

Periodic Country Report: Poland

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Introduction

The European Arrest Warrant (hereinafter referred to as "EAW") is a legal instrument which has introduced, to the greatest extent possible, the principle of mutual recognition, which is the "cornerstone" of EU cooperation in criminal matters.¹ At the core of the EAW – as stated in recital 10 of the FD EAW – lies a high level of trust in relations between the Member States of the European Union.

In Polish procedural criminal law, the institution of the EAW is regulated in Chapter 65a ("Motion to a European Union Member State for the surrender a requested person pursuant to a European Arrest Warrant") and in Chapter 65b ("Motion of a European Union Member State to surrender a requested person pursuant to a European Arrest Warrant") of the Polish Code of Criminal Procedure, hereinafter the CCP).² It was introduced into the CCP by transposition into the Polish legal order of FD EAW, pursuant to the Act of 18 March 2004,³ which entered into force on 1 May 2004, upon Poland's accession to the European Union.

It is judicial practice that shapes the functioning of the EAW mechanisms. Judicial practice also highlights questions related to the objective to ensure relative automatism for the implementation, by way of the EAW, of the principle of mutual recognition of criminal judgements. Judicial practice also shaped the dynamic relationship between the EAW and the Polish legal system and highlighted the need for significant modifications to the CCP and the Polish Constitution in the scope of the EAW.

Even before the entry into force of the provisions transposing the EAW, significant doubts arose concerning the possibility of surrendering a Polish citizen based on the EAW, and the need emerged to examine the compatibility of Article 607t § 1 of the CCP with Article 55(1) of the Constitution of the Republic of Poland of 2

¹ Recital 6 of Council Framework Decision Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190 hereinafter referred to as "FD EAW".

² Act of 6 June 1997; consolidated text: OJ of 2021, item 534; thereafter referred to as "the CCP".

³ OJ 2004, no. 69, item 626

April 1997.⁴ The issue was brought to the attention of the Regional Court in Gdańsk, IV Criminal Chamber, which in turn submitted a question of law on the compatibility of Article 607t of the CCP with Article 55(1) of the Constitution of Poland to the Constitutional Tribunal. The provision of Article 607t § 1 of the CCP established that if the EAW was issued for the purpose of prosecuting a Polish citizen or an individual benefiting from the right of asylum in the Republic of Poland, the surrender could be executed on condition that the person would be returned to the territory of the Republic of Poland after the final termination of the proceedings in the country where the EAW had been issued. In turn, Article 55(1) of the Constitution of Poland implied – without any exceptions – **the prohibition of extradition of a Polish citizen**. The Constitutional Tribunal, pointing to the differences between the EAW and traditional extradition procedures, stated that the Constitution of Poland didn't account for the differences between the statutory institutions of surrender and extradition. The Tribunal pointed out that extradition consists of the surrender to a foreign state of an indicted or convicted person, in order to enable the conduct of criminal proceedings against this person, or the serving of punishment established by a sentence concerning this person. The surrender of a person indicted by the EAW for the purpose of conducting criminal proceedings against that person on the territory of another EU member state, or of serving of an imprisonment sentence or some other custodial measure was also recognized as a category (type) of extradition, as regulated in Article 55(1) of the Constitution of Poland. Therefore, the Tribunal concluded that the differences between surrender under the EAW and the statutory institution of extradition couldn't result in the derogation of the constitutional impediment barring surrender of Polish citizenship. Consequently, the Constitutional Tribunal of Poland in the Judgement of 27 April 2005⁵ held that Article 607t § 1 of the CCP, to the extent that it allowed for the surrender of a Polish citizen to a Member State of the European Union subject to an EAW, was incompatible with Article 55(1) of the Constitution of Poland. At the same time, the Constitutional Tribunal ruled that the aforementioned provision of the CCP would cease to be legally binding upon the lapse of 18 months from the date of publication of the judgement. The Constitutional Tribunal indicated the necessity to make appropriate legal changes, including in the Basic Law. At the same time, the Tribunal stressed that the EAW, as compared to the traditional extradition procedure, represented a more advanced form of judicial cooperation in criminal matters relying on a high level of mutual trust in EU Member States' legal systems, and their respect of fundamental human rights and liberties. It also stated that the common standards of rights and liberties guaranteed within the EU justified the abandonment of the formal guarantees provided for under classical instruments of international cooperation. The Constitutional Tribunal also emphasised the significance of the EAW for the proper functioning of the judiciary in Poland, primarily for the strengthening of internal security.

Considering the foregoing, amendments were made to both the Constitution of Poland and the provisions of the CCP. First, pursuant to the Act of 8 September 2006,⁶ as of 7 November 2006 the content of Article 55 of the Constitution of Poland was amended to allow the surrender of a Polish citizen to another EU Member State on the basis of the EAW. Following this amendment, Article 607p of the CCP was amended by the Act of 27 October 2006.⁷ The latter added a paragraph (§ 1(5)) to Article 607p of the CCP, which introduced an obligation

⁴ OJ 1997, no. 78, item 483; hereinafter referred to as “the Constitution of Poland”.

⁵ Case no. P 1/05, OJ 2005, no. 77, item 680, Legalis no. 68295.

⁶ OJ 2006, item 1471.

⁷ OJ 2006, no. 226, item 1647.

to refuse the execution of an EAW due to considerations linked to the protection of human and citizens' freedoms and rights.

This example shows that the EAW is an institution the use of which is closely connected with the necessity, proportional to the related limitations, to respect fundamental human rights and liberties. At the same time, a high level of mutual trust is supposed to underpin the functioning of the EAW as an instrument based on the mutual recognition of judgments in criminal cases. Nevertheless, the assumption according to which member states judicial authorities can trust each other when cooperating under the EAW is challenged in judicial practice. In fact, these challenges show that there is high level of distrust between Member States, which in recent years, not only but mainly due to the changes made in the judicial system, is seen in particular in relation to Polish judicial authorities issuing EAWs.

The present report analyses a selection of cases illustrating the key legal challenges and interpretative issues which have emerged in relation of Polish courts cooperating with other Member States through the EAW. We consider cases where it was Poland that requested surrender from another EW Member, and cases where the EAW was initiated following requests for surrender to Poland from another EU Member State. The selection of the material to be analysed has been guided by two factors. First, an attempt has been made to present the most important judicial decisions shaping judicial practice in the context of EAW proceedings in Poland. Second, the selection considers cases highlighting key legal and interpretative questions that have emerged when Poland acted as issuing or executing state. Due to the space available, a decision has been made to present only some judgements in greater detail and to discuss the remaining ones mainly against their background in order to elaborate on and shed appropriate light on the problems identified.

Section I – Issuing of EAWs: rule of law and fundamental rights considerations

The rule of law and fundamental rights are factors that can play an important role in the context of the application of the EAW. The importance of the principle of the rule of law and the need to protect fundamental rights results from Article 2 of the Treaty of European Union (hereinafter referred as “the TEU”), which stipulates that the EU is founded on the values such as respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights. Consideration should be given not only to the rights guaranteed by the provisions of the Constitution of Poland and other relevant regulations under the national laws of individual Member States, but also to those provided for in the Charter of Fundamental Rights of the European Union (hereinafter referred to as “the CFR”) and in the European Convention on Human Rights (hereinafter referred to as “the ECHR”) or the Treaties (for that matter in particular the above-mentioned Article 2 and Article 19 of the TEU).

Sub-section I.1 covers cases in which issues related to the independence and impartiality of Polish judicial authorities had a direct impact on the execution of Polish EAWs by other EU Member States. In sub-section I.2 analyses cases related to Polish authorities’ understanding and application of the principle of proportionality when issuing EAWs. Cases where the Polish authorities clearly emphasized the need to use other measures of judicial cooperation before issuing the EAW are identified.

I.1 Questions related the lack of independence of the issuing judicial authority in Poland

According to the provision of art. 607a of the CCP, the EAW is issued by the competent regional court. At the stage of the preparatory proceedings the EAW is issued on a motion of the public prosecutor, if it is suspected that a person prosecuted for an offence falling under the jurisdiction of Polish criminal courts may be staying in the territory of another EU Member State. However, during the court and enforcement proceedings, the EAW is issued *ex officio* or on a motion of a competent district court.

It is important to emphasise at this point the current problems related to the execution of EAWs issued by Polish courts due to the so-called “reforms” in the judiciary carried out in the years 2015-2019 in Poland⁸. A wealth of evidence exists that the changes made in Polish law have undermined the rule of law, a situation that poses a real threat to the fairness of judicial proceedings. In particular, concerns relate to: the independence and legitimacy of the Constitutional Tribunal, raised by the Commission under the Article 7(1) of the TEU; procedures for appointing members of the National Council for the Judiciary; the functioning of the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber of the Supreme Court of Poland; disciplinary regime for judges, especially after the amendments introduced by the Act of 20 December 2019. Changes made in Polish law in the area of justice and related steps taken towards Poland at the EU level in relations to concerns about the rule of law, in particular as regards the independence and impartiality of the

⁸ In particular, the attention should be paid to the changes introduced by: the Act of 23 December 2015 amending the Act of 25 June 2015 on the Constitutional Tribunal (OJ 2015, item 1064), the Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts (OJ 2018, item 3), the Act of 8 December 2017 on the Supreme Court (OJ 2018, item 5), the Act of 20 December 2019 amending the Act relating to the organization of the ordinary courts, the Act on the Supreme Court and certain other acts (OJ 2020, item 190).

Polish judiciary, had an impact on cross-border judicial cooperation under the EAW FD, in cases where Poland acted as issuing state.

In the *Celmer* case⁹, the Irish High Court requested the CJEU for a preliminary ruling in connection with the EAW issued by Poland, primarily questioning whether it is necessary for the executing authority to make additional findings in a specific and precise manner to establish whether the person prosecuted under the EAW is at risk of an unfair trial where the trial will take place within a system that is no longer based on the rule of law. The High Court also asked whether, where it was necessary to carry out a specific analysis, the national court executing the EAW was required to request the judicial authority issuing the EAW to provide the necessary additional information to enable it to dismiss the suspicion of a risk of an unfair trial.

In response to the questions, on 25 July 2018 the CJEU issued its judgement in which it held that Article 1(3) of FD EAW must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a EAW has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by Article 47(2) of the CFR, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, in the light of that person's situation, the nature of the offence for which he or she is being prosecuted and the factual context giving rise to the EAW and taking into account the information provided by the issuing Member State pursuant to Article 15(2) FD EAW, there are substantial grounds for believing that the individual concerned will run such a risk if he is surrendered to that State. An assessment in this respect must therefore be carried out in a specific and precise manner. It is therefore not sufficient to merely identify systemic deficiencies, but it is also necessary to translate them into an assessment made *in concreto*.

Following the above-mentioned judgement of the CJEU the Irish High Court held in the judgement of 19 November 2018¹⁰ that the systemic and generalized deficiencies in the independence of the judiciary in Poland of themselves did not reach the threshold on amounting to a real risk that there would be a flagrant denial of the respondent's right to a fair trial. Based on this assumption the court ordered the surrender of the respondent to face trial in Poland.

Issues related to lack of trust in EAW cooperation with Polish issuing authorities manifested also in proceedings involving the Netherlands as Member State of execution. The District Court of Amsterdam raised – in view of the identified systemic deficiencies of the judiciary in Poland and the resulting risk of infringement of the fundamental right to an independent court, as well as the right to a fair trial – doubts about the legitimacy of executing Polish EAWs. The court pointed out doubts regarding the independence of courts in Poland related, *inter alia*, to the introduction of the so-called the “muzzle law”¹¹. In its judgment of 17 December 2020,¹² the CJEU reaffirmed the two-steps verification standard. According to the CJEU interpretation of Article 6(1) and Article 1(3) FD EAW, where the executing judicial authority has evidence of systemic or generalized

⁹ Judgement of 12 March 2018, *Minister of Justice and Equality v. Artur Celmer* [2018] IEHC 119.

¹⁰ Judgement of 19 November 2018, *Minister of Justice and Equality v. Artur Celmer no.5* [2018] IEHC 639.

¹¹ Request of the District Court in Amsterdam of 31 July 2020, case no. RK 20/771 13/751021-20, ECLI:NL:RBAMS:2020:3776, para. 9.

¹² Joined Cases C-354/20 PPU and C-412/20 PPUECLI:EU:C:2020:1033.

deficiencies¹³ concerning the independence of the judiciary in the issuing Member State, that authority cannot deny the status of ‘issuing judicial authority’ to the issuing court solely on that basis. It can neither presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial. In presence of evidence of systemic or generalized deficiencies concerning the independence of the judiciary in the issuing Member State, the executing judicial authority must continue to assess in each case whether there is a risk of a breach of a right to a fair trial of the person concerned should be surrender. This judgement was fundamental insofar as, pending the answer of the CJEU to the questions submitted for a preliminary ruling, courts in Germany¹⁴, Slovakia, Spain and Ireland also decided to suspend the execution of EAWs issued by Poland [Świątkowski (2021), p. 25].

The quoted judgments of the CJEU have not prevented further requests for preliminary rulings from being raised, times and again, by courts of Member States dealing with EAWs issued by Polish authorities. This can be seen on the ground of the Judgement of the Regional Court in Amsterdam of 10 February 2021¹⁵, in which the court, after carrying out the two-steps test, relating both to questions of a systemic nature in general and to guarantees of a fair trial *in concreto*, refused to execute an EAW issued by the Regional Court in Poznań for prosecution in Poland. [In this context, it should be emphasized that due to the requests referred for a preliminary ruling on 14 September 2021 by the District Court of Amsterdam, the CJEU consolidated the jurisprudence regarding the application of the two-steps test in the judgement of 22 February 2022 delivered in joined cases C-562/21 PPU and C-563/21 PPU¹⁶.](#)

The objective of the CJEU decisions in the LM, L and P, and in the joined cases C-562/21 PPU and C-563/21 PPU judgments was not to resolve the rule of law issues that motivated the requests for preliminary rulings. Rather, the CJEU wanted to prevent that the application of the EAW mutual recognition-based instruments leads to executing courts becoming complicit in human rights violations. In recent years, however, the possibility to cooperate with Poland on the basis of mutual recognition instruments have been increasingly compromised by various elements of Poland's so-called reforms of the judiciary, from prematurely retiring judges to the muzzle law. The European Commission confirmed in the Rule of Law Report (Country Chapter on the rule of law situation in Poland) of 20 July 2021¹⁷ that the reforms made in the Polish judiciary since 2015 increased the influence of the executive and legislative powers over the justice system to the detriment of judicial independence. Therefore the European Commission decided to launch the procedure under Article 7(1) of the TEU and in April 2021 referred Poland to the Court of Justice in view of law on the judiciary which undermines the independence of judges is incompatible with EU law. According to this, on 14 July 2021, in the case C-204/21¹⁸, the CJEU ordered the immediate suspension of the Disciplinary Chamber of the Supreme Court of Poland as the does not provide all the guarantees of impartiality and independence and is not protected from

¹³ Which existed at the time of EAW issue or which arose after that issue.

¹⁴ Decision of the Higher National Court in Karlsruhe of 17 February 2020, case no. Ausl 301 AR 95/18; Decision of the Higher National Court in Karlsruhe of 27 November 2020, case no. Ausl 301 AR 104/19.

¹⁵ Case no. RK 20/771 13/751021-20, ECLI:NL:RBAMS:2021:420.

¹⁶ [Joined Cases C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100.](#)

¹⁷ Commission Staff Working Document. 2021 Rule of Law Report. Country Chapter on the rule of law situation in Poland, SWD(2021) 722 final.

¹⁸ Order of the Vice-President of the CJEU of 14 July 2021 in case C-204/21 R, ECLI:EU:C:2021:593.

the direct or indirect influence of the Polish legislature and executive. On 7 October 2021 the Polish Constitutional Tribunal delivered its judgment in case K 3/21¹⁹. The Polish Constitutional Tribunal ruled that Article 1 and Article 19 of the TEU are incompatible with the Polish Constitution. In particular, the PCT claimed that Article 19(1) TEU, as interpreted by the CJEU, undermines national competences laid down in the Polish Constitution, which according to the Tribunal provides for a right to regulate the system of the judiciary. Then on 27 October 2021²⁰ the Vice-President of the CJEU ordered Poland to pay to the budget of the EU a daily penalty payment as Poland has not suspended the Disciplinary Chamber of the Polish Supreme Court.

I.2 Proportionality assessment

An issue that requires a separate emphasis is how the principle of proportionality is understood and applied by Polish courts in EAW proceedings. The proportionality clause is expressed in Article 607b of the CCP,²¹ which provides for the inadmissibility of issuing the EAW if the “interest of justice” does not require it. With the amendment of Article 607b of the CCP, the legislator has supplemented the criteria for testing the proportionality of the EAW to include situations where the issuance of the EAW is not required by the interest of justice. In addition, the proportionality clause also sets out the inadmissibility of EAWs issued for: criminal proceedings conducted against the person prosecuted for an offence punishable by up to one year's imprisonment; the execution of a custodial sentence of up to 4 months or any other measure involving deprivation of liberty for a period not exceeding 4 months.

The inclusion of the ‘interest of justice’ criterion has been intended by the legislator to be a reference to the principle of proportionality which is functional to the purpose of making adjudication on the EAW more flexible [Falkiewicz (2018), p. 9]. Polish courts often do not validate requests to issue EAW precisely because there is no interest of justice, and thus interpreted such criterion as a notion which limits issuance of the EAW. This results in the necessity to assess the seriousness of the crime (its gravity), the entity of custodial sentence, and to opportunity of involving the authorities of other Member State in prosecution. It is argued that, in accordance with the principle of proportionality, the authorities issuing the EAW should weigh the benefits of issuing it against the consequences of its execution. The execution of the EAWs is associated with high costs and need to involve the authorities of Member States and to organize international convoys²². It is also justified to consider the period of searching for a prosecuted person on the territory of Poland in order to assess whether the issuance of the EAW is not premature²³.

¹⁹ Case no. K 3/21, OJ 2021, item 1852, Legalis no. 2613143, <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

²⁰ Order of the Vice-President of the CJEU of 27 October 2021 in case C-204/21 R, ECLI:EU:C:2021:878.

²¹ The indicated regulation, in its current normative form, was established under the Act of 27 September 2013 (OJ 2013, item 1247), with effect from 1 July 2015.

²² Decision of the Regional Court in Konin of 5 March 2020, case no. II Kop 5/20, not published; Decision of the Regional Court in Konin of 22 June 2020, case no. II Kop 14/20, not published; Decision of the Regional Court in Konin of 2 July 2020, case no. II Kop 15/20, not published; Decision of the Regional Court in Konin of 6 July 2020, case no. II Kop 16/20, not published; Decision of the Regional Court in Konin of 28 September 2020, case no. II Kop 21/20, not published.

²³ Decision of the Regional Court in Konin of 1 April 2020, case no. II Kop 9/20, not published; Decision of the Regional Court in Konin of 18 December 2020, case no. II Kop 29/20, not published.

In the context of the Polish courts' adherence to the principle of proportionality while issuing EAWs, it is worth referring to the Decision of the Regional Court in Tarnobrzeg of 16 July 2015.²⁴ In that case, the court considered the district court's motion for the EAW in a case in which a sentence of 8 months' deprivation of liberty with a conditional suspension of its execution, subsequently ordered to be carried out, was imposed. The Regional Court, in not accepting the motion for the issuance of the EAW, stated that, although the condition concerning the severity of the sentence had been met and there were no other grounds preventing the issuance of the EAW, the gravity and nature of the offence for which the person had been convicted should also be taken into account when proceeding in the case at hand. A proportionality check is necessary in order to prevent EAWs from being issued for offences which, although falling within the scope of Article 2(1) FD EAW, are not serious enough to justify the use of the EAW. Referring to the Report from the Commission to the European Parliament and the Council of 11 April 2011 [European Commission (2011)], the court noted that the frequent issuing of EAWs in cases of minor offences undermines confidence in the application of this procedure. Attention was drawn to aspects relevant to a proper proportionality assessment such as, in particular, those relating to the seriousness of the offence, the length of the sentence or the possible existence of alternative approaches that would be less onerous for both the person sought and the executing authority, and a cost/benefit analysis of the application of the EAW. The Regional Court drew attention to the economic costs involved in the search for a person under the EAW procedure and the fact that it should be triggered only as a last resort and relate to crimes whose combating is a priority in the state criminal policy.

In the Decision of 30 April 2020²⁵ Regional Court in Warsaw stated that there were no grounds for issuing an EAW, inter alia, due to the fact that the suspect was accused of committing an act which social harmfulness was low, and which did not violate legally protected goods to such an extent that it would require the issuance of the EAW. On the other hand, in the Decision of 17 March 2020²⁶ the Regional Court in Konin found that the issuing of the EAW was groundless due to the fact the persons wanted for surrender was suspected of committing three minor fraud offenses and the value of the damage caused by them was insignificant.

The refusal to issue the EAW due to disproportionality is often also justified by the low sentence of imprisonment imposed on the convict. This applies to the cases in which the EAW is admissible – because it concerns executing a penalty of imprisonment of up to four months or any other measure involving the deprivation of liberty not exceeding four months – but the Polish courts find that its application is not appropriate. In the Decision of 1 June 2020²⁷ the Regional Court in Warsaw refused to issue the EAW in a case in which, due to the lack of compensation for the damage, the convict was ordered to execute the initially conditionally suspended sentence of 10 months imprisonment. The Court justified its decision with the lack of interest of justice in issuing the EAW due to the relatively low penalty. At the same time, the court took into account the minor harmfulness of the committed crime, the personal circumstances of the convict and the period of limitation on enforcement. The Regional Court in Warsaw also stressed that the EAW should be treated as an *ultima ratio*. For this reason, the court indicated that before referring to use of the EAW, another legal possibility should be considered to bring about the execution of the sentence against the perpetrator of

²⁴ Case no. II Kop 14/15, Legalis no. 1487526.

²⁵ Case no. VIII Kop 62/20, not published.

²⁶ Case no. II Kop 1/20, not published.

²⁷ Case no. 96/20, not published.

the crime, the social costs of which are much lower, including the procedure of transferring of enforcement or confirmation of the place of stay of the convict by the Schengen Information System and delivery of the summons to appear in order to serve the sentence of imprisonment. A fortiori, it has been considered that the issuing of the EAW was not proportionate in relation to convicts who were sentenced to 5 months imprisonment²⁸; 6 months imprisonment²⁹.

Polish national jurisprudence also shows that the principle of proportionality interpreted in relation to the criterion of the 'interest of justice' does not only refer to the level of the seriousness of the offence or the severity of sentence imposed. The practical application of such principle requires to take into account factors arising *in concreto* from the circumstances of the proceedings initiated by the application for issuing the EAW. In this context, the court, when deciding on the EAW, the court should also take into account the economic costs of searching for the convict, detaining him and then transporting him to Poland³⁰.

Polish courts also refuse to issue the EAWs due to its disproportionality due to the low sentence remaining to be served. In its Decision of 6 July 2020³¹, the Regional Court of Konin found no grounds to apply the EAW not only due to the limited severity of the sentence imposed (6 months imprisonment), but also because the convict only had about two and a half months of imprisonment to serve, due to the inclusion of the period of pre-trial detention in the case. In its Decision of 22 June 2020,³² the same Court refused to issue the EAW because of the lack of seriousness of the crime for which the person was sentenced (8 months imprisonment conditionally suspended), but also in consideration of the limited duration of the sentence remaining to serve (about 2 months, after 6 months had been served under the electronic supervision system). In its decision of 7 January 2020, the Regional Court in Warsaw made a similar assessment³³. The Court considered proportionate the decision to refuse the issuing of an EAW in relation to a person sentenced to a penalty of 1 year and 6 months of imprisonment, who – after counting the period of pre-trial detention towards the sentence – had 6 months and 2 days of imprisonment to serve. On the other hand, in its decision of 29 April 2020³⁴ the same Court did not accept the issuing of the EAW against a convict who had to serve a remaining sentence of 4 months and 28 days of imprisonment. When carrying out the proportionality test, the Court took into account the gravity of the offense and the sentence imposed (5 months imprisonment), the amount of the sentence remaining to be served, the nature of the case, economic reasons and personal circumstances of the convict resulting from the case files and the period of limitation on enforcement. The Regional Court in Warsaw refused to apply the EAW in account of the low level of enforceable penalties – 1 month and 21 days of imprisonment in its decision of 28 April 2020³⁵, and 96 days of imprisonment in its decision of 4 June 2020³⁶.

²⁸ Decision of the Regional Court Warsaw-Praga in Warsaw of 9 November 2020, case no. V Kop 72/20, not published.

²⁹ Decision of the Regional Court Warsaw-Praga in Warsaw of 21 January 2020, case no. V Kop 84/19, not published.

³⁰ Decision of the Regional Court Warsaw-Praga in Warsaw of 17 August 2020, case no. V Kop 52/20, not published.

³¹ Case no. II Kop 16/20, not published.

³² Case no. II Kop 14/20, not published.

³³ Case no. VIII Kop 312/19, not published.

³⁴ Case no. VIII Kop 61/20, not published.

³⁵ Case no. VIII Kop 64/20, not published.

³⁶ Case no. VIII Kop 100/20, not published.

The principle of proportionality was also referred to by the Regional Court in Płock in the decision of 25 April 2017³⁷. The Court stated that while Article 607b of the CCP posed no formal obstacles to the issuance of the EAW in the specific case, the application of the EAW would be disproportionate to the real need and excessive from the perspective of the factual circumstances. This was justified by the considerable lapse of time passed from the moment the judgment had become final, which altered the factual and legal assessment of the circumstances of the case. It is in the public interest that persons who have committed a criminal offence are prosecuted fairly, and that the penal reaction meets its objectives. As a rule, the public interest prevails over the private interests of the convicted person and of the victim, but this depends on the nature and gravity of the offence committed, the circumstances in which it was committed and the characteristics of the offender. The considerable delay in the application of the measures of penal reaction, however, had the effect of diminishing the predominance of the public interest over the private interest in the form of the convict's private and family life. Therefore, the Regional Court considered that such a late application of legal measures with regard to the convict made their application likely to constitute a disproportionate interference with the concerned person's rights, contrary to Article 8 of the ECHR.

The Supreme Court in the Judgement of 24 June 2008³⁸ stressed that it is inadmissible to issue the EAW in a situation where the crime is punishable by a non-custodial sanction. This can be derived from Article 607b of the CCP, just as the thesis that the inadmissibility of issuing the EAW also applies to a custodial sentence with the conditional suspension of its execution, with the exception of a situation where its execution has been ordered. The analysis of the Polish case-law shows that there is no interest of justice in issuing EAW also in the case of the prosecution of a convicted person for offenses for which a penalty of fine or a penalty of restriction of liberty was imposed, and then, due to the failure to carry out the sentence, an alternative penalty of imprisonment was ordered³⁹.

1.3 Assessment of EAW as appropriate measure for the specific case

The issuance of the EAW is linked to a decision on pre-trial arrest or a final judgment imposing a custodial sentence or any other judicial decision imposing a protective measure involving deprivation of liberty. In the justification of Resolution of 20 January 2005,⁴⁰ the Supreme Court stated that Chapter 65a of the CCP (on requesting a Member State for surrender under the EAW) does not contain provisions under which it could be concluded that a decision on the EAW is tantamount to applying or not applying a preventive measure in the form of pre-trial detention. A decision on the EAW must therefore be preceded by a final or enforceable judicial decision, independent of the EAW, under which the person prosecuted is due to be deprived of their liberty. Thus, when ruling on the issuance of the EAW for prosecution purposes, Polish courts take into account the possibility of fulfilling the procedural duties by the wanted person without the need to resort to the EAW and thus to pre-trial detention. A motion for EAW should take into account the particular circumstances of the case, and if the EAW does not result in the adequate measure for the specific case, the decision to issue such measure could be refused based on the principle of proportionality.

³⁷ Case no. II Kop 25/16, Legalis no. 2090779.

³⁸ Case no. III KK 49/08, Legalis no. no. 121796

³⁹ Decision of the Regional Court in Konin of 29 June 2020, case no. II Kop 18/20, not published; Decision of the Regional Court in Słupsk of 2 November 2020, case no. II Kop 24/20, not published.

⁴⁰ Case no. I KZP 29/04, Legalis no. 66640

Prior research indicates that the practice related to adjudicating on the issuance of the EAW in Poland led to two judgments with a refusal decision, one concerning a Dutch citizen and the other a Norwegian citizen. In both cases the court found that it would be sufficient to notify them by way of legal aid [Gardocka, T. (2011), p. 46]. The EAW should be used as a last resort. In another case, the court refused to issue the EAW, arguing *inter alia*, that the proceedings under the EAW would generate substantial costs in a situation where, although the place of residence of the suspect was outside Poland, it was not very difficult to serve the summons on them, also through the authorities of the Member State. A decision to refuse to issue the EAW thus appears to be the appropriate solution when deprivation of liberty, closely related to the execution of the EAW, is too harsh a measure, and other forms of cross-border cooperation remain available and appropriate to the procedural situation [Gardocka, T. (2011), pp. 49-50].

This approach is currently reflected in several decisions to refuse the issuing of EAWs. For example, in its decision of 25 March 2020⁴¹ the Regional Court in Konin stated that there were no grounds for issuing the EAW due to the low importance of the allegation made against the suspect, and the fact that the authority conducting the proceedings had information that allows him to contact the suspect and conduct activities with him through the European Investigation Order. Similarly, in the Decision of 30 March 2020⁴² the Regional Court in Konin did not consider the application for issuing the EAW against the sentenced person to a penalty of 1 year and 6 months imprisonment with a conditional suspension of its execution, the execution of which was then ordered, in a situation where law enforcement authorities managed to determine not only the state, but also a specific city, in which the convict is staying. In view of similar findings regarding the place of residence of the convict, in its decision of 17 March 2020⁴³ the Regional Court in Konin also refused to issue the EAW in the case of a minor offense of non-alimony in which the sentence to imprisonment had been subject to a conditional suspension. In both cases, the Regional Court in Konin found that it was possible to make an attempt to contact the convict, including delivering a summons to the prison by means of the European Investigation Order. In view of the presented approach, in its decision of 6 July 2020⁴⁴ the Regional Court in Konin decided there were no grounds for issuing the EAW in a case where the application for pardon submitted by the convicted person showed that the latter lived and worked in Germany. The district court applying for the EAW should therefore first try to serve the convicted person with a summons to the prison. Only after an unsuccessful attempt, one should consider issuing the EAW. Against this background, attention should also be paid to the decision of 18 December 2020⁴⁵, in which the Regional Court in Konin points out that in a situation where the authorized agency applying for the EAW has relatively precise information about whereabouts of the convict (knows in which country and city the convict is staying), it is possible that after cooperation with the competent central authorities for receiving and sending request for legal aid in the territory of the EU, the person may be apprehended without the need to issue the EAW. As it should be emphasized when referring to the decision of the Regional Court in Słupsk of 8 April 2020⁴⁶, when the court knows the place of the convict's stay in one of the Member States, then in accordance with the principles of loyalty and fairness, he should try to determine the exact address by means of legal aid and then deliver the convict's summons to the prison to the address so determined in order to serve the

⁴¹ Case no. II Kop 2/20, not published.

⁴² Case no. II Kop 8/20, not published.

⁴³ Case no. II Kop 3/20, not published.

⁴⁴ Case no. II Kop 13/20, not published.

⁴⁵ Case no. II Kop 29/20, not published.

⁴⁶ Case no. II Kop 6/20, not published.

sentence of imprisonment. Subsequently, in the event of the ineffectiveness of the summons, it would be possible to issue the EAW. It would be inconsistent not to exhaust the indicated procedure with the principle of proportionality. This approach is justified by the fact that – as the Regional Court in Słupsk in the Decision of 31 July 2020⁴⁷ points out – it cannot be ruled out that a convict called to serve a sentence of imprisonment will appear voluntarily, without the need to initiate an expensive and lengthy procedure of the EAW. Therefore, it would be disproportionate to involve the judicial authorities of other Member States in a situation where the Polish authorities failed to perform the basic steps to determine the whereabouts of the person to whom the EAW would be issued⁴⁸.

I.4 Liability for compensation for unjustified pre-trial detention or arrest based on EAW issued in Poland

In this context, it appears important to briefly refer to the issue recently resolved by the Supreme Court concerning the State Treasury's liability for compensation for unjustified pre-trial detention or arrest on the basis of the EAW issued in Poland. In the Resolution of 25 February 2021⁴⁹, the Supreme Court held that the term "pre-trial detention or arrest" as used in Article 552 § 4 of the CCP also covers actual deprivation of liberty applied by a foreign state to a prosecuted person as a result of a Polish court issuing the EAW. By this decision, the Supreme Court opened the way for claiming – under the special procedure provided for in Article 552 et seq. of the CCP – the liability of the State Treasury for damages and compensation for undoubtedly wrongful pre-trial detention or arrest. The Supreme Court stressed that it is justified to argue that the State Treasury is liable for actual deprivation of liberty in the Member State to which the EAW is addressed and pointed out that by initiating the procedure under the EAW Polish authorities shape the situation of an individual. The Supreme Court considered that, in view of the high probability that the EAW issued by Polish authorities will be executed, it would not be reasonable from the perspective of justice and equality to exclude, on purely formal grounds, the basis of the liability of the Polish State Treasury.

At the basis of the Supreme court decision there is the understanding that the EAW mechanism is based on a high degree of trust between Member States, and its implementation may be only limited, as a rule, where obligatory or optional prerequisites for its refusal arise. This results in a kind of automatism of the EAW, which is based on the assumption that the court issuing the warrant has evidence that – if it was in the possession of the court carrying out the arrest – would justify a decision of the same content. However, if circumstances come to light which clearly show that there were no grounds for issuing the EAW at all that, the court in the executing state is obliged to verify whether the conditions for issuing an EAW in the first place have been met. At the same time, the Supreme Court considered that in cases where the state issuing the EAW has wrongly decided to initiate the EAW procedure, it should also be responsible for the consequences that such decision have on the concerned individual, and a Polish court cannot shift responsibility for a breach of law onto the authorities of a foreign state.

⁴⁷ Case no. II Kop 14/20, not published.

⁴⁸ The decision of the Regional Court Warsaw-Praga in Warsaw of 15 July 2020, case no. V Kop 47/20, not published.

⁴⁹ Case no. I KZP 5/20, Legalis no. 2535894.

Section II – The execution of EAWs: national judicial authorities as monitors of trust

The second part of the report is devoted to the presentation of key issues related with the execution of the EAWs by Polish judicial authorities. In Poland, it is the public prosecutor who, after receiving the EAW, initiates the court procedure regarding the execution of the EAW (Article 607k § 2 of the CCP). Then the competent regional court is the judicial authority adjudicating with respect to surrender and detention on remand in a hearing, in which the public prosecutor and the defence counsel may participate (Article 607l § 1 of the CCP). In this context, the reference to judicial decisions concerning the possibility of questioning the competence of the body issuing the EAW, in particular with a view to assessing whether it may qualify as a "judicial authority" as understood in Article 6(1) of FD EAW, appear to be of major importance. The issues related to the use of pre-trial detention in connection with the EAW have also been addressed. In the light of the presented case law, attention was also drawn to the possibility of applying non-custodial pre-trial coercive measures in the execution of the EAW. The case law relating to optionality of the refusal to execute EAWs from the perspective of the need to respect the liberties and rights of the persons to whom the EAW applies was also analyzed.

II.1 Qualifications of authorities issuing an EAW

The first group of judgments to be analysed in this section covers questions raised before Polish executing authorities and related to the independence and impartiality of the authorities issuing EAWs in the Member State seeking surrender from Poland.

In the first place, it appears significant to refer to the Decision of the Supreme Court of 10 September 2020.⁵⁰ The decision concerned the surrender of a person wanted for prosecution in Greece. It was issued following the examination of a cassation appeal filed by the Ombudsman due to the failure of the Court of Appeal to carry out a comprehensive appellate review. In its decision, the Court of Appeal limited itself to examining the allegations raised by the defence counsel in the appeal against the decision of the regional court. As a result of such examination, the court upheld the regional court's finding that the EAW had been issued by a judicial authority as understood in Article 6(1) FD EAW. In the cassation appeal it was argued that since the EAW had been issued by the public prosecutor, it had been necessary to examine *ex officio* whether the authority issuing the EAW was a judicial authority in the meaning of the FD EAW. The Supreme Court dismissed the cassation appeal as unfounded. It focused first and foremost on the question whether the failure to raise, *ex officio*, doubts about the independence of the prosecutor issuing the EAW and to proceed *ex officio* to examine the prosecutor's independence constituted a gross negligence. The Supreme Court emphasised that every court responsible for executing the EAW is obliged to examine whether an EAW originates from an authority designated as authorised by the individual issuing states. There was no doubt that the authority designated by Greece, pursuant to Article 6(3) of FD EAW, was the Prosecutor for the Court of Appeal, which had *ratione loci* jurisdiction to adjudicate the offense. If the EAW procedure is based on a high level of mutual trust between Member States, it is essential to enable the implementation of the principle of mutual recognition of judgments, which is at the basis of EU judicial cooperation in criminal matters. Referring to the CJEU judgement

⁵⁰ Case no. V KK 432/19, Legalis no. 2500765.

in joined cases *Aranyosi and Căldăraru*,⁵¹ the importance of the principle of mutual recognition was highlighted, including in particular the fact that Member States are, as a rule, obliged to recognise the EAW. The Supreme Court opined that the executing Member State may verify whether the authority which has issued the EAW designated by the Member State actually meets the conditions for being recognised as a competent authority only in very exceptional situations. According to the Supreme Court such a need arises if, in the course of proceedings related to the execution of the EAW, it is claimed that the issuing authority is not independent. Such an allegation was not raised in the course of the proceedings. The court hearing the appeal against the decision on the surrender to Greece was not found to be in breach of law in a situation where it did not raise, *ex officio*, doubts as to whether the Greek EAW issued by the prosecutor originated from a competent entity.

In order to outline the relevant context and the different factual and legal situation arising from the decision under review, the Supreme Court referred to the judgement of the CJEU in *OG and PI*.⁵² In the judgment in question, the CJEU ruled that the public prosecutor's offices in Lübeck and Zwickau in Germany did not satisfy the requirement of providing guarantees to act independently in issuing the EAW, and hence were not judicial authorities as understood in Article 6(1) FD EAW. As decided by the CJEU, the concept of a judicial authority issuing the EAW does not include the public prosecutor's offices of a Member State that are exposed to the risk of being subject, directly or indirectly, to individual orders or instructions from the executive, such as the Minister of Justice. It should be noted that in the *OG and PI*, the CJEU stated that in order to qualify as issuing judicial authority pursuant to Article 6(1) FD EAW, the authority must meet the requirement of independence, meaning that it acts independently while taking the decision to issue an EAW. According to the CJEU, the principle of independence is thus inherent to the concept of "issuing judicial authority". The principle of independence (which primarily refers to the guarantees provided by the legal order of the issuing Member State) requires that, based on the statutory rules and the institutional framework of that Member State, the issuing judicial authority does not face the risk of being subject to an instruction in a specific case from the executive, while adopting the decision to issue the EAW. This reasoning led the CJEU to conclude that the public prosecutor's offices in Germany did not fall within the concept of "issuing judicial authority", because they were legally subordinated to the executive, and the latter could give directions or instructions to public prosecutors in specific cases, also when issuing an EAW. In the *OG and PI* judgement, the Court also held that, in order to be considered "issuing judicial authority" within the meaning of Article 6(1) FD EAW, the authorities of a Member State must give assurances that they act independently while performing their responsibilities to issue an EAW. However, the Supreme Court considered that such an approach cannot amount to questioning the qualification of an authority to issue the EAW merely on the basis that it is a prosecuting authority. It must be made clear with regard to the judgement under review that, first in the course of the EAW proceedings, the nature of the prosecuting authority was not questioned from the point of view of Article 6(1) FD EAW. On the basis of such consideration, the Supreme Court observed that there were no other indications to support the necessity to examine, *ex officio*, the qualifications of the prosecutor of the Greek Court of Appeal to issue the EAW.

⁵¹ Judgement of the of 5 April 2016, on Joined Cases C-404/15 *Aranyosi* and C-695/15 *Căldăraru* (ECLI:EU:C:2016:198).

⁵² Judgement of the CJEU of 27 May 2019, In Joined Cases C-508/18 *OG* and C-82/19 *PI* (ECLI:EU:C:2019:456)

The question of the qualifications of the authority issuing the EAW was considered also by the Court of Appeal in Katowice in Decision of 6 August 2019.⁵³ In the case in question, the Regional Court in Katowice decided to surrender a Polish citizen to Germany in connection with the EAW issued by a German district court. The decision of the Regional Court in Katowice was appealed against by the suspect's defense counsel. The appeal was based on the allegation that the decision to execute the EAW had been made despite the existence of an obligatory ground for refusal to execute the warrant. The defense attorney alleged that the regional court made a decision which led to defective legalisation of the EAW issued by the German prosecutor's office and the German court, while ignoring that the content of both EAWs was identical and did not meet the requirements specified in Article 6(1) FD EAW. Against this background, the Court of Appeal, in upholding the contested warrant, addressed the question of the competence of the German authority to issue the EAW in the light of FD EAW. In doing so, it referred to the already cited *OG and PI* judgement of the CJEU. The Court justified its decision in view of the facts of the case: the EAW was issued by the Public Prosecutor's Office prior to the quoted judgment of the CJEU. After the CJEU judgment, however, Germany remedied the original defect in the prosecutor's warrant, where it had been issued by a German district court. The Court of Appeal therefore held that, considering the circumstances of the case, there were no grounds for concluding that the Member State issuing the EAW Member had not complied with the dual-level protection of the procedural and fundamental rights of the person prosecuted. In doing so, it emphasised that the functioning of the EAW is based on mutual trust between the Member States that it is possible to guarantee the protection of fundamental rights within the framework of their national legal orders. The district court fulfilled its obligation in a situation where the EAW was issued by a judicial authority and the EAW was identical as regards the parties and the subject-matter of the case with the warrant originally issued by the prosecuting authority. However, the Court considered that no circumstances were indicated which would make it sufficiently plausible to conclude that the execution of the EAW would lead to the infringement of the fundamental right to a fair trial, due to systemic or general irregularities in the independence of the authority issuing the EAW.

II.2 Pre trial detention

The use of pre-trial detention in connection with the execution of the EAW is strictly linked to the essence of this instrument. However, the grounds for the application of a preventive measure in the form of detention are regulated differently in the legislations of individual states. In Poland, the general grounds for pre-trial detention are set out in Article 249 § 1 of the CCP. According to this provision, pre-trial detention may be applied when the evidence gathered in the case indicates a high probability that the accused has committed an offence. At the same time, at least one of the special grounds regulated in Article 258 of the CCP must be met. It should be noted, however, that Article 607k § 3 of the CCP foresees a self-sufficient ground for pre-trial arrest in the context of the EAW, i.e. the existence, in another Member State of the EU, of a final and legally binding judgement of conviction or any other decision constituting the basis for the deprivation of liberty of the person prosecuted.

On 26 June 2014, the Supreme Court⁵⁴ adjudicated whether a court applying pre-trial detention under an EAW procedure is entitled to apply Article 249 § 1 of the CCP, or whether the mere issuance of the EAW should be

⁵³ Case no. II AKz 704/19, Legalis no. 2273064

⁵⁴ Case no. I KZP 9/14, Legalis no. 966597

regarded as sufficiently substantiating an allegation of an offence giving rise to an obligation on the part of the judicial authority of the state executing the EAW to apply pre-trial detention. The Supreme Court observed that when deciding on a prosecutor's motion for pre-trial detention pursuant to Article 607k § 3 of the CCP against a person wanted for surrender under an EAW issued by another Member State for prosecution purposes, the Polish executing authority does not have to examine the evidentiary basis of the warrant. The self-sufficient ground for pre-trial detention set out in Article 607k § 3 of the CCP is a *lex specialis* in relation to the general ground expressed in Article 249 § 1 of the CCP. At the same time, the Supreme Court observed that the decision on the motion for pre-trial detention may be influenced by the existence, in each case, of statutory provisions imposing the refusal to execute the EAW. These provisions include those foreseen under Article 607p § 1(5) of the CCP, which provides for the possibility to reject the execution of an EAW based on considerations related to human and citizen freedoms and rights. In its decision, the Supreme Court referred to the principle of mutual recognition, as well as to the high level of trust in relations between Member States, which constitute the foundations of the effective functioning of the EAW. Mutual trust requires that in the absence of statutory grounds for refusing surrender, the requirements for the execution of an EAW are deemed to be fulfilled. Furthermore, Article 607z of the CCP gives the possibility of requesting the issuing State to supplement information if the one provided in the warrant is not sufficient to decide on the surrender of the prosecuted person. On the other hand, however, no case file is attached to the EAW and it is therefore impossible to verify the evidence contained therein. The Supreme Court considered that Article 607k § 3 of the CCP allows Polish courts to confirm the existence of an evidentiary basis supporting the possibility of applying pre-trial detention in the execution of an EAW.

Another relevant decision in this regard is the one taken by the Court of Appeal in Katowice of 10 September 2014⁵⁵. According to Court of Appeal, an EAW issued by another Member State for prosecution purposes satisfies the general ground for pre-trial detention pursuant to Article 249 § 1 of the CCP. The Court of Appeal in Katowice upheld the decision of the Regional Court in Sz. which had been appealed against by the defence counsel for the prosecuted man. The Regional Court issued a decision on the pre-trial detention of P.Z. for a period of seven days on the basis of the fact that an EAW had been issued against the prosecuted man. The existence of the EAW was confirmed by the data entry in the Schengen Information System, and the subsequent reception of the EAW via fax by the Regional Court. The Court of Appeal thus held that the case involved the situation referred to in Article 607k § 3a of the CCP. This provision allows to use pre-trial detention for a maximum period of 7 days if requested by the judicial authority issuing the EAW, by making an entry in the SIS Schengen or in the database of the International Criminal Police Organisation. These entries constitute an assurance that a final and legally binding judgement of conviction or any other decision giving rise to deprivation of liberty has been imposed against the person prosecuted. The Court of Appeal found that the use of pre-trial detention for a 7 days period was necessary to send the original EAW together with a translation into Polish and to submit the said documents together with the motion of the Polish prosecutor to the court for the surrender of the prosecuted man to the state issuing the EAW.

In its decision of 22 July 2016⁵⁶, the Court of Appeal in Kraków held that to proceed with the surrender of a person wanted for prosecution in the context of EAW proceedings and the application of pre-trial detention to

⁵⁵ Case no. II AKz 306/14, Legalis no. 1219085.

⁵⁶ Case no. II AKz 267/16, Legalis no. 1487526.

such a person it is not necessary for the court to have the original EAW. With reference to Article 10(4) of FD EAW, it may be sufficient to send the EAW by any secure means (e.g. fax) ensuring the preservation of the written record in a manner allowing the executing authority to verify its authenticity.

In its decision of 26 June 2014, the Supreme Court pointed out that the ground for pre-trial detention (Article 607k § 3 of the CCP) manifests itself without the need to verify the general ground for pre-trial arrest (Article 249 § 1 of the CCP) and the special premises (Article 258 of the CCP). Nevertheless, the legitimacy of the use of pre-trial detention should be reviewed from the perspective of the proportionality of the resulting restrictions on the individual's exercise of their constitutional liberties and rights. A preventive measure should be adjusted to the procedural situation, and pre-trial detention should be perceived, in the light of Polish law, as applicable only when necessary. This approach is consistent with the decision of the Court of Appeal in Wrocław of 26 April 2021⁵⁷. In such occasion, the Court emphasized that pursuant to Article 607k § 3 of the CCP, the existence in another Member State of a final conviction or other decision constituting the basis for the deprivation of liberty of the prosecuted person is a sufficient condition for the application of pre-trial detention. However, the Court pointed out that the provisions of the FD EAW do not allow for a direct conclusion that the court is under an obligation to order pre-trial detention. In this context, the Court indicated – with reference to Article 12 of the FD EAW – that when the prosecuted person is arrested under the EAW, the executing judicial authority decides whether the person should be temporarily arrested. The matter is resolved in accordance with the law of the Member State executing the EAW. In the case at hand, the Court of Appeal in Wrocław, recognizing the complaint of the defense counsel of the person prosecuted under the EAW, overturned the decision of the Regional Court in Wrocław which had applied the conditional pre-trial detention. The Court of Appeal in Wrocław found that deprivation of liberty was not necessary for the effective implementation of the EAW. The Court of Appeal stated that, in the circumstances of the case, the correct course of the proceedings would be secured with the use of the bail, without need to impose pre-trial detention.

A negative decision of the court on pre-trial detention may therefore be influenced by the fulfilment of the statutory grounds for refusal to execute the EAW, e.g. if the surrender would violate human and citizen freedoms and rights [Article 607p § 1(5) of the CCP].

II.3 Rights of the defence

The analysis of case law related to the execution of EAWs in Poland allows to understand how and the extent to which Polish courts take into consideration the rights of the defence in surrender proceedings with other EU Member States.

Right to private and family life, right to life

A case in point is the Decision of the Court of Appeal in Katowice of 15 February 2017.⁵⁸ The decision concerns an appeal against a decision of a regional court related to the surrender of a suspect to Germany. The Court of Appeal upheld the challenged decision, dismissing the allegations raised in the appeal. The defence counsel argued that in the course of the proceedings the man under prosecution had indicated that, despite not living

⁵⁷ Case no. II AKz 276/21, <https://prawoanny.pl/prawo-kanne/wykonanie-ena-skierowanego-do-polski-przez-inne-panstwo-czlonkowskie-ue-a-koniecznosc-stosowania-tymczasowego-aresztowania-postanowienie-sadu-apelacyjnego-we-wroclawiu-z-26-iv-2021-r-ii-akz-276-21/>.

⁵⁸ Case no. II AKz 77/17, Legalis no. 1637236.

with his two minor children who resided in Poland, he had good contact with them, regularly visited his children, maintained frequent contacts with one of them, cherished the bond between him and his children, and did not limit himself to paying alimony. The defence further noted that the circumstances of the case suggested that the surrender to Germany (where the prosecuted man would have faced a heavy custodial sentence for the offence for which surrender was sought) would have completely severed the bond between the prosecuted and his children.

However, the Court of Appeal indicated that the plea of the defence counsel concerning the infringement of Article 607p § 1(5) of the CCP, which specifies the obligatory premise of refusal to execute the EAW where it would violate human and citizen freedoms and rights, was not correct. The Court did not find that, as a result of the decision on surrender, the rights and obligations of the prosecuted man towards his two minor children would be violated. It noted that a claim that the execution of the EAW violates human and citizen freedoms and rights must be supported by concrete facts and circumstances. It cannot be the result of abstract considerations but must take into account the concrete procedural situation. Establishing whether the premise under Article 607p § 1(5) of the CCP has been met cannot be the result of speculation or lack of confidence in the justice system of another Member State. Mere likelihood of an infringement of human and citizen freedoms and rights is not sufficient to refuse surrender. It is necessary to establish clearly and on an adequate basis that such an infringement will take place or that there is a probability bordering on certainty in this respect.⁵⁹

For the reasons stated above, it was assumed that the regional court had not violated Article 607p § 1(5) of the CCP. The execution of the EAW did not constitute an infringement of the wanted person's liberties and rights regarding his family life. The Court of Appeal noted that, although the prosecuted man did not live with his children, no circumstances had emerged which would indicate that the mothers of the suspect's children would not be able to take care of them in his absence and there were no circumstances that would suggest that such care could be hindered.

Against this background it should be noted that the analysis of Polish jurisprudence on the execution of EAWs issued in other EU Member States shows that there are few cases of refusal to execute EAWs upon fundamental rights considerations. In two related cases concerning the Dutch EAWs, the Regional Court in Warsaw, in the decisions of 21 September 2020⁶⁰, refused to execute EAWs in the case of parental child abduction from the Dutch social services due to a risk for protection of human rights (right to private and family life, right to life) and the lack of impartiality of the issuing authority (the reasoning was that the issuing authority when deciding on the execution of EAWs issued by Polish judicial authorities is not objective, asks several irrelevant questions concerning the remuneration of the judges, which are not translated into Polish). Also in its decision of 18 May 2020, the Regional Court in Gdańsk⁶¹ refused to surrender the person accused of parental child abduction. In this case the court stated that surrender would be contrary to the right to private and family life of the requested person and his son.

⁵⁹ Cf: Decision of the Court of Appeal in Katowice of 4 April 2018, case no. II AKz 167/18, Legalis no. 1832046.

⁶⁰ Decision of the Regional Court in Warsaw of 21 September 2020, case no. VIII Kop 180/20, not published; Decision of the Regional Court in Warsaw of 21 September 2020, case no. VIII Kop 181/20, not published.

⁶¹ Decision of the Regional Court in Gdańsk of 19 May 2020, case. no. IV Kop 56/20, not published.

Procedural rights of the defence

The application of grounds for the refusal of surrender provided under Article 607p § 1(5) of the CCP was also debated in the case dealt with by the Court of Appeal in Kraków in its Decision of 18 December 2017.⁶² The decision was issued after hearing an appeal against the decision of a regional court to surrender a Polish citizen, A.O., to France for the purpose of conducting criminal proceedings against him. The decision to execute surrender was adopted on the condition that the Polish citizen would be returned to the territory of Poland after the conclusion of the proceedings, if he consented to it. The regional court noted that the wording of the EAW suggested that a non-final judgment had been issued against A.O. in France. It had not been served on him but it would be served on him immediately after the surrender, and he would be immediately informed of his right to appeal against the judgment, resulting in a review of the case on the merits. At the same time, no obligatory or optional grounds for refusing to execute the EAW were identified.

An appeal against the regional court's judgement was lodged by the defence counsel, which alleged a violation of Article 607p § 1(5) of the CCP for failure to clarify whether the defendant would receive legal aid *ex officio*, following the surrender of A.O. to France, and whether he would have had the possibility to appeal against the judgment issued against him. Moreover, it was challenged that no decision had been made as to whether, following his transfer, A.O. would be served with the default judgment together with its translation into Polish, given that the applicant had so far attempted to serve court documents on A.O. only in French.

The Court of Appeal decided to uphold the contested decision. Interpreting the provisions on obligatory ground for refusal to enforce the EAW under Article 607 § 1(5) of the CCP, the Court reaffirmed that the ground for refusal based on fundamental rights considerations must be interpreted narrowly. The Court of Appeal emphasised that the EAW system of mutual recognition of foreign judgments is based upon the acceptance of differences between different legal systems and trust in judgments issued by foreign judicial authorities are part of this context. The principle is derived from the assumption that all Member States comply with the standards of protection of human rights and liberties set by the ECHR or by the CFR. The presumption arising from the principle of mutual trust is only rebutted if it is established that fundamental rights will be infringed as a result of the surrender. Regarding the pleas raised by the defence in the appeal, the Court of Appeal stressed that both Poland and France are bound by the provisions of Article 6(3) of the ECHR and Articles 47 and 48 of the CFR. The Court also observed that both Member States are bound by 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, as well as the Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings. For the aforementioned reasons, the Court of Appeal underlined that, taking into account the comparable level of protection of human and citizen freedoms and rights imposed by the regulations binding Poland and France, it was impossible to conclude that, in the circumstances of the case, there was even a suspicion that the rights of the prosecuted, A.O., in respect of the right to a fair trial and the right to defence would be infringed in France.

⁶² Case no. II AKz 527/17, Legalis no. 1712559.

A similar argumentation was expressed by the Court of Appeal in Kraków in the Decision of 9 July 2019.⁶³ Also in this case, the court, while stressing the importance of the principle of mutual recognition of judgments, stressed that the Polish court, acting on the principle of mutual trust, had been assured that the accused in the case would be provided with a defence counsel, a translator, and, if necessary, medical care.

As part of the analysis of the jurisprudence of Polish courts on the execution of EAWs, one case was identified in which the refusal resulted from a mistake in the scope of personal data of the requested person. The court refused to execute an EAW on the basis of Article 607 § 1(5) of the CCP on the grounds as follows: the requested person was not the offender; his ID card had been stolen and another person committed the offences using his ID; he was convicted and sentenced under this false name⁶⁴.

⁶³ Case no. II AKz 380/19, Legalis no. 2290574.

⁶⁴ Wąsek-Wiaderek, M. and Zbiciak, A. (2022), „The Practice of Poland of the European Arrest Warrant”, in R. Barbosa, V. Glerum, H. Kijlstra, A. Klip, Ch. Peristeridou, M. Wąsek-Wiaderek and A. Zbiciak, *European Arrest Warrant. Practice in Greece, the Netherlands and Poland*, Hague: Eleven, p. 300.

Section III– Mutual Trust and cooperation through the EAW: key interpretation and implementation challenges, and solutions adopted in Poland

The foregoing analyses make it possible to observe key jurisprudential developments related to the implementation of the EAW in Poland.

When it comes to EAWs issued by Polish authorities, judicial authorities in several EU Member States are increasingly doubting whether they should be executed. In some EU countries, concerns that general deficiencies in the judiciary in Poland can undermine the right to have a case heard by an independent court, and hence the right to a fair trial, led to a systemic refusal to execute Polish EAWs. The Decision of the Regional Court in Amsterdam of 10 February 2021 highlight a general lack of confidence in the independence of the judiciary in Poland and reflect rising concerns about risks that the fundamental rights of a person to be surrendered under the EAW in a specific case will be infringed. Against this background, the CJEU developed a line of jurisprudence imposing judicial authorities in the executing state to perform a two-stage verification of the EAW and its assessment in relation to the state issuing the EAW, not only *in abstracto*, but also – and in the case of Poland above all – *in concreto*.

In the past, a significant percentage of refusals concerning Polish EAWs (over 10%) resulted from disproportionality [Gardocka, T. (2011), p. 46]. However, the amendment made to Article 607b of the CCP in 2015 introduced the criterion of the interest of justice among the prerequisites for the admissibility of issuing the EAW. A general clause was included in Polish law creating a legal basis for Polish courts to apply certain flexibility, and hence freedom of decision in cases when the issuance of the EAW is not precluded by formal considerations, but the gravity of the criminal act, its nature or its low social harmfulness support the view that the EAW would be inadequate in relation to the measures undertaken in connection with its execution and in relation to the burdens connected with the EAW. A refusal is then an expression of a substantive rather than a formal assessment and introduces the possibility of a practical departure from the principle of mutual trust and recognition of judgments in a particular case.

Despite the fact that the Polish legislator has enabled the application of the principle of proportionality in the issuing phase of the EAW, such principle has not been fully implemented in practice by Polish courts [Helsinki Foundation for Human Rights (2018)]. The answers of the Undersecretary of State in the Ministry of Justice to the interpellation on the European Arrest Warrant [Ministry of Justice (2015)], stating that the concept of the interest of justice should be applied *ad casum* and assessed by the court issuing the EAW, do not appear to have changed the practices of Polish issuing authorities.

Elements which have emerged as relevant in decoding the content of the proportionality principle in the issuing of EAWs are: the gravity of the offence and the penalty (the EAW should be used for more serious offences); the situation of the accused and their personal circumstances (e.g. perverting the course of justice, hiding); the anticipated ineffectiveness of other legal aid measures (e.g. summons to voluntary appearance, search of European databases); economic considerations (the costs of proceedings to execute the EAW should be proportionate to the harm caused by the criminal act). However, Polish courts still show a certain reluctance to make recourse to proportionality when issuing EAWs. Such trend reflects the persisting existence of automatism in the use of this mutual recognition instrument. At the same time, the recent Polish Supreme Court's Resolution on state liability for wrongly issued EAWs established that Polish courts remain responsible

for the consequence deriving from the activation of mutual recognition obligations resulting in wrongful deprivation of liberty in another Member State in connection with the execution of Polish EAWs.

In relation to the execution of EAWs issued by other Member States, jurisprudential practices in Poland show a high degree of compliance with the principle of mutual recognition of judgments. Automatism in the execution of EAWs is combined with the verification of existence of grounds for refusal of surrender based on the EAW. While adjudicating on the execution of the EAW in view of the allegations raised by the defence in the context of assessing the infringement of human and citizen freedoms and rights, Polish courts have considered issues relating to concerns about guaranteeing the right to a fair trial. In no situations Polish courts refused to surrender a prosecuted person because of deficiencies in the independence of issuing Member States' judicial authorities. Polish courts have not questioned the independence and have not referred to the problem of possible subordination of the courts of other EU Member States. Doubts have been raised with respect to the possibility to qualify as judicial authority the prosecuting bodies notified by some countries as competent to issue the EAW. However, such doubts have not led to refusals of surrender. The established practice of Polish courts in the implementation of the principles of mutual recognition of judgments based on mutual trust is also exemplified by decisions about pre-trial detention in connection with the execution of the EAW. Polish courts have also accepted EAWs sent by any secure means ensuring that the written record is preserved in such a way that the authenticity of the EAW can be verified. Such an approach seems relevant in the context of the COVID-19 pandemic, which has made rapid and comprehensive digitalisation of cross-border cooperation between Member States crucial.

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