined subjective scope and therefore foreign banks are not subject to the Polish jurisdiction.[11] Therefore, the application, even *mutatis mutandis*, of the legal basis cited above appears doubtful. Nor is it justified to compare the situation under consideration with the rules on secrecy exemption set

9 See e.g. Appellate Court in Katowice, Decision of 4 September 2018, Ref. No. II Akz 645/18; cf. also an affirmative commentary on that ruling – Ochnio, „Glosa do postanowienia Sądu Apelacyjnego w Katowicach," 104–117; Appellate Court in Krakow, Decision of 13 July 2022, Ref. No. II AKz 424/22, LEX; Kotowski, *Organ*…; Sakowicz, „Komentarz do art. 589w k.p.k."; Kierzynka, „Komentarz do art. 589w k.p.k."; Kuczyńska, „Komentarz do art. 589w k.p.k."; Augustyniak, „Komentarz do art. 589w k.p.k."; Anna Błachnio-Parzych, „Organ uprawniony do wydania europejskiego nakazu dochodzeniowego w celu uzyskania informacji stanowiących tajemnicę bankową na podstawie art. 106b ust. 1 Prawa bankowego – glosa do postanowienia Sądu Apelacyjnego w Łodzi z 19.09.2018 r., II AKz 496/18," *Glosa*, no. 3 (2022): 33–41.

10 Appellate Court in Krakow, Decision of 23 October 2018, Ref. No. II AKz 524/18, Legalis; Appellate Court in Łódź, Decision of 19 September 2018, Ref. No. II AKz 496/18, Legalis; District Court in Łomża, Decision of 25 January 2019, Ref. No. II Kop 42/18, Legalis; District Court in Łomża, Decision of 28 March 2019, Ref. No. II Kop 7/19, Legalis.

11 As in: Appellate Court in Krakow, Decision of 23 October 2018, Ref. No. II AKz 524/18, Legalis; Appellate Court in Łódź, Decision of 19 September 2018, Ref. No. II AKz 496/18, Legalis; Bernard Smykla, „Komentarz do art. 1," in *Prawo bankowe. Komentarz*, ed. Bernard Smykla, Lex 2011, accessed July 10, 2023.

out in the Criminal Procedure Code since they are clearly and precisely enshrined in the law, both in objective and subjective terms.[12]

The provisions of the Directive 2014/41/EU itself account for the second argument analysed in the related literature and case law. In Article 2(c) (ii), the Directive stipulates that the issuing authority is the authority with competence to order for evidence to be gathered in accordance with the national law. However, it should be noted that the Directive has been implemented in the Polish legal order by amending the Criminal Procedure Code but the banking law has not been amended and no related executive regulations allowing for the proper application of the provisions of the Directive have been enforced, either. Neither are there any grounds for direct implementation of directives. Article 589 of the Criminal Procedure Code, pointing to the public prosecutor as the authority to issue the EIO during pre-trial proceedings, constitutes the binding provision in this respect.

The third argument is to refer to the wording of Article 589w § 5, second sentence, Criminal Procedure Code in conjunction with Article 6(1)(b) of the Directive 2014/41/EU. The Directive provides that one of the pre-conditions for the issuance of the European Investigation Order is that the investigative measure(s) indicated in the EIO could have been ordered under the same conditions in a similar domestic case. In the reasons for the decision, the Supreme Court considered that requesting for the data covered by bank secrecy by a prosecutor from another Member State without a prior consent from the court would be a case of "forum shopping", i.e. looking for a more lenient (for the competent authority) forum for obtaining evidence, which is not permitted by the Directive. However, it is important to bear in mind the scope of application of the provisions of the Directive and its implementation into the Polish legal order. The Appeal Court in Łódź pointed out that the Criminal Procedure Code laid down the relevant legal framework.[13] If the legislature's intention were to expand and broaden the scope of the secrecy protected by the Criminal Procedure Code, it would have made an appropriate amendment.

Article 589w § 5 sentence 2 of the Code of Criminal Procedure points out that "the provisions on particular actions and evidence shall be applied

12 Differently, but without broader substantiation: Kotowski, *Organ…*

13 Appellate Court in Łódź, Decision of 19 September 2018, Ref. No. II AKz 496/18, Legalis.

accordingly." However, it should be stipulated that this provision applies to actions and evidence specified in the law which contains the relevant provision, i.e. the Code of Criminal Procedure. It is not possible for this regulation to cover other actions referred to in an unspecified number of legal acts. This is because it should be kept in mind that the specific bank secrecy regulations are not contained directly in the Code of Criminal Procedure but in Article 106b(1) of the Banking Law. It is this provision of special legislation, and not the Code itself (as in the case of the confidential information directly governed by Article 180 of the Code of Criminal Procedure), that sets out bank secrecy, but first of all its scope. As I have mentioned above, this scope does not include foreign banking institutions. Therefore, in my opinion, it is not possible to adopt the construct of application *mutatis mutandis* of the provisions of the Banking Law by extending the scope of application of bank secrecy to entities that are not subject to the Polish jurisdiction.

This issue cannot be considered in the context of the limitation of procedural guarantees. It should be borne in mind that the execution of the EIO in another EU Member State is carried out according to the rules in force in the Member State concerned.

The last key argument is to point to the formal verification exercised by the authority executing the EIO in terms of the competence to issue the EIO. The above statement is accompanied by the conclusion that the issuance of the EIO by an irrelevantly competent authority may lead to the refusal to execute it. Scholars in the field, when arguing for the view that judicial approval is necessary, point out that the consent is merely the implementation of the national procedures.[14] The Supreme Court has rightly stated in its reasoning that a Polish court may not exempt a bank based in another Member State from bank secrecy, as this is done by the relevant authority executing the order.[15]

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14 Ochnio, „Glosa do postanowienia Sądu Apelacyjnego w Katowicach," 109.

15 As in: CJEU Judgement of 8 December 2020, Criminal proceedings against A and Others., Case C-584/19, EU:C:2020:1002, Paragraphs 65 and 75. However, the analysis of the authorities authorised to exempt from bank secrecy in all the EU Member States goes beyond the scope of this study.

To summarise those deliberations, it must be concluded that the arguments set out in the commented decision of the Supreme Court concerning the court's role, as far as the subject matter at issue is concerned, cannot be accepted. It seems that convincing arguments are those set out above, which indicates a deliberate decision of the legislature when implementing the provisions concerning the EIO into the Polish legal system. After all, the related literature provides arguments from the ruling of the ECJ which concluded that only the authority competent to order a given investigative measure under the national law of the issuing state could be competent to issue the EIO.[16] This seems to be a key axis of the dispute, i.e. the place of the public prosecutor in the national procedure as the EIO issuing authority, and of the court under the Banking Law. As A. Ochnio has rightly pointed out, the EIO executing authority will have to initiate the procedures applicable in its national legal system in order for such evidence to be taken, including, for example, the bank secrecy exemption by a court in the EIO executing state or the approval of providing the information covered by bank secrecy, as issued by that court.[17] A similar decision will have to be taken by the Polish court with regard to the execution of the EIO. It is therefore important to bear in mind the intention behind implementation of the Community instruments of the cooperation between Member States in criminal matters, namely speeding up the proceedings. The requirement for the consent from the Polish court as imposed along with the duplication of that action in the EIO executing state would contribute to the increased length of the proceedings and could also lead to a situation in which a Polish court has given its consent while a court in the EIO executing state has not given its consent on the basis of the same facts. Nevertheless, it should be postulated that the legislature intervene in order to fully eliminate the doubts that have only been deepened by the substantiation of the decision of the Supreme Court, which has referred to this issue only incidentally, looking at the subject matter of the case in respect of which it was issued.

16 Błachnio-Parzych, „Organ uprawniony do wydania europejskiego nakazu dochodzeniowego," 39; CJEU Judgement of 16 December 2021, Criminal proceedings against HP, Case C-724/19, EU:C:2021:1020.

17 Ochnio, „Glosa do postanowienia Sądu Apelacyjnego w Katowicach," 110.

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