This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

D 2.1

POLISH REPORT

Grant Agreement nº:	<101089634>
Project Acronym:	FACILEX
Project Title:	Facilitating mutual recognition: Analytics and Capacity building Information LEgal eXplainable tool to strengthen cooperation in the criminal matter
Website:	FACILEX - Facilitating mutual recognition: Analytics and Capacity building Information LEgal eXplainable tool to strengthen cooperation in the criminal matter (unibo.it)
Contractual delivery date:	M20
Contributing WP	WP2
Dissemination level:	PUBLIC
Deliverable leader:	UWr
Contributors:	UNIBO

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Document History

Version	Date	Author	Partner	Description
1.0	January 2024	Wojciech Jasiński Karolina Kremens Agnieszka Frąckowiak-Adamska	UWr	First draft
2.0	April 2024	Nicolo Gibelli/Antonio Pugliese	Unibo	Feedback
3.0	August 2024	Wojciech Jasiński Karolina Kremens Agnieszka Frąckowiak-Adamska	UWr	Final draft

1 Contributors

Partner	Name	Role	Contribution
UWr	Wojciech Jasiński Karolina Kremens Agnieszka Frąckowiak-Adamska	Authors	National Report
Unibo	Nicolo Gibelli/Antonio Pugliese	Reviewer	Feedback
Unibo	Giulia Lasagni	Reviewer	Feedback

On behalf of the University of Wrocław, the present deliverable has been drafted by Professors Wojciech Jasiński, Karolina Kremens and Agnieszka-Frąckowiak Adamska under the scientific supervision of Professor Wojciech Jasiński.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

2 Table of Contents

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

3 List of Acronyms

CCP – Code of Criminal Procedure

Directive 2014/41 – Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters

EAW – European Arrest Warrant

EIO – European Investigation Order

EU – European Union

FD EAW - Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)

Regulation 2018/1805 – Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders

4 Executive Summary

This study focusing on the transposition and implementation of EU instruments, i.e. the EAW, the EIO and Regulation 2018/1805, leads to the general conclusion that their incorporation into the Polish legal order turns out to be better than, for example, in the case of EU directives establishing minimum standards for the rights of the suspect and the accused, in which numerous structural deficiencies were identified [1]. However, this conclusion in no way allows us to assume that the process of reception of the EU law instruments in question in Poland is perfect or even correct. Due to the different nature and purposes that EAW, EIO and Regulation 2018/1805 serve it is difficult to identify any common problems for all three instruments. Nevertheless, the transposition of each of them into Polish criminal legal system has its drawbacks of varying gravity.

Generally, the provisions of the oldest instrument - **FD EAW** - can be considered as effectively implemented to the Polish criminal legal system with two notable exceptions.

[1] See: Karolina Kremens, Wojciech Jasiński, Dorota Czerwińska, Dominika Czerniak, *There and back again: a struggle with transposition of EU directives* in Michele Caianiello, Giovanni Sartor, Giuseppe Contissa, Giulia Lasagni (eds.) *Effective protection of the rights of the accused in the EU directives: a computable approach to criminal procedure law* (Brill 2022) pp. 154–169.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

The first exception provides for preferential treatment of Polish citizens and their greater protection against surrender when compared to situation of other Member States' nationals. This is due to the limited scope of the use of EAW regarding Polish citizens that can only concern offences committed outside of the territory of Poland paired up with a requirement of double criminality. The second exception concerns the grounds for refusal to execute the EAW expanded by Poland to include five additional mandatory grounds, some of which apply only to Polish citizens. This resulted in opening an infringement proceeding by EU Commission against Poland under Article 258 TFEU for an incorrect transposition of the FD EAW. The procedure is still ongoing, so the results are not yet known.

The transposition of **Directive 2014/41** resulted in no systemic or structural deficiencies which could put into question the overall effectiveness of the use of EIOs in Poland. The deficiencies are mostly minor and in practice they do not block the conduct of effective cooperation between the Member States. Moreover, identified errors are rather easy to correct or eliminate by the Polish lawmaker if only there will be a will to do so.

One of the most problematic issues arises from the transposition of Articles 24-25 of the Directive 2014/41 providing for witness or expert hearings by videoconference or other audiovisual transmission as well as by telephone conference. The Polish legal provisions regulating these measures do not offer a sufficient framework to carry out hearings in a form provided by EU law. Therefore, the provisions of the Polish CCP should be tailored to the specific needs of videoconferences conducted under the EIO framework, where the issuing authority not only participates in an interrogation as is in case of domestic proceedings, but has a leading role in an interrogation. This calls for reconsideration of Polish regulations available in CCP and their adjustment to the requirements of cooperation in criminal matters with EU Member States.

Second, some issues are arising in the context of admissibility of evidence obtained through EIO. Polish CCP does not contain any specific rules of admissibility of evidence obtained in the scope of mutual cooperation in criminal matters. This should be considered as a systemic flaw as evidence gathered abroad require such special rules. There is only one provision addressing this issue directly (Article 587 CCP). However, it is very limited in its scope and regulates admissibility of evidence only with regard to measures enumerated therein. Article 587 CCP does not encompass all types of evidence that can be gathered

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

abroad, including those obtained with the use of EIO. Therefore, at least for the sake of clarity, the lawmaker's intervention is desirable.

Finally, the proper assessment of reception of **Regulation 2018/1805** into Polish criminal legal system is difficult since adoption of the EU instrument did not result in any legislative activity in Poland whatsoever. This cannot be explained by the obvious fact that the discussed Regulation 2018/1805 has a direct effect in the Polish legal order and therefore does not require any form of transposition. The untouched normative environment renders the application of provisions concerning freezing and confiscation no longer intuitive. This is because the CCP provides for such default provisions that right now apply only to Ireland and Denmark but continues to list them, even in the titles of the relevant chapters, as instruments to be used in cooperation with EU Member States. Paired up with a generally low level of awareness of the EU law among Polish lawyers, especially prosecutors, this results in alarmingly low statistics on the use of freezing and confiscation orders.

The lack of normative changes in view of adoption of Regulation 2018/1805 resulted also in general incompliance of Polish normative framework when it comes to the rights of victims and the compensative nature of the instruments provided in EU law. Although strengthening victims' rights to restitution and compensation remains one of the most obvious goals of Regulation 2018/1805, it becomes impossible to achieve if national confiscation mechanisms preclude the possibility of performing a compensatory function, which happened in case of Poland. This is a result of the normative framework of ordering forfeiture under Polish law which makes it a concurrent mechanism to restitution and compensation and not a way to enable them (Article 44 § 5 CC). The regulation of freezing orders under Polish law (Article 291 § 1 points 3-5 CCP) also confirms this conclusion. In result, the forfeiture of assets simply cannot be ordered if they are to be returned to the victim or another entitled entity.

Summing up, the level of implementation of the three mutual recognition instruments in Poland varies. While the implementation of the EIO is generally correct and is almost unaffected by structural deficiencies, the same cannot be said about the EAW. In this case, the problems are fundamental and sovereignty-related (differentiation between Polish and non-Polish citizens). Serious doubts can also be raised in relation to freezing and confiscation orders. While the provisions of Regulation 1805/2018 can be applied directly, their effective execution depends on the national legal framework. When the latter is

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

deficient it does not allow the confiscation order under Regulation 1805/2018 to achieve all the aims it should serve. The crucial deficits of the national legal framework, as they cannot be neutralized by creative interpretation of the legal provisions in practice, call for immediate legislative changes.

5 The implementation of criminal mutual recognition instruments in Poland

5.1 Introduction

5.1.1 Overview of the criminal procedural system

Since Poland is a part of the continental law family, the role of the written sources of law is crucial. As provided in the Constitution of the Republic of Poland[2], the Constitution itself is the supreme source of law in the Polish legal system. Therefore, as in many other areas, the constitutional provisions have a multidimensional effect on the criminal proceedings as provided in the Code of Criminal Procedure of 1997[3]. The Constitution sets the framework in which the CCP provisions function and provides for the guidelines for their further interpretation. On the other hand, the CCP may contain only provisions that do not remain in conflict with the constitutional rules. This implies that the analysis of the law on criminal procedure is impossible without understanding the constitutional context[4].

The scope of constitutional provisions that make an impact on the framework of criminal process is vast. The Polish Constitution establishes the *nullum crimen sine lege* principle[5] or provides for the prohibition of torture and inhuman or degrading treatment

[2] *Konstytucja Rzeczypospolitej Polskiej* (Constitution of the Republic of Poland), Dziennik Ustaw 1997, Nr 78, poz. 483.
[3] *Ustawa z dnia 6 czerwca 1997 r. - Kodeks postępowania karnego* (Code of Criminal Procedure, hereinafter: CCP), Dziennik Ustaw 1997, nr 89, poz. 555 with amendments.
[4] Paweł Wiliński, *Konstytucjonalizacja współczesnego procesu karnego* in Piotr Hofmański (ed), *System Prawa Karnego Procesowego. Tom I – Zagadnienia ogólne. Cześć 1* (LexisNexis 2013) 690.
[5] Article 42 (1) Polish Constitution states that "Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible".

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

and punishment [6] which are both relevant to criminal process. Furthermore, certain provisions directly refer to rights and freedoms of participants to the proceedings (both defendant and victim) such as the protection of liberty (Article 31(1) of the Polish Constitution), the right to privacy in the context of personal inviolability (Article 41(1) of the Polish Constitution), private life and family life (Article 47 of the Polish Constitution), freedom of communication (Article 49 of the Polish Constitution) and inviolability of home (Article 50 of the Polish Constitution). Some of the fundamental rights that are enshrined in international law, as well as the EU legal order, are directly expressed in the Polish Constitution and further clarified in the provisions of CCP. Among such rights can be found the presumption of innocence[7] and the right of defense understood as the right to defend oneself and the right of access to a lawyer[8]. This also relates to the right to a fair and public hearing of a case, without undue delay, before a competent, impartial and independent court[9]. The right of access to court is interpreted as including two elements: the right to a judicial system of justice and the right to judicial review of acts prejudicial to the constitutionally guaranteed rights and freedoms of individual[10].

From the perspective of international cooperation in criminal matters it is worth noting that the Polish Constitution contains some general rules regarding this matter. Apart from a fundamental provision in Article 9 stating that Poland shall respect international law binding upon it, there are also more detailed regulations included in the basic law. The most important is Article 55, which as a rule prohibits the extradition of a Polish citizen. However, exceptions are permitted if the request for extradition is based on an international agreement (bilateral or multilateral) to which Poland is a party or national provisions implementing the latter and the prohibited act covered by the extradition request:

1) was committed outside the territory of the Republic of Poland, and

[6] Article 40 Polish Constitution states that "No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited".

[7] Article 42 (3) Polish Constitution states that "Everyone shall be presumed innocent until his or her guilt is determined by the final judgment of a court". This is reflected in Article 5 § 1 CCP providing that "Accused is presumed innocent until her or his guilt is proven and determined by the final judgment of a court".

[8] Article 42 (2) Polish Constitution states that "Everyone against whom criminal proceedings are conducted shall have the right to defense in all stages of the proceedings. In particular, she or he may choose a defense counsel or, under the terms of the law, use a defense counsel ex officio". The right is repeated in Article 6 CCP providing that "The accused is entitled to the right of defense, including the right to be assisted by a defense counsel, of which he must be informed".

[9] Article 45 (1) Polish Constitution.

[10] Judgment of the Constitutional Court of 12 May 2003, SK 38/02, OTK-A 2003 Nr 5 poz. 38.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

2) constituted an offense under the law of the Republic of Poland or would have constituted an offense under the law of the Republic of Poland if committed in the territory of the Republic of Poland, both at the time of its commission and at the time of the request for extradition.

The abovementioned conditions are not applicable if the request for extradition was submitted by an international judicial body established on the basis of an international agreement ratified by the Republic of Poland, in connection with the crime of genocide, crime against humanity, war crime or crime of aggression covered by the jurisdiction of this body.

Not only the wording of Article 55 of the Constitution itself, but also its evolution is important from the perspective of the EU cooperation in criminal matters. In the original version of the Polish Constitution the prohibition of extradition of Polish citizens was absolute. After the accession to the EU and transposition of the FD EAW into the Polish legal system doubts were raised as to whether the discussed constitutional provision is not in conflict with the EU law regarding EAW and respective provisions of the CCP transposing it, particularly Article 607t § 1 CCP[11]. The Constitutional Court in its judgment of 27 April 2005[12] ruled that the latter provision, which implies that the surrender of a Polish citizen to a EU Member State on the basis of a EAW is possible, is inconsistent with Article 55(1) of the Constitution of the Republic of Poland. As argued in the ruling the constitutional prohibition of extradition of Polish citizens to other countries is general and the term 'extradition' used in the basic law should be understood as encompassing all instruments, regardless of their specific name, which enable to transfer a requested person for the purpose of conducting a criminal proceeding against him or her or executing a penalty. Taking into account the principle of primacy of the EU law the Constitution has been changed[13] in order to secure its practical operation. It should be emphasized that the amendment of the Constitution of 1997 was one of only two that took place in last two and a half decades when the basic law is in force[14].

[11] Article 607t § 1 CCP provides that if the EAW was issued for the purpose of prosecuting a person who is a Polish citizen or who enjoys the right of asylum in the Republic of Poland, the transfer may take place under the condition that the person will be transferred to the territory of the Republic of Poland after the conclusion of the proceedings in the state of issuance of the EAW, if the person consents to this.

[12] Judgment of the Constitutional Court of 27 April 2005, P 1/05, OTK-A 2005 Nr 4 poz. 42.

[13] *Ustawa z dnia 8 września 2006 r. o zmianie Konstytucji Rzeczypospolitej Polskiej* (Law amending the Constitution of the Republic of Poland) Dziennik Ustaw 2006, Nr 200, poz. 1471.

[14] The other amendment that entered into force in 2009 prohibited persons convicted for a criminal offence

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Apart from the special protection of Polish citizens regarding the extradition procedure Polish Constitution provides also that the decision on extradition has to be taken by a court. Moreover, the extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, as well as an extradition which would violate rights and freedoms of a requested person[15].

Besides Polish Constitution and CCP the main sources that play a major role in the Polish criminal justice system encompass five other Codes that relate in turn to the substantive criminal law (Criminal Code[16]), execution of penalties (Criminal Enforcement Code[17]), the law of petty offences (Petty Offences Code[18] and Petty Offences Procedure Code[19]) and the criminal fiscal law (Criminal Fiscal Code[20]). Additionally, some of the provisions of Act on support and rehabilitation of juveniles[21] relate to the criminal proceedings conducted against juvenile offenders prosecuted in criminal courts. In the criminal context also the acts issued by the Minister of Justice are of importance. Even though they are inferior to the parliamentary acts and serve only an auxiliary role they are considered as binding sources of law as rules of clarifying character[22].

Polish law operates under the Continental law system and follows an inquisitorial model of investigation and trial[23]. As a classic inquisitorial system, Polish criminal

prosecuted *ex officio* for a penalty of deprivation of liberty from becoming a member of the Parliament.

[15] Article 55 (4) and (5) Polish Constitution.

[16] *Ustawa z dnia 6 czerwca 1997 r. - Kodeks karny* (Criminal Code, hereinafter: CC), Dziennik Ustaw 1997, Nr 89, poz. 553 with amendments.

[17] *Ustawa z dnia 6 czerwca 1997 r. - Kodeks karny wykonawczy* (Criminal Enforcement Code), Dziennik Ustaw 1997, Nr 90, poz. 557 with amendments.

[18] *Ustawa z dnia 20 maja 1971 r. - Kodeks wykroczeń* (Petty Offences Code), Dziennik Ustaw 1971, Nr 12, poz. 114 with amendments.

[19] *Ustawa z dnia 24 sierpnia 2001 r. - Kodeks postępowania w sprawach o wykroczenia* (Petty Offences Procedure Code), Dziennik Ustaw 2001, Nr 106, poz. 1148 with amendments.

[20] *Ustawa z dnia 10 września 1999 r. - Kodeks karny skarbowy* (Fiscal Code), Dziennik Ustaw 1999, Nr 83, poz. 930 with amendments.

[21] *Ustawa z dnia 9 czerwca 2022 r. o wspieraniu i resocjalizacji nieletnich* (Act on suport and rehabilitation of juveniles), Dziennik Ustaw 2022, poz. 1700 with amendments.

[22] Wojciech Jasiński and Karolina Kremens, *Criminal Law in Poland* (Wolters Kluwer 2019) 55-56.

[23] Note that between July 1, 2015 and March 16, 2016 Poland experimented with an idea of enhanced adversariality in the criminal proceedings. See Wojciech Jasiński and Karolina Kremens, *Criminal Law in Poland* (Wolters Kluwer 2019) 48-49, Wojciech Jasiński, *Polish criminal procedure after the reform* (2015) https://www.academia.edu/68943579/Polish_Criminal_Process_After_the_Reform_1_Polish_Criminal_Process_After_the_Reform (accessed 30.08.2024) and Karolina Kremens, *The new wave of penal populism from a Polish perspective* in Elisa Hoven and Michael Kubiciel (eds), *Zukunftperspektiven des Strafrechts: Symposium zum 70. Geburstag von Thomas Weigend* (Nomos Verlagsgesellschaft 2020) 126-129.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

proceedings can be divided into long and formal criminal investigation and court proceedings during which the evidence gathered at the first stage of proceedings is reproduced with the court playing a leading role during the trial. The criminal investigation is conducted pursuant to the principle of legality[24]. The collection of evidence is performed under formal rules and recorded carefully in the dossier (case file) so the court will be able to rely on these findings during trial. The parties to the criminal investigation, that is the suspect and the victim, are generally allowed to actively participate in criminal investigation by taking part in witness' interrogations and permitted to demand additional investigative measures to be undertaken by the police[25].

In theory, the prosecutors, whose operations are governed by the Prosecution Service Act of 2016[26], conduct or supervise every criminal investigation[27]. But in practice the powers of the prosecutor in that regard are limited by the criminal justice agencies, which is especially visible in cases concerning less serious crimes[28]. The conduct of the investigation is therefore primarily vested with police (*Policja*)[29]. Prosecutors are expected to play a dual role in the criminal process: while during criminal investigations the prosecutor encompasses the role of the active criminal justice authority, at the moment when indictment has been filed with the court he or she becomes a party to the proceedings, assuming all functions of a public prosecution authority. This also means that the prosecutor is ultimately a major prosecuting authority in Poland (Article 45 § 1 CCP).

The proceedings before the court are initiated after the investigation is closed by filing with a court a formal charging instrument, that is the indictment supplemented with the full dossier of the pretrial findings. The prosecutor often chooses to file a different

[24] Article 10 CCP. See Celina Nowak and Sławomir Steinborn, *Poland* in Katalin Ligeti (ed) *Toward a Prosecutor of the European Union, Volume 1: A Comparative Analysis* (Hart Publishing 2013) 500-501.
[25] Article 167 CCP and Article 315 CCP.
[26] *Ustawa z dnia 28 stycznia 2016 r. - Prawo o prokuraturze* (Prosecution Service Act), Dziennik Ustaw 2016, poz. 177 with amendments.
[27] Article 298 § 1 CCP and Article 326 § 1 CCP.
[28] Investigations can be conducted in two separate forms: inspection (*śledztwo*) and inquiry (*dochodzenie*). Inspection is usually conducted in more complicated cases, i.e. in case of all felonies and some misdemeanors, e.g. those in which the suspect is a judge or prosecutor. See Doris De Vocht, *Poland* in Ed Cape, Zaza Namoradze, Robert Smith, Taru Spronken (eds) *Effective Criminal Defence in Europe* (Intersentia 2010) 429.
[29] Police operates under the Police Act (Ustawa z dnia 6 kwietnia 1990 r. o Policji). Some other agencies possess additional investigative powers e.g. as well as other agencies such as the Border Guard (*Straż Graniczna*), Central Anticorruption Bureau (*Centralne Biuro Antykorupcyjne*) or even the Hunting Guard (*Straż Łowiecka*) - see Wojciech Jasiński and Karolina Kremens, *Criminal Law in Poland* (Wolters Kluwer 2019) 29-36.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

charging document that is motion to resolve a case without a trial which is the result of plea bargain alike proceedings (Article 335 § 1 and 2 CCP). The latter, by allowing to proceed during an informal hearing and not a trial, substantially speeds up proceedings and makes it a popular way of disposing of criminal cases. If the case reaches the trial stage proceedings are conducted publicly and by rule in an adversarial way. However, the court is obliged to establish the truth, so it may (and usually does) act *ex officio*, e.g. by calling and examining the witnesses. Similarly, as in case of the investigative stage of criminal proceedings, the victim is given a fairly wide range of procedural rights. If the victim wishes to engage in the proceedings, he or she may depose a statement of entering the trial as an auxiliary prosecutor. In such a case the victim is a party to the proceedings with rights equivalent to the ones granted to the prosecutor. Moreover, even in cases when the prosecutor dropped charges, there is a procedure (albeit a long and formalized one) allowing the victim (represented by an attorney) to bring an indictment to the court instead of a prosecutor (so-called *skarga subsydiarna*, Articles 55 and 330 CCP).

The judgment in all cases is delivered by the court and each party to the proceedings (public and auxiliary prosecutor as well as a defendant) is granted broad power to appeal it. In cases of acquittal and convictions for a deprivation of liberty (without suspension), there is also, after fulfilling several other procedural conditions, a possibility to question the appeal court judgment before the Supreme Court in cassation proceedings (Articles 519-539 CCP).

During the criminal investigation the independent judicial oversight of measures interfering with rights and freedoms of an individual is secured. Polish law does not provide for a judge for preliminary investigation as is known from German or Italian systems. Nonetheless, the use of the most severe coercive measures during criminal investigation such as pretrial detention and secret surveillance may be imposed only by a court (Article 250 § 1 and Article 237 § 1 CCP). The law does not, however, provide for a prior judicial scrutiny of every single investigative action that may interfere with rights of individual. Therefore searches, seizures and arrest warrants can be issued by the prosecutor (Article 220 § 1 CCP and Article 247 § 1 CCP). The independent judicial oversight in such cases is secured by the right to a judicial review of each undertaken measure (Article 236 CCP and Article 246 CCP)[30].

[30] For a concise and general overview of Polish criminal justice system see also: Karolina Kremens, *Poland* in Pedro Caeiro, Sabine Gless, Valsamis Mitsilegas, Miguel João Costa, Janneke de Snaijer, Georgia

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

5.1.2 Overview of the implementation roadmap

In general, the Polish lawmaker decided that the EU provisions regarding mutual recognition of decisions in criminal matters will be transposed by way of introducing amendments to the CCP. As the latter encompasses almost completely legal matters regarding the procedural aspects of criminal proceedings in Poland, this choice seems to be quite obvious. However, it should be noted, that even in countries which codified the provisions regarding criminal procedure, this approach is not always followed. For example in Germany, Portugal and Romania a separate statute was adopted in order to provide a framework for international cooperation in criminal matters[31]. Even though a similar approach has also been proposed in the Polish legal doctrine[32], so far, the path of subsequent amendments of the CCP is being followed each time when there is a need to adjust the Polish legal system to new EU provisions aiming at developing the mutual recognition scheme. Since Poland joined EU after first legal instruments devoted to cooperation in criminal matters were adopted, the initial statute amending the CCP was passed in March 2004 (entering into force on the day of Polish accession to the EU – May 1st 2004) transposing the FD EAW[33]. The subsequent statute added provisions regarding joint investigation teams[34]. After 2004 there were several other amendments introduced in order to transpose the provisions of framework decisions and directives introducing the mutual recognition instruments. Among them the transposition of Directive 2014/41 in 2018[35] should be underlined.

Teodorakakou (eds), *Elgar Encyclopedia of Crime and Criminal Justice* (Edward Elgar Publishing 2024) online.

[31] Sławomir Steinborn, *O potrzebie uchwalenia ustawy o międzynarodowej współpracy w sprawach karnych* in Jolanta Jakubowska-Hara, Celina Nowak, Jan Skupiński (eds.), *Reforma prawa karnego – propozycje i komentarze. Księga pamiątkowa Profesor Barbary Kunickiej-Michalskiej* (Scholar 2008) 441.

[32] See: Sławomir Steinborn, *O potrzebie uchwalenia ustawy o międzynarodowej współpracy w sprawach karnych* in Jolanta Jakubowska-Hara, Celina Nowak, Jan Skupiński (eds.), *Reforma prawa karnego – propozycje i komentarze. Księga pamiątkowa Profesor Barbary Kunickiej-Michalskiej* (Scholar 2008) 445-450.

[33] *Ustawa z dnia 18 marca 2004 r. o zmianie ustawy - Kodeks karny, ustawy - Kodeks postępowania karnego oraz ustawy - Kodeks wykroczeń* (Law amending Criminal Code, Code of Criminal Procedure and Petty Offences Code) Dz.U. 2004, Nr 69, poz. 626.

[34] *Ustawa z dnia 16 kwietnia 2004 r. o zmianie ustawy - Kodeks karny oraz niektórych innych ustaw* (Law amending Criminal Code and other statutes) Dz.U. 2004, Nr 93, poz. 889.

[35] Amedment to the CCP introduced by: *ustawa z dnia 10 stycznia 2018 r. o zmianie ustawy - Kodeks postępowania karnego oraz niektórych innych ustaw* (Law amending Code of Criminal Procedure and other statutes) Dz.U. 2018, poz. 201.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

In the last two decades some of the initial transpositions were subject to further statutory changes. This is particularly the case of CCP's regulations regarding the EAW. As mentioned in 5.1.1., even the Constitution of the Republic of Poland needed to be adjusted to the new EU cooperation in criminal matters scheme. Also the statutory provisions on issuing and executing of EAWs has been amended a few times in several aspects[36]. On the contrary, the CCP's provisions regarding the EIO have not been changed so far.

The situation with the Regulation 2018/1805 is specific. Taking into account its legal character which differs significantly from directives and framework decisions it is obvious that it does not need to be transposed into the domestic legal systems. However, two things have to be emphasized. First, it must be noted that the EU legal acts preceding the Regulation 2018/1805, namely Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence and Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders had been transposed to the Polish CCP (Chapters 62a, 62b, 66c and 66d) and these regulations have not been repealed so far. Therefore, it must be established whether they can be applied in cases falling under the scope of Regulation 2018/1805 (see 5.4.1). Second, the Regulation 2018/1805 although not subject to transposition, nonetheless operates together with the domestic provisions regarding freezing and confiscation orders. They serve particularly as legal basis for all technical measures undertaken by authorities executing freezing or confiscation orders. Therefore, the character, aim and scope of freezing and confiscation orders which are to be executed in Poland must remain in accordance with their counterparts in domestic law. Thus, national law has to be carefully analyzed in order to establish whether they fulfill this condition (see 5.4.3-5.4.4).

5.2 The implementation of Framework Decision 2002/584

[36] See e.g. *ustawa z dnia 5 listopada 2009 r. o zmianie ustawy - Kodeks karny, ustawy - Kodeks postępowania karnego, ustawy - Kodeks karny wykonawczy, ustawy - Kodeks karny skarbowy oraz niektórych innych ustaw* (Law amending Criminal Code, Code of Criminal Procedure, Criminal Enforcement Code, Criminal Fiscal Code and other statutes) which according to justification of the bill presented to the Parliament introduced amendments eliminating the errors and lacunas in CCP's provisions in force at that time identified in the judicial practice (Rządowy projekt ustawy o zmianie ustawy - Kodeks karny, ustawy - Kodeks postępowania karnego, ustawy - Kodeks karny wykonawczy, ustawy - Kodeks karny skarbowy oraz niektórych innych ustaw, Druk nr 1394 - https://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/1394).

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States was implemented in Poland by the Act of 18 March 2004. Special chapters on the EAW were added to the CCP. Chapter 65a (Articles 607a-607j) governs the procedure when Poland is an issuing State and Chapter 65b (Articles 607k-607zc) governs the procedure when Poland is an executing State. Several additional acts of lower level supplemented the implementation.

Generally, the provisions of FD EAW can be considered as properly implemented to the Polish legal system with two notable exceptions relating to preferential treatment of own citizens and grounds for refusal. The first of these exceptions is the distinction, not provided for in the FD EAW, between the situation of the surrender of other Member States' nationals and that of its own nationals, providing greater protection against the surrender of the latter. With regard to Polish nationals, the EAW can only concern offences committed outside the territory of Poland and a double criminality is required.

As regards the grounds for refusal to execute an EAW, although all of them have been implemented in the Polish legal order, in some cases this has been done in a rather discretionary manner. Poland has introduced into its legal system five additional mandatory grounds for refusal, not provided for in the FD EAW (some of them only for Polish citizens). In some cases, the nature of the grounds for refusal was changed (mandatory instead of optional).

In this context, it should be mentioned at the outset that the European Commission has opened an infringement proceeding for an incorrect transposition of the Framework Decision on the European arrest warrant (EAW) against Poland on the basis of Article 258 TFEU. The Commission sent to Poland (and other Member States) a letter of formal notice on 3 December 2020 and an additional letter of formal notice on 14 July 2023. The first formal notice concerned the preferential treatment of Polish citizens compared to EU citizens from other Member States and providing additional grounds for refusal of warrants not provided for in the Framework Decision.

The additional letter of formal notice concerned the failure to correctly transpose the provisions on:

- the temporary transfer of the requested person pending the decision on surrender;
- the conditions for the hearing of the requested person pending the decision on surrender;
- the judgments where the sentenced person was not personally present at the trial;

- competing international obligations.

The proceeding is ongoing and it has not yet reached the stage of a reasoned opinion of the Commission which is the step required by Article 258 TFEU before a case can be brought before the Court of Justice of the European Union.

5.2.1 Scope

5.2.1.1 Limited scope of application of EAW in case of Polish citizens

At the time of the implementation of the FD EAW Article 55(1) of the Polish Constitution prohibited the extradition of a Polish citizen. Soon after, in a judgment of 27 April 2005[37], the Polish Constitutional Tribunal ruled that the surrender procedure under the EAW was a form of extradition, making the freshly introduced provisions of the CCP permitting the surrender of a Polish national to an EU Member State under the EAW[38] inconsistent with the Polish Constitution.

In response to this on 8 September 2006 the Polish Parliament modified Article 55 of the Constitution[39] by adding exceptions regarding the prohibition of extradition of Polish nationals which permitted to apply the EAW. At the same time, the amendment introduced new barriers to the EAW concerning Polish citizens, not provided for in the FD EAW. **In case of EAWs involving Polish citizens surrender is possible only if the offence was committed outside of the territory of Poland** (§ 2(1)) **and with the requirement of double criminality** (§ 2(2))[40]. As this provision is of crucial importance it is worth quoting the current version of Article 55:

> '1. The extraditionof a Polish citizen shall be prohibited, except in cases specified in sections 2 and 3.
>
> 2. Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an

[37] Constitutional Tribunal Judgment of 27 April 2005 No. P 1/05, OTK ZU 4/A/2005, item 42, para 5.9 (text in English available at: http://trybunal.gov.pl/fileadmin/content/omowienia/P_1_05_full_GB.pdf (accessed 30.08.2024).
[38] Article 607t § 1 CCP.
[39] The amendment entered into force on 7 November 2006.
[40] The amendment also added to the existing prohibition of the extradition of a person suspected of having committed a crime for political reasons but without the use of force, a prohibition of an extradition which would violate rights and freedoms of persons and citizens (§ 4).

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition:
1) was committed outside the territory of the Republic of Poland, and
2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request'.

3. […]

4. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens.
5. […].'."

Polish Constitutional Tribunal in a judgment of 5 October 2010 in case SK 26/08 accepted such a solution. It simply observed (without any critical comment) that 'Article 55 of the Constitution renders a guarantee protecting against extradition differently in the context of Polish citizens than with regard to persons who do not have Polish citizenship'. It also indicated that Article 55(1) of the Constitution, as a rule, guarantees protection against extradition to Polish citizens with exceptions which are stipulated in the two subsequent paragraphs of that Article.

The favorable treatment of Polish citizens stemming from Article 55 of the Constitution is repeated in Article 607p § 2 CCP according to which "If a European warrant was issued against a requested person who is a Polish citizen, the warrant may be executed on the condition that the act on which it is based has not been committed in the territory of the Republic of Poland or on a Polish aircraft or vessel and that it constitutes an offence under the law of the Republic of Poland or that it would constitute an offence under the law of the Republic of Poland had it been committed in the territory of the Republic of Poland, both at the time of its perpetration and at the time, when the European warrant was submitted".

Article 55 of the Constitution and Article 607p § 2 CCP provide for a qualified test of a double criminality – the act on which the EAW is based should constitute an offence under the law of the Republic of Poland **both at the time of its commission and when the EAW was submitted**.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Regarding the way in which the double criminality is verified in practice, **the Supreme Court however does not require a detailed verification**. It stated that 'in proceedings for the execution of the European Arrest Warrant, in case of a Polish citizen, the court is not - as a rule - required to verify the factual circumstances of the offence the requested person allegedly committed, to examine the issue of guilt, social harmfulness or illegality of the alleged prohibited act. The competence of the court, when examining whether the negative ground for non-execution of the EAW set forth in Article 607p § 2 of the Code of Criminal Procedure has occurred, is limited only to verifying whether the behavior alleged against a Polish citizen prosecuted in another country of the European Union finds - in an abstract sense - a counterpart in Polish criminal law'[41].

The common view expressed in Polish academic literature is that Article 607p § 2 CCP is contrary to the FD EAW[42].

The European Commission has started an infringement proceeding against Poland for a preferential treatment of their citizens by sending a letter of formal notice on 3 December 2020.

The case can be of high importance due to the conflict between constitutional law and EU law. In case of collision between EU law and the law of states the former prevails[43]. But in case of collision between the Framework Decision and the Polish Constitution, according to Polish law, the latter prevails. According to Article 8(1) of the Polish Constitution 'The Constitution shall be the supreme law of the Republic of Poland' and the Polish Constitutional Court does not accept the supremacy of EU law over the Polish Constitution. In the judgment assessing the conformity of the Accession Treaty with the basic law, it stated that in case of a collision between provisions of EU law and the Polish Constitution 'the Nation as the sovereign, or a State institution authorized by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland's withdrawal from the EU'[44].

[41] Order of the Supreme Court of 12 May 2021, II KK 415/20, LEX nr 3289306.
[42] M. Wąsek-Wiaderek, A. Zbiciak, *The practice of Poland on the European Arrest Warrant*, in: R. Barbosa et al., *European Arrest Warrant. Practice in Greece, the Netherlands and Poland* (Boom Juridisch 2022) 249 and the literature cited there.
[43] Article 91(3) of the Polish Constitution: 'If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws'.
[44] Constitutional Tribunal Judgment 11 May 2005, K 18/04, OTK ZU 5A/2005, poz. 49.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

5.2.1.2 Lack of double criminality requirement

Poland transposed Article 2(2) FD EAW introducing an abolition of the double criminality requirement in case of 32 offences partially - only in relation to persons other than Polish nationals.[45] In the case of Polish citizens, a verification of this requirement is still necessary according to Article 55(2)(2) of the Constitution and Article 607p § 2 CCP. Both provisions foresee a qualified test of double criminality, i.e. the act on which the EAW is based should constitute an offense under the law of the Republic of Poland both at the time of its commission and when the EAW was submitted. However, regarding the way in which it is verified in practice, the Polish Supreme Court does not require a detailed verification. It stated that in proceedings for the execution of an EAW concerning a Polish citizen, the court is not – as a rule – required to verify the factual circumstances of the offense the requested person allegedly committed, or to examine the issue of guilt, social harmfulness, or illegality of the alleged prohibited act. The competence of the court "is limited only to verifying whether the behavior alleged against a Polish citizen prosecuted in another country of the European Union finds – in an abstract sense – a counterpart in Polish criminal law"[46].

The list of offences of Article 2(2) FD EAW has been in principle correctly implemented in Article 607w CCP. There are only minor stylistic differences. In case of one offence (robbery with a firearm) in Polish CCP it is split into two offences. That is why Article 607w CCP lists 33 such offences while Article 2(2) FD EAW only 32.

To sum up, **in case of persons who are not Polish citizens, the abolition of the double criminality requirement is transposed correctly. To the contrary, in case of Polish citizens a verification of the double criminality of the act is still required** (see 5.2.1.1.).

5.2.1.3 Principle of specialty

[45] Article 607w CCP.
[46] Order of the Supreme Court of 12 May 2021, II KK 415/20, LEX nr 3289306.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Principle of specialty was implemented to Polish CCP into Article 607e. The transposition is full. According to Article 607e § 1 CCP a person transferred as a result of the execution of a warrant may not be prosecuted for offenses other than those that formed the basis for the transfer, nor may the sentences of deprivation of liberty or other measures involving deprivation of liberty imposed on him for those offenses be executed. According to Article 607e § 3(4) CCP, the provision of § 1 shall not apply if the criminal proceedings do not involve the application of a measure of deprivation of liberty against the requested person.

This principle is frequently invoked in Polish case law. The Supreme Court supports it and explains that the general rule of specialty applicable to the requested person prosecuted under the EAW does not constitute a legal obstacle to prosecution for offences other than those that formed the basis for the surrender, as long as no measure involving deprivation of liberty, in practice detention on remand, is applied to the person during the proceedings[47]. In addition, the Supreme Court stated, the fact that the transferred person is deprived of liberty in the case of the offence that formed the basis for the transfer is irrelevant[48].

5.2.2 Grounds for non-recognition and non-execution

The grounds for refusal to execute the EAW are provided for in Articles 607p-607y CCP. However, to cover the whole picture it must be taken into account that some of the mandatory grounds of refusal listed in the CCP stem from Article 55(2) and (4) of the Polish Constitution. This may create important consequences in case of collision between the Framework Decision and Polish law.

The FD EAW provides for three mandatory grounds for refusal of execution of EAW (Article 3), seven optional grounds for refusal (Article 4) and four situations in which it is not possible to refuse execution of the EAW in case of trial *in absentia* (Article 4 a). Poland transposed all of them into the CCP. However, additional mandatory grounds for refusal were adopted, alongside the distinction of the differentiating situations of Polish

[47] Order of the Supreme Court of 15 July 2020, V KK 680/19, LEX nr 3277061. In the same vein, judgment of the Supreme Court of 11 January 2022, II KK 341/20, LEX nr 3342242.
[48] Order of the Supreme Court of 15 July 2020, V KK 680/19, LEX nr 3277061.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

nationals and nationals of other Member States in the case of surrender. Thus, the Polish CCP provides for a greater protection of Polish citizens not provided for in the EAW FD. Additionally, the nature of the reasons for refusal has also been changed in some cases (mandatory instead of optional).

Mandatory grounds for refusal

Mandatory grounds for refusal provided for the FD EAW

Poland in principle transposed correctly all three mandatory grounds for refusal of execution of the EAW, but also introduced five additional ones (three formulated expressly as grounds for refusal and two of them formulated as conditions *sine qua non*[49]). They are provided in Article 607p CCP and Article 607s § 1 CCP.

Article 3(1) of FD EAW has been transposed to Polish law in Article 607p § 1(1) CCP according to which the execution of the European Warrant shall be refused if criminal offence covered with the EAW, in the case of jurisdiction of Polish criminal courts, is subject to pardon on the basis of amnesty.

Article 3(2) of FD EAW has been transposed to Polish law into Article 607p § 1(2) CCP according to which the execution of the EAW shall be refused if a final and binding ruling regarding the same acts has been issued against the requested person in another State and, in the event of sentencing for the same acts, the requested person is serving or has served a penalty, or the penalty may not be executed according to the law of the state in which the sentence has been pronounced. The scope of Article 607p § 1(2) CCP is wider than Article 3(2) of FD EAW as it covers final rulings issued in any State (not only Member States as in case of FD EAW). The refusal of EAW based on *ne bis in idem principle* is thus mandatory

[49] Article 607p CCP and Article 607s § 1 CCP. Two situations defining the *sine qua non conditions* for the execution of an EAW are set out in Articles 607p § 2 and 607s § 1 CCP. According to Article 607p § 2 CCP "If the European warrant has been issued in respect of a person prosecuted who is a Polish national, the warrant may be executed on condition that the act to which the European warrant relates was not committed on the territory of the Republic of Poland or on a Polish ship or aircraft and constituted an offence under the law of the Republic of Poland or would have constituted an offence under the law of the Republic of Poland had it been committed on the territory of the Republic of Poland, both at the time when it was committed and at the time when the European warrant was received." Article 607s § 1 CCP "A European warrant issued for the purpose of executing a custodial sentence or a measure involving deprivation of liberty against a prosecuted person who is a Polish citizen or who enjoys the right of asylum in the Republic of Poland shall not be executed if he or she does not consent to the surrender."

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

both in case of an EU Member State and third State final ruling[50]. The transposition is not in full accordance with the wording of the FD EAW.

Article 3(3) of FD EAW has been transposed to Polish law in Article 607p § 1(4) CCP according to which the execution of the EAW shall be refused if the person who is the subject of the EAW may not be held criminally responsible under Polish law for the acts on which the arrest warrant is based, owing to his/her age. According to Article 10 § 1 of Polish Criminal Code the age of criminal responsibility in Poland is 17. In addition, in the case of several serious offences listed in paragraph 2 of Article 10 and if additional conditions are met (regarding the perpetrator and previously applied correctional measures), minors over the age of 15 may be criminally liable. Since 1 October 2023 also a minor who, after the age of 14 and before the age of 15, commits a criminal act as defined in Article 148 § 2 or 3 CC (aggravated murder) under specific conditions, may be liable under the terms of the Criminal Code. However, according to the CJEU judgment in case C-367/16 *Dawid Piotrowski*[51] courts acting as executing authorities must simply verify whether the person concerned has reached the minimum age required to be regarded as criminally responsible in the executing Member State for the acts on which such a warrant is based, without having to consider any additional conditions, relating to an assessment based on the circumstances of the individual, to which the prosecution and conviction of a minor for such acts are specifically subject under the law of that Member State. It is now accepted in the doctrine that Poland as an executing State should only establish whether the person has reached the age of criminal responsibility under Polish law (without verifying the other conditions)[52].

Additional mandatory grounds and additional conditions (not provided for in the FD EAW)

Poland has introduced five additional mandatory grounds for refusal to execute the EAW not provided for in the FD EAW. They are as follows:

1) According to Article 607p §1 point 3 CCP the execution of the European Warrant shall be refused if a final decision on surrender to another Member State of the European Union has been issued against a requested person. This is a procedural impediment introducing the principle of chronological priority in the case of several surrender decisions under the EAW.

[50] This is the result of linguistic interpretation, legislative work and the opinion of the majority of doctrine – see S. Steinborn, *Komentarz do artykułu 607p kodeksu postępowania karnego*, Lex online 2015 and the literature referred to therein.
[51] Judgment of CJEU of 23 January 2018, EU:C:2018:27.
[52] S. Steinborn, *Komentarz do artykułu 607p kodeksu postępowania karnego*, Lex online 2015.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

2) According to Article 607p §1 point 5 CCP **t**he execution of the European Arrest Warrant shall be refused, if it would infringe freedoms and human and citizens rights.
3) According to Article 607p §1 point 6 CCP the execution of the European Arrest Warrant shall be refused, if the offence was committed without violence for political reasons.
More detailed analysis of grounds for refusal indicated in points 2 and 3 is done in 5.2.2.1. below.
4) Additionally, the execution of an EAW will be refused in case of Polish citizens if the act to which the EAW applies has been committed in the territory of the Republic of Poland or on board of a Polish vessel or aircraft or if there is a lack of double criminality (consequence stemming from the requirements from Article 607p § 2 CCP). For a more detailed analysis of this ground for refusal, see 5.2.1.2).
5) The execution of an EAW issued for execution purposes will be refused in the case of Polish nationals and persons exercising their asylum right in the Republic of Poland if they do not agree to be surrendered[53]. For more information see comment to Article 4(6) FD EAW below.

The ground for refusal indicated in point 4 relate only to Polish citizens and the ground for refusal indicated in point 5 to Polish citizens and persons exercising their asylum right in the Republic of Poland.

Optional grounds for refusal

Poland has transposed most of the grounds for refusal correctly, but not all. The following is a list of cases of incorrect implementation.

Article 4(1) of FD EAW has been transposed to Polish law in Article 607r § 1(1) and § 2 CCP. However this ground for refusal is applied in a narrower manner - only in case of non-Polish citizens, because it must be read together with Article 55(2) of Polish Constitution which prevents the extradition of Polish citizens in case of a lack of double criminality and Article 607p § 2 which introduces this prohibition into CCP (for more see 5.2.2. additional grounds for refusal (point 5)).

Article 4(5) of FD EAW has been transposed into Polish law in Article 607p CCP not in full accordance with the wording of the EAW FD as in Poland it is a mandatory ground for refusal while in EAW FD it is an optional one. The refusal of EAW based on *ne bis in idem principle* is thus mandatory both in case of an EU Member State and third state final ruling.

[53] Article 607s § 1 CCP.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Article 4(6) FD EAW has been transposed to Polish law in Article 607s CCP which differentiated the nature of this ground according to nationality (mandatory in case of Polish nationals and persons exercising their asylum right in the Republic of Poland and optional in case of persons who have the place of residence or permanently stays in the territory of the Republic of Poland). The implementation thus is not full in accordance with FD EAW in which refusal of execution in such a situation is always optional. In case of refusal of surrender, the foreign sentence will be executed in Poland. Article 607s § 3 CCP states that 'By refusing the surrender due to reasons specified in § 1 or § 2, the court shall decide on the execution of the penalty or measure adjudicated by the judicial authority of the European Warrant issuing state'. Article 607s § 4 CCP specifies how the Polish court shall adjust the imposed penalty to the catalogue of penalties provided by Polish law.

Article 4(7)(b) FD EAW has not been transposed into Polish law. It provides that the executing judicial authority may refuse to execute the European Arrest Warrant where the European Arrest Warrant relates to offences which have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory. There is no such a provision in Polish CCP.

Grounds for refusal in case of trial in absentia

Referring to trials *in absentia*, Article 4a(1) EAW FD has been transposed into Polish law in Article 607r § 3 CCP[54] as an optional ground for refusal. A detailed assessment of the transposition of this provision was done within the framework of the *InAbsentiEAW* project[55]. It is worth underlining here that Poland transposed some of the exceptions of Article 4a in such a way that the level of protection of fundamental rights as envisaged by

[54] Poland transposed the Framework Decision 2009/299/JHA by means of a legislative amendment to the CCP - Law Amending the Criminal Code, the Code of Criminal Procedure and Corporate Criminal Liability Act 2011 *(Ustawa z dnia 29 lipca 2011r. o zmianie ustawy - Kodeks karny, ustawy - Kodeks postępowania karnego oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary*) DzU 2011 poz 1135.

[55] The research project, financed by the European Union's Justice Programme, concerns European Arrest Warrants issued for the enforcement of sentences after in absentia trials. It studies the application of Article 4a of EAW FD by means of case studies from Belgium, Hungary, Ireland, the Netherlands, Poland and Romania. The research report: 'Improving Mutual Recognition of European Arrest Warrants for the Purpose of Executing Judgments Rendered Following a Trial at which the Person Concerned Did Not Appear in Person' <https://www.inabsentieaw.eu/publications/> (accessed 30.08.2024).

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

this provision was lowered[56]. The *InAbsentiEAW* report points out that as to the first exception of Article 4a, it is not required that the requested person was summoned in person, nor that he or she be informed of the date of the hearing "in such a manner that it was unequivocally established that he or she was aware of the scheduled trial"[57]. Moreover, as to the second exception – concerning defense by a mandated legal counselor – it is not required that the requested person was aware of the scheduled trial.

5.2.2.1 Fundamental rights and proportionality issues

Fundamental rights

Article 55(4) of the Polish Constitution of 1997 states that 'The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens'. Article 607p § 1 CCP confirms that **'**The execution of the European Warrant shall be refused, if: […] 5) it would infringe freedoms and human and citizens rights […], 6) The offence was committed without violence for political reasons'.

These provisions are broad and are not limited to a specific right or freedom (they seem to cover any kind of freedom and right). It is not specified whether they relate to the rights guaranteed by the Polish Constitution, by the ECHR or by the Charter of Fundamental Rights of the EU. The most natural interpretation would be that they relate to the Polish Constitution, as the term used in Article 55(4) is similar to the title of Chapter 2 of the Polish Constitution ('The Freedoms, Rights and Obligations of Persons and Citizens')[58]. But the Polish Constitutional Tribunal interpreted them as covering with this expression both those rights that are guaranteed by the provisions of international law acts binding on Poland, including in particular the provisions of the European Convention on Human Rights, as well as constitutionally protected freedoms and rights[59].

[56] Ibid.
[57] Ibid.
[58] Article 55(4) "wolności i prawa człowieka i obywatela" and Chapter 2 „Wolności, prawa i obowiązki człowieka i obywatela" .
[59] Confirmed e.g. by Order of the Court of Appeal in Cracow of 24 May 2017, II AKz 160/17, LEX nr 2307632. The decision related to Article 611tk § 1(5) CCP which implements the Framework Decision 2008/909/JHA of November 27, 2008. But its content is identical to Article 607p § 1(5) CCP as it provides a refusal to execute a judgment due to the protection of human freedoms and rights.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

The Constitutional Tribunal interpreted Article 607p § 1(5) CCP broadly also in a judgment of 5 October 2010 in case SK 26/08[60]. It found that this provision is consistent with Article 45(1) and Article 42(2) in conjunction with Article 55(4) of the Constitution insofar as Article 607p(1)(5) CCP contains a ground for refusal to execute a EAW issued against a Polish citizen for the purpose of criminal prosecution including following situations:

1) where it is obvious for the court adjudicating on the execution of the European Arrest Warrant that the person who is the subject of the said warrant has not committed the act on the basis of which the European arrest warrant has been issued, and

2) where the description of the act on the basis of which the European Arrest Warrant has been issued is imprecise to the extent it is impossible to adjudicate on the execution of the said warrant.

But, apart from that, in the practice of common courts this ground for refusal of EAW is interpreted strictly[61]. It was stated that[62]:

- the probability of a violation of freedoms and rights is not sufficient, what is required is a finding, or at least a probability approaching certainty, that such a violation will occur[63]. In other words, "In the light of the wording of Article 607p § 1(5) of the Code of Criminal Procedure it is not sufficient to establish a probability of a violation of freedoms and rights, but a solemn statement, or at least a probability bordering on certainty, that such a violation will occur is necessary. The presumptive mode used in the provision under comment means that if the transfer of the requested person were to happen, his or her freedoms and rights would be violated. It is therefore not a question of the degree of likelihood that a breach of fundamental rights will occur, but a finding that such a situation (breach) will occur if the surrender takes place"[64].

[60] Judgment of Polish Constitutional Tribunal of 5 October 2010, SK 26/08, OTK-A 2010/8/73.
[61] For more examples of case law see M. Wąsek-Wiaderek, A. Zbiciak, *The practice of Poland on the European Arrest Warrant*, in: R. Barbosa et al., *European Arrest Warrant. Practice in Greece, the Netherlands and Poland* (Boom Juridisch 2022) 246-247.
[62] Order of the Court of Appeal in Katowice of 16 October 2020, II AKz 1090/20, LEX nr 3127228.
[63] The same statement is expressed in Order of the Court of Appeal in Katowice of 28 July 2020, II AKz 768/20, LEX nr 3127226.
[64] Order of the Court of Appeal in Katowice of 4 April 2018, II AKz 167/18, LEX nr 2557275.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

- the presence of information about irregularities, concerning groups of people or specific correctional facilities, does not imply that in a particular case a person will experience inhuman or degrading treatment after transfer to the issuing state;[65];
- the lack of language skills of the defendant is not an obstacle that prevents the execution of the EAW, as in many cases it would impede the effective use of this mechanism. The fair trial standards of the European Union member states imply that the requested person will be provided with the assistance of an interpreter during the proceedings in other Member State.[66]

These grounds expressed in Article 607p § 1(5) and (6) CCP at first glance seem to be contrary to the FD EAW, because of the *numerus clausus* of grounds of refusal in Articles 3-4a FD EAW. Yet the picture is not entirely clear, considering the pending discussion on whether the protection of human rights could be a separate, overriding ground for refusal. Especially Article 1(3)[67] and recitals 12[68] and 13[69] show the importance of the protection of fundamental rights as does the recent case law of the CJEU in which this Court admitted that in some circumstances the infringement of the prohibition of torture and inhuman and degrading treatment (Cases C-404/15 and C-659/15 PPU *Pál Aranyosi* and *Robert Căldăraru)* or the right to a fair trial (C-216/18 PPU LM) could lead to non-execution of a EAW. The issue calls for a clarification.

Proportionality

The Polish criminal justice system is based on the principle of mandatory prosecution. According to Article 10 CCP, with respect to an offense prosecuted *ex officio*, the authority responsible for the prosecution of offenses is obliged to initiate and conduct the investigation, and the public prosecutor is moreover obliged to file an indictment with

[65] Order of the Court of Appeal in Katowice of 4 April 2018, II AKz 167/18, LEX nr 2557275.
[66] Order of the Court of Appeal in Katowice of 4 April 2018, II AKz 167/18, LEX nr 2557275.
[67] 'This FD shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU'.
[68] 'This FD respects fundamental rights and observes the principles recognised by Article 6 of the TEU and reflected in the CFR […]'.
[69] 'No person should be removed, expelled or extradited to a State where there is a serious risk that he would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

a court and support it throughout the proceedings. This has resulted in a very high number of EAWs[70] also in trivial cases[71], which in turn has led to criticism from other Member States.

In response to the complaints about the absence of the principle of proportionality in Polish law, in 2013 a general clause of "the interest of the administration of justice" was added to Article 607b CCP[72]. Since then, an EAW must not be issued if it does not serve the interest of justice, which, even if not defined in the legal provision and decided case by case, covers the principles of necessity and proportionality. In particular, according to the Supreme Court, the need for engaging the authorities of foreign states should be considered when issuing the warrant[73]. Despite its general wording, which does not explicitly refer to the principle of proportionality, this clause seems to be efficient in practice. The data show that EAWs are now used by Polish courts in a more appropriate manner[74].

5.2.3 Issuing the EAW

In principle the requirements for issuing the EAW were transposed correctly. Issuing a EAW is limited to offences of sufficient severity as provided in Article 2(1) of the FD EAW. The issuing of a EAW shall be inadmissible unless required by the interests of justice (see 5.2.2.1 on proportionality). Article 6(1) FD EAW has been transposed to Polish law in Article 607a CCP. The issuing judicial authority is a regional court (*sąd okręgowy*) having territorial jurisdiction over the place where the relevant proceedings are conducted.

[70] For example, in 2006, Poland issued 2,421 out of a total of 6,889 EAWs in the EU; in 2008, 4,829 out of 14,910 EAWs; and in 2009, 4,844 out of 15,827.
[71] See for example Witold Klaus, Justyna Włodarczyk-Madejska, Dominik Wzorek (2021) In the Pursuit of Justice: (Ab)Use of the European Arrest Warrant in the Polish Criminal Justice System, Central and Eastern European Migration Review 10(1): 95-117 <http://ceemr.uw.edu.pl/content/pursuit-justice-abuse-european-arrest-warrant-polish-criminal-justice-system> (accessed 30.08.2024).
[72] Law amending the Code of Criminal Procedure and other laws *(Ustawa z dnia 27 września 2013 r. o zmianie ustawy Kodeks postępowania karnego oraz niektórych innych ustaw)* DzU 2013 poz 1247 with amendments. The amendment entered into force on 1 July 2015.
[73] Order of the Court of Appeal in Cracow of 28 April 2020, II AKa 207/20, LEX nr 3145371.
[74] For example, in 2015, Poland issued only 2,390 out of a total of 16,144 EAWs in the EU, in 2021; 1,541 out of 14,789. See also Małgorzata Wąsek-Wiaderek, Adrian Zbiciak, 'The practice of Poland on the European Arrest Warrant' in: Renata Barbosa and others, European Arrest Warrant. Practice in Greece, the Netherlands and Poland (Boom Juridisch 2022) 258–259 and examples cited therein. In 2020 Polish courts issued 1,795 EAWs and in the same year they refused to issue an EAW in 551 cases. Most of these refusals were justified by the proportionality principle, which means that this principle is expressly addressed in EAW procedure, both in law and practice.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

In Poland, decisions on both detention on remand and on the EAW are issued by a court. In the case of Poland, therefore, there is no doubt that the relevant authorities are judicial authorities within the meaning of Article 6 EAW FD. However, the reforms limiting the independence of the judiciary introduced between 2016 and 2023 led to four preliminary references from other Member States – two from Ireland[75] and two from the Netherlands[76] – as to whether they should refuse to execute EAWs from Poland. The CJEU upheld the principle of mutual trust, and while it allowed a refusal to execute EAWs due to the risk of violation of Article 47 of the Charter, it set very strict criteria in the form of a two-step test[77].

According to Article 607a CCP if there is a suspicion that a person prosecuted for an offence falling under the jurisdiction of Polish criminal courts may be staying in the territory of a Member State of the European Union, a competent regional court, on a motion of the public prosecutor, or *ex officio* or on a motion of a competent district court in judicial and enforcement stage of the proceedings, may issue a European Arrest Warrant, referred to in this Chapter as a „Warrant". Once the court issues an EAW it orders a translation of the order into the official language of the executing Member State (Article 607c § 2 CCP).

5.2.4 Execution procedure

Article 6(2) FD EAW has been transposed to Polish law in Article 607k § 2 CCP. The executing judicial authority is the regional court[78] having territorial competence. But the authorities competent to receive EAWs issued by the authorities of other Member States are provincial prosecutor's offices having territorial competence.

After receiving the EAW (directly from the court of another EU Member State or via SIS*, Interpol,* or *European judicial network*), the prosecutor shall hear the requested person, inform her or him about the content of the EAW and the right to consent regarding the

[75] Case C-216/18 PPU *LM*, EU:C:2018:586 ; Case C-480/21 *W O, J L v. Minister for Justice and Equality*, EU:C:2022:592.
[76] Joined Cases C-354/20 PPU and C-412/20 PPU Openbaar Ministerie vs. L and P, EU:C:2020:1033; Joined Cases C-562/21 PPU and C-563/21 PPU *X and Y v Openbaar Ministerie*, EU:C:2022:100.
[77] For a critical analysis of this case law, see Agnieszka Frąckowiak-Adamska, 'Trust until it is too late! Mutual recognition of judgments and limitations of judicial independence in a Member State: L and P' (2022) 59 Common Market Law Review 113-150.
[78] In Poland in January 2024 there are 47 regional courts. See: Rozporządzenie Ministra Sprawiedliwości z dnia 28 grudnia 2018 r. w sprawie ustalenia siedzib i obszarów właściwości sądów apelacyjnych, sądów okręgowych i sądów rejonowych oraz zakresu rozpoznawanych przez nie spraw, Dz.U. 2018 poz. 2548 with amendments.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

surrender and the right to consent regarding the non-application of Article 607e § 1 CCP[79]. Subsequently, the prosecutor shall submit a request to the competent regional court[80]. The court takes a decision on detention, on remand[81] and on the transfer of the person at a hearing in which the prosecutor and defense counsel have the right to participate[82]. When notifying the requested person of the hearing, the court must serve the EAW along with its translation submitted by the public prosecutor. If it is impossible to have it translated before the session, the court orders a translation to be made. It is considered sufficient to inform the person of the content of the EAW if this does not hinder the execution of his/her rights[83].

During the proceedings the court shall take from the prosecuted person a statement of consent regarding the surrender or consent regarding the non-application of Article 607e § 1 CCP filed with the record. This statement cannot be withdrawn, of which the prosecuted person shall be advised[84].

An interlocutory appeal *(zażalenie)* can be filed within three days after the announcement of the decision. If the prosecuted person has been deprived of liberty and has not been brought to the court session the three-day period is calculated from the day date of service of the decision[85]. According to Article 451 CCP the appellate court, upon motion of an accused deprived of liberty, submitted within 7 days as of the date of serving a notification on the acceptance of appeal on them, shall order that the accused be brought to the trial, unless the appellate court decides that the presence of the defense counsel of the accused would be sufficient[86]. The decision is sent to the issuing authority. Surrender

[79] Article 607k § 2 CCP.
[80] And to a competent authority if separate regulations of the Polish law provide that prosecuting a person against whom a European Warrant has been issued shall depend on its permission (Article 607k § 4 CCP).
[81] Article 607k § 3 CCP. According to Article 607k § 3a even before receiving the EAW the Polish courts have possibility to adopt a provisional detention for a period not longer than 7 days if it is requested by the competent judicial authority that has issued the EAW, ensuring that a valid and final sentencing judgment has been rendered as regards the prosecuted person or another decision has been issued serving as the basis for deprivation of liberty.
[82] Article 607l § 1 CCP.
[83] Article 607l § 1a CCP.
[84] Article 607m § 2 CCP.
[85] Article 607m § 3 CCP.
[86] However, the Supreme Court in order of 12 May 2021 (II KK 415/20, LEX nr 3289306) found that defendant's absence during appeal proceedings, despite the fact that the requested person expressed a willingness to be heard, is a procedural defect, but it did not have a significant impact on the content of the appealed order. Indeed, it recalled that recital 10 of the preamble to the Framework Decision of the Council of the European Union of June 13, 2002 on the European Arrest Warrant and the surrender procedures between

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

shall take place within 10 days of the final decision[87]. If the Member State does not receive a person within the time limits, the immediate release of this person shall be ordered, provided that the person is not deprived of liberty for the purpose of another pending case[88].

The execution procedure seems to in conformity with the FD EAW with the exception of a lack of implementation of Article 18(3) FD EAW.

According to Article 18 FD EAW where the EAW has been issued for the purpose of criminal prosecution, the executing judicial authority must: either agree that the requested person should be heard according to Article 19 or agree to the temporary transfer of the requested person. According to § 3 of this Article, in the case of temporary transfer, the person must be able to return to the executing Member State to attend hearings concerning him or her as part of the surrender procedure. Poland has not implemented this paragraph into its law.

Central authority designated on the basis of Article 7(1) FD EAW to assist the competent judicial authorities in Poland is, as indicated on the Judicial Atlas on the European Judicial Network website [89] , Prokuratura Krajowa, Biuro Współpracy Międzynarodowej (National Prosecutor's Office - Bureau of International Cooperation)[90].

Ministry of Justice - Department of International Cooperation and Human Rights (ENA)[91] is designated as the authority responsible for receiving transit requests and the necessary documents, as well as any other official correspondence relating to transit requests (on the basis of Article 25(2) FD EAW).

Member States 2002/584/JHA declares that the mechanism of the European Arrest Warrant is based on a high level of trust between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union

[87] Article 607n § 1 CCP.

[88] Article 607n § 3 CCP.

[89] https://www.ejn-crimjust.europa.eu/ejn2021/AtlasAuthorityData/EN/351/955/3090/4/True/5323/False .

[90] On the EJN website under 'Notification under arts. 7.1, 7.2 and 25.2 European Arrest Warrant' by Poland, the last notification under Article 7.1 is of 5 February 2008 . It indicates as Article 7(1) central authority the Minister of Justice - Attorney General Address for correspondence: National Prosecutor's Office Bureau of International Legal Cooperation. At the time of the 2008 notification, the National Prosecutor's Office was part of the Ministry of Justice. See https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/3224 .

[91] https://www.ejn-crimjust.europa.eu/ejn2021/AtlasAuthorityData/EN/351/955/3091/4/True/6931/False .

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

5.2.4.1 Issues for the rights of the suspect, accused and other parties

With reference to rights provided by six EU directives on procedural rights of the suspect and accused – see the detailed report prepared within the framework of the Cross-Justice project[92].

5.2.5 Cooperation issues between executing and issuing authorities

Both issuing and executing authorities in Poland communicate directly with authorities in other Member States. Neither the central authority nor the Minister of Justice is involved in the exchange of correspondence. Article 15(2) and (3) of FD EAW was transposed into Article 607 d § 2 and 3 and Article 607z CCP. According to Article 607d § 2 CCP if the location of the requested person is known or was established as a result of the search, the public prosecutor and the regional court that issued the warrant at the stage of judicial and enforcement proceedings, sends it directly to the judicial authority of the executing State. A copy of the warrant will be sent to the Minister of Justice. According to § 3 the provision of § 2 applies accordingly in the event the State executing the warrant requests additional information or documents.

Only if the place of stay of a requested person is not known but there is a suspicion that they may be staying in the territory of a Member State, the public prosecutor, and at the judicial and enforcement stage of proceedings, the regional court that has issued the warrant, shall send the copy of the EAW to the central Police unit co-operating with Interpol, together with a motion to commence international search.

According to Article 607z § 1 CCP, if information transmitted by the European Warrant issuing state is not sufficient to take a decision on the surrender of the requested person, the court shall call on the judicial authority that has issued the European Warrant to supplement the information within a specified time limit.

5.2.6 Remedies

[92] https://site.unibo.it/cross-justice/en/project-results/publications

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

In case of detention on remand of a surrendered person, all general rules apply to him or her. The person is entitled to appeal against a detention order (Article 252 CCP) and submit a motion for quashing a detention order at any time (Article 254 CCP).

The Supreme Court decided also that the phrase "detention on remand or arrest" used in Article 552 § 4 of the CCP (provision allowing an arrested person to obtain compensation for wrongful detention in domestic cases) also encompasses the actual deprivation of liberty applied by a foreign state to a requested person as a result of an EAW issued by a Polish court[93].

5.3 The implementation of Directive 2014/41

5.3.1 Scope

The Polish lawmaker decided to transpose the provisions of Directive 2014/41 primarily to the CCP. It implies that the EIOs can be issued and executed in **criminal proceedings, i.e. the procedure designed to decide on criminal liability for committing an offence regulated in the Criminal Code or any other statute**. In Poland only natural persons can be held criminally liable for a criminal offence. In order to transpose Directive 2014/41, two chapters were added to the CCP – Chapter 62c 'Request to a European Union Member State to conduct investigative measures on the basis of a European Investigation Order (Articles 589w-589zd) and 62d 'Request from a European Union Member State to conduct investigative measures on the basis of a European Investigation Order' (Articles 589ze-589zt).

Additionally, the CCP's provisions regarding the EIO are applicable **to petty offences cases**. Petty offences are a separate category of minor criminal offences (subject to fine, community service and in exceptional cases subject to penalty of detention of maximum 30 days) which are partly codified in the Petty Offences Code of 1971 as well as in numerous other statutes. The procedure applied in petty offences cases is codified in the Petty Offences Procedure Code of 2001. Article 116c § 1 of the Petty Offences Procedure Code provides that Chapters 62c and 62d CCP concerning the issuing and executing of EIO shall apply, *mutatis mutandis*, to petty offence proceedings. However, **the scope of application of provisions regarding issuing of the EIO is limited only to petty offences provided in**

[93] Judgment of the Supreme Court of 12 October 2021, IV KK 249/19, LEX nr 3520443.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Chapters XI and XIV of the Petty Offences Code, i.e. petty offences against the safety of traffic and against property. In case of any other type of petty offence the competent authorities taking investigative actions are not authorized to issue an EIO.

Chapters 62c and 62d of the CCP are also applicable in **criminal fiscal proceedings** (Article 113 § 1 Criminal Fiscal Code[94]). In this type of proceeding, the liability of natural persons accused of committing a fiscal criminal offense or a fiscal petty offense codified in the Criminal Fiscal Code is addressed.

Polish criminal and petty offence law does not provide for a liability of persons other than natural. Nonetheless a separate legal act - Act of 28 October 2002 on liability of collective entities for acts prohibited under penalty[95] - enables to hold legal persons liable for offences committed by natural persons, broadly speaking, representing this body. While this type of liability of not treated as criminal *sensu stricto*, it is obviously repressive in its nature, as the financial penalty that can be ordered can reach more than 1 mln euros and the legal persons may also be banned from applying for various public funding schemes or public procurement. The 2002 Act is tacit about any form of international cooperation in investigating corporate liability cases. However, **Article 22 of the 2002 Act provides that the provisions of the Code of Criminal Procedure shall apply *mutatis mutandis* to proceedings regarding liability of collective entities for acts prohibited under penalty. Since Chapters 62c and 62d are not explicitly excluded from the scope of the mentioned reference, there is, at least theoretically, a possibility of issuing an EIO in a discussed corporate liability proceeding[96].**

Polish law does not provide for the possibility of issuing an EIO in proceedings other than criminal, petty offence and the one regarding liability collective entities governed by the 2002 Act.

For what concerns the type of investigative measures that can be carried out on the basis of an EIO, the Polish CCP, similarly to Directive 2014/41, does not limit this issue. Article 589w § 1 CCP is very general in its wording as it provides that the EIO can be issued

[94] Criminal Fiscal Code 1999 *(Ustawa z dnia 10 września 1999 r. Kodeks karny skarbowy)* DzU 1999 Nr 83 poz 930 with amendments.
[95] *Ustawa z dnia 28 października 2002 r. o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary* (Law on liability of collective entities for acts prohibited under the threat of penalty), Dziennik Ustaw 2002, Nr 197, poz. 1661 with amendments.
[96] This view is however questioned by some scholars. See: Joanna Klimczak, Dominik Wzorek, Eleonora Zielińska, *Europejski nakaz dochodzeniowy w praktyce sądowej i prokuratorskiej – ujawnione problemy i perspektywy rozwoju* (Wydawnictwo Instytutu Wymiaru Sprawiedliwości 2022) 31.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

if it is necessary to take or obtain evidence that is located or may be conducted on the territory of another EU Member State. Similarly, the provisions regarding the execution of the EIO does not limit the scope of investigative measures that can be carried out in Poland.

Article 3 of Directive 2014/41 provides that the EIO is not applicable in cases of setting up of a joint investigation team and the gathering of evidence within such a team. This exception is not expressly stated in the CCP's provisions on the EIO. However, as the Polish CCP contains a separate body of legal norms regarding joint investigation teams (Articles 589b-589f) and they do not refer anyhow to provisions on the EIO, it must be concluded that they constitute a legal basis for cooperation within joint investigation teams and therefore regulations on EIO are not applicable. Thus, **the Article 3 of Directive 2014/41 has been fully transposed into the Polish legal system.**

Summing up, **the provisions of Directive 2014/41 regarding the scope of application of the EIO has been fully transposed into the Polish legal system. What should however be underlined, is that Poland has decided not to enable the issuance of an EIO in all types of proceedings enlisted in Article 4 of Directive 2014/41. This is possible only in criminal, petty offence and criminal fiscal proceedings as well as proceedings regarding liability of collective entities for acts prohibited under penalty.**

5.3.2 Grounds for non-recognition and non-execution

The margin of appreciation offered to executing authorities in deciding on the execution of the EIO is one of the crucial issues in ensuring the effective functioning of this mutual recognition instrument. Of course the logic of mutual recognition is to limit the leeway of the executing authority to a necessary minimum. However, it does not imply an automatism in execution of decisions issued in other EU Member States. The European lawmakers made it clear in the recitals of Directive 2014/41, which underline that while the issuing authority is best placed to decide, on the basis of its knowledge of the details of the investigation concerned, which investigative measure is to be used, still the executing authority is authorized to use another type of investigative measure if the indicated measure does not exist under its national law or would not be available in a similar domestic case (Recital 10). Moreover, the EIO should be chosen where the execution of an investigative measure seems proportionate, adequate and applicable to the case in hand. While the assessment is performed by the issuing authority, there are still refusal grounds

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

enlisted in the Directive. Moreover the executing authority should be entitled to opt for a less intrusive investigative measure than the one indicated in an EIO if it makes it possible to achieve similar results (Recital 11). Last but not least, mutual trust also has its limits as explicitly mentioned in Recital 19, which provides that if there are substantial grounds for believing that the execution of an investigative measure indicated in the EIO would result in a breach of a fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights recognized in the Charter, the execution of the EIO should be refused.

From the perspective of the executing authority the most important issue is how the refusal grounds are transposed. The grounds for non-recognition or non-execution of an EIO are enlisted mainly in Article 11 of Directive 2014/41. The wording of this provision indicates that the existence of a relevant ground does not oblige the competent EU Member State's judicial authority to refuse to recognize or execute an EIO. It is only an option and the final assessment whether it is necessary is left for the EU Member States' lawmakers or competent judicial authorities. It is however worth noticing that Recital 19 of Directive 2014/41, which refers to a ground for refusal based on the justified belief that the execution of EIO would result in a breach of a fundamental rights, is worded in a more categorical way, as it states that if such a situation occurs, the execution of the EIO should be refused. Taking into account the leeway left for the domestic lawmakers the Polish legal system provides for both mandatory and optional grounds for refusal to execute the EIO issued in another EU Member State. As mentioned above this seems to be acceptable, taking into account the wording of Article 11 of Directive 2014/41. The transposition of the grounds for non-recognition or non-execution of an EIO is thus full and correct[97]. Below, the transposition of each of the grounds for non-recognition or non-execution included in Directive 2014/41 will be analyzed.

[97] Similar views are expressed in the legal doctrine. See: Joanna Klimczak, Dominik Wzorek, Eleonora Zielińska, *Europejski nakaz dochodzeniowy w praktyce sądowej i prokuratorskiej – ujawnione problemy i perspektywy rozwoju* (Wydawnictwo Instytutu Wymiaru Sprawiedliwości 2022) 61, 62 and sources cited therein. The discussed case is different than the case of an EAW. FD EAW makes a clear distinction between mandatory and optional grounds for refusal, which leaves a lesser margin of discretion for the domestic lawmaker in the transposition process. Moreover, what is crucial, when transforming an optional ground from the directive into a mandatory one in the domestic legislation is whether it does not excessively limit the power of the court to assess the relevant factors in a specific case (see: Judgment of the Court (Grand Chamber) of 6 October 2009. C-123/08, *Dominic Wolzenburg* [2009] ECLI:EU:C:2009:616). Taking that into account in the case of Directive 2014/41 the assessment of the transposition should be positive.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

In case of a ground for non-recognition or non-execution based on an immunity or a privilege provided in Article 11(1)(a) of Directive 2014/41, Polish CCP divides it into two separate grounds for refusal (Article 589zj § 1(1) and (4)). The first one is mandatory and covers situations where:

- the court or the prosecutor has not obtained the required authorization to carry out an investigative measure with the participation of the person indicated in the EIO (e.g. because of diplomatic immunity or immunity of the judge if they had not been lifted according to international or Polish law), or
- the EIO concerns an interrogation in circumstances covered by an absolute prohibition of interrogation according to Polish law (e.g. interrogation of a defence attorney on issues covered by client-attorney privilege).

Apart from the abovementioned mandatory ground the Polish CCP provides also for an optional ground for refusal which concerns the hearing of persons referred to in Article 179 § 1 or Article 180 § 1 and § 2 CCP, as to the circumstances specified in these provisions (Article 589zj § 2(8) CPP). Articles 179 § 1 and 180 § 1 and § 2 CCP refer to interrogations of persons obliged to keep state or professional secrecy (e.g. state officials, physicians, attorneys, journalists). Articles 179 and 180 CCP provide also for procedures allowing to lift the respective secrecy obligation. In case the EIO concerns an interrogation where there is a need to lift the secrecy obligation, it has to be done first (Article 589zj § 4 CPP). If a competent authority does not grant permission, the execution of the EIO should be refused. However, before issuing a decision on refusal a competent court or prosecutor shall consult with the authority issuing the EIO in order to enable it to amend or supplement the EIO (Article 589zj § 5 CPP).

As to the ground for non-recognition or non-execution based on national security interests provided in Article 11(1)(b) of Directive 2014/41 Polish CCP implements this provision in a similar way as in case of refusal based on immunity or privilege. Article 589zj § 1(6) CCP provides that the execution of an EIO shall be refused if the requested measure would threaten national security. Additionally Article 589zj § 2(3) and (8) provides for an optional ground for refusal if:

- the execution of the EIO would involve the disclosure of classified information obtained in the course of covert activities, as well as related to the conduct of these activities, or
- EIO concerns the hearing of persons referred to in Articles 179 § 1 or art. 180 § 1

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

and § 2 CCP, as to the circumstances specified in these provisions (discussed above). The optional ground for refusal allows for a certain degree of flexibility in cases where the information covered by state secrecy could be revealed, which is reasonable, as not in all cases its disclosure might pose a threat to national security or public order.

The third ground for refusal is related to a possibility of carrying out the investigative measure in a non-criminal proceedings. Article 589zj § 2(5) CCP transposed Article 11(1)(c) of Directive 2014/41 by introducing an optional ground for refusal if, according to Polish law, the investigative measure covered by the EIO cannot be carried out in the proceedings in which it was issued.

Article 11(1)(d) of Directive 2014/41 states another ground for refusal of the execution of EIO which is based on the principle of *ne bis in idem*. This provision has been transposed to the Polish CCP as a mandatory ground for refusal regulated in Article 589zj § 1(2) CCP, which provides that the execution of an EIO shall be refused if a final judgment has been rendered against the prosecuted person in a Member State of the EU for the same acts as those indicated in the EIO, and, if convicted of the same acts, the prosecuted person is serving a sentence or has served it, or the sentence cannot be enforced according to the law of the state where the conviction was rendered.

Directive 2014/41 provides in Article 11(1)(e) and (g) that the execution of the EIO can be refused if the double criminality requirement is lacking. These provisions were fully transposed into the Polish legal system. Article 589zj § 2(1) CCP provides that the execution of an EIO may be refused if the prohibited act for which the EIO has been issued, other than listed in Article 607w CCP (offences included in annex D of Directive 2014/41), does not constitute a criminal offence under Polish law. Additionally, Article 589zj § 2(2) CCP states that the prohibited act for which the EIO has been issued, under Polish law was committed in whole or in part on the territory of the Republic of Poland or on a Polish ship or aircraft and does not constitute a criminal offence under Polish law.

The ground for refusal enlisted in Article 11(1)(f) of Directive 2014/41 based on a substantiated belief that the execution of EIO will violate human rights has also been fully transposed by the Polish lawmaker. Article 589zj § 1(5) CCP provides that it is mandatory to refuse to execute an EIO if its execution would violate human rights and liberties.

The last ground for refusal to execute EIO mentioned in Article 11(1)(h) of Directive 2014/41 has also been fully implemented. Article 589zj § 2(4) states that the execution of

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

an EIO may be refused if, according to Polish law, the investigative measure to which the EIO relates cannot be carried out in the case.

Apart from Article 11 of Directive 2014/41, additional grounds for refusal to execute EIO are also enlisted in Article 22(2) of Directive 2014/41. They concern the temporary transfer of the persons held in custody for the purpose of carrying out an investigative measure. Both the grounds which are based respectively on lack of consent of the person to be transferred and the fact that the transfer is liable to prolong the detention of the person in custody were fully transposed to the Polish legal system into a mandatory and an optional ground for refusal (Articles 589zj § 1(7) and 589zj § 2(6) CCP). Also the grounds for refusal to execute EIO provided by Article 24(2) of Directive 2014/41 are fully transposed (Articles 589zj § 2(7) and 589zi § 1 CCP). The same can be said about additional grounds for refusal provided for by Articles 28(1) and 29(3) as well as 30(5) of Directive 2014/41.

Along with grounds for refusal the Polish CCP also fully transposed the exceptions to applicability of these grounds stated in Article 11(2-3) of Directive 2014/41 (Articles 589zj § 3 and 6 CCP). However, it should be noted that in case of investigative measures, which always have to be available under the law of the executing State (Article 10(2) of Directive 2014/41 in connection with Article 11(2)) the transposition is partly flawed. First, in case of the transposition of Article 10(2)(a) the relevant Polish provision (Article 589zi § 3(1) CCP) provides that a piece of evidence is already in the possession of the court or prosecutor, without referring to the way it was obtained. In Directive 2014/41 it is however explicitly mentioned that 'the information or evidence could have been obtained, in accordance with the law of the executing State, in the framework of criminal proceedings or for the purposes of the EIO'. So the Polish provision understood literally is in fact broader than the relevant Directive provision and at least in theory[98] allows for sharing evidence which were not obtained according to the law. Second, Article 10(2)(d) of Directive 2014/41 refers to non-coercive investigative measures as defined under the law of the executing State. However, the transposition done in Poland does not refer to this particular feature of the investigative measures. The Polish lawmaker decided to use the expression "evidence the admission, obtaining, or taking of which does not require, in a similar domestic case, the issuance of a decision by a judge or prosecutor" (Article 589zi § 3(4) CCP in connection with Articles 589zj § 6 CCP). The rationale for this choice is unclear. Although in general the non-coercive investigative measures and measures that do not need to be authorized by a judge or a

[98] The case law analysis did not reveal such cases.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

prosecutor seem to overlap, in practice the implementation might be deficient, as in practice a measure may turn out to be coercive and at the same time it will not have to be authorized by a judicial or prosecutorial decision.

While discussing the grounds for refusal it is also worth mentioning that the Polish lawmaker fully transposed Article 11(4) of Directive 2014/41, which introduces an obligation to consult the issuing authority before deciding not to recognize or not to execute an EIO (Article 589zj § 5 CCP).

Summing up, the transposition of the grounds for non-recognition or non-execution of an EIO is full and correct. Polish lawmaker, profiting from the leeway stemming from Directive 2014/41, decided to introduce both mandatory and optional grounds for non-recognition or non-execution. The only minor flaws in the transposition process concern exceptions to applicability of these grounds provided in Article 11(2-3) of Directive 2014/41.

So far the grounds for refusal were not subject to extensive judicial interpretation. Therefore, not much can be said about potential doubts as to the understanding of the scope of non-recognition and non-execution grounds in judicial practice. However, the case law regarding the equivalent grounds referring to EAW, including particularly the one based on human rights issues, should be *mutatis mutandis* applicable also to the EIO.

5.3.3 Procedure for issuing an EIO

According to the declaration made by the Republic of Poland the issuing authorities in Poland are: district courts, regional courts, courts of appeal[99], Supreme Court, prosecutor in any of the prosecutorial units in Poland[100], Police and other specialized agencies (Border Guard, Internal Security Agency, the National Revenue Administration, the Central Anticorruption Bureau, the Military Police, the Trade Inspectorate and the State Sanitary Inspectorate, the President of the Office of Electronic Communications, State Hunting

[99] The structure of common courts in Poland is three-fold – district courts (sądy rejonowe), regional courts (sądy okręgowe) and courts of appeal (sądy apelacyjne). Apart from common courts there are also military and administrative courts which are separate as well as, at the top of the judicial structure in Poland, the Supreme Court.

[100] The structure of Public Prosecution Office is similar to the structure of common courts – district prosecution offices (prokuratura rejonowa), provincial prosecution offices (prokuratura okręgowa) and regional prosecution offices (prokuratura regionalna). At the very top of the organizational structure of the Polish prosecution service is the National Prosecution Office (Prokuratura Krajowa).

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Guard, Forest Service, heads of Customs and Revenue Offices as well as heads of Revenue Offices, the Military Counter-Intelligence Service and Military Intelligence Service).

Article 589w § 1 CCP clarifies precisely which court or prosecutor is competent to issue an EIO. It provides that it is the court before which the case is pending or the public prosecutor conducting the pre-trial proceedings. These authorities may issue an EIO *ex officio* or at the request of a party, defense counsel or attorney representing the victim. The EIO can also be issued by the Police or specialized agencies indicated above if they conduct the investigation. However in such a case the EIO has to be validated by the prosecutor supervising the investigation (Article 589w § 7 CCP). The validation by a prosecutor or a court (if the relevant provisions regarding an investigative measure provide that the court is authorized to decide on its application) is also needed if the Police or other authorized agencies (e.g. Internal Security Agency, the Central Anticorruption Bureau) issued an EIO during covert measures conducted outside of an ongoing investigation within the legal framework provided in Police Act and other statutes (Article 589w § 7 CCP).

Poland fully transposed the provisions of Directive 2014/41 regarding the nature of EIO. The definition of EIO adopted in Polish CCP covers all investigative measures as provided in Article 3 of Directive 2014/41 (Article 589w § 1 CCP). As mentioned in 5.3.1. the issuance of EIO in Poland is possible only in criminal, petty offence proceedings and proceedings regarding liability of collective entities for acts prohibited under penalty (Article 4). **The form of EIO set out in Annex A to Directive 2014/41 has also been fully transposed into the Polish legal system in a Regulation of the Minister of Justice of 8 February 2018 on the model form of the European Investigation Order**[101].

Article 6(1) of Directive 2014/41 provides that two conditions have to be met in order to issue an EIO. First, the issuing of an EIO must be necessary and proportionate for the purpose of the proceedings referred to in Article 4 of Directive 2014/41 taking into account the rights of the suspected or accused person. Second, the investigative measure(s) indicated in an EIO could be ordered under the same conditions in a similar domestic case. **While the second condition has been transposed to Article 589x CCP explicitly, the same cannot be said about the first one. In this case, the Polish lawmaker decided to modify the wording of the condition enlisted in Article 6(1)(a) and provided in Article 589x point 1 CCP that the issuance of an EIO is not permissible if the interest of the administration of justice does not require it.** Although this interest undoubtedly covers the necessity and

[101] Dziennik Ustaw 2018, poz. 366.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

proportionality principles, as well as the need to observe the rights of suspects and accused persons, the very broad and general character of the discussed condition may negatively influence the practical operation of the EIO if the issuing authorities decide to interpret it without reference to Article 6(1)(a) of Directive 2014/41. Especially the lack of direct reference to proportionality in a country like Poland, where the criminal justice system is based on a principle of mandatory prosecution, may result in a excessive use of this mutual recognition tool. In this context, it is worth reminding, that Poland has already faced charges of EAW's overuse after this tool has been introduced[102]. From this perspective, it would have been better to refer in the Polish CCP explicitly to the proportionality principle. Nonetheless, in the case law of Polish courts it is underlined that "the interest of justice clause (…) should be interpreted in the same way as in the case of the EAW (European Arrest Warrant), that is, when issuing the warrant, the need for involving foreign authorities should be considered"[103].

Poland fully transposed the provisions regarding the transmission of the EIO and secured that the communication takes place directly between the issuing authority and the executing authority. According to the official notification Poland did not establish a central authority for cases being processed at the judicial stage of criminal proceeding. However, if an EIO was issued at the judicial stage of the proceeding, and establishing the competent court in Poland was not possible (even *via* contact points of the European Judicial Network in Criminal Matters), the transmission of an EIO will be possible *via* the Department of International Cooperation and Human Rights of the Ministry of Justice. On the other hand the central authority for cases at the pre-trial stage of criminal proceedings is the International Cooperation Office of the National Public Prosecutor's Office.

5.3.4 Execution procedure

According to the declaration made by the Republic of Poland the executing authorities in Poland are: district and regional courts as well as prosecutors in the provincial public prosecution offices. District courts are competent if the case is at the judicial stage of the proceedings. The choice of the district court depends on where the evidence

[102] See e.g. Witold Klaus, Justyna Włodarczyk-Madejska, Dominik Wzorek, In the Pursuit of Justice: (Ab)Use of the European Arrest Warrant in the Polish Criminal Justice System, Central and Eastern European Migration Review, Vol. 10, No. 1, 2021, pp. 95-117.
[103] Order of the Court of Appeal in Cracow of 28 April 2020, II AKa 207/20, LEX nr 3145371; see also: Order of the Court of Appeal in Katowice of 14 August 2018, II AKz 403/18, LEX nr 2633164.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

indicated in the EIO is located or can be taken. The prosecutors are competent in cases at the investigative stage of proceedings. Similarly as in cases of district courts, the location of potential evidence determines the choice of the public prosecution office (Article 589ze § 1 CCP). There are three exceptions to these two rules. Firstly, if according to Polish law the competence for obtaining, taking or deciding on admissibility of evidence is entrusted to a court (district or regional), this court is also competent to issue a decision on the execution of the EIO, regardless of on what stage of proceedings is the case (Article 589ze § 2 CCP). Secondly, the regional court is always competent in the execution of EIO regarding the temporary surrender of a person deprived of liberty to the issuing state for the purpose of conducting an investigative measure in that state (Article 589ze § 3 CCP). Thirdly, the regional court is also competent in the execution of EIO regarding temporary surrender of a person deprived of liberty to the Republic of Poland for the purpose of conducting an investigative measure (Article 589ze § 4 CCP). In case the EIO has been referred to the authority that is not competent according to the abovementioned rules, the EIO shall be forwarded to the competent authority and the issuing authority shall be notified about this fact (Article 589ze § 5 CCP).

In case of an EIO which is to be executed in Poland, the accepted language in which it should be drafted is Polish. Only in urgent cases an EIO translated into English is also accepted.

The provisions of Directive 2014/41 regarding the form of the EIO and the technical issues regarding the transmission of the EIO are fully transposed into the Polish legal system.

The general rule expressed in Directive 2014/41 is that the positive grounds for issuing the EIO (necessity, proportionality, protection of the rights of the suspected or accused person) are assessed by the issuing authority. The executing authority in general is not in a position to question this assessment. However, as provided in Article 6(3) of Directive 2014/41, if the executing authority has reason to believe that the conditions for issuing an EIO have not been met, it may consult the issuing authority on the importance of executing the EIO. The consultations may result in a withdrawal of the EIO. This provision has been fully implemented in the Article 589zn § 1 CCP, which provides that if doubts are raised as to whether the issuance of the EIO was justified, or whether the investigative measure in question would have been permissible in the issuing country, the competent

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

court or prosecutor shall consult with the authority issuing the EIO and, if the interests of justice so require, request the withdrawal of the EIO.

Another main rule regarding the execution of the EIO is that, in general, the executing authority shall recognize an EIO without any further formality being required, and ensure its execution in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State, unless one of the grounds for non-recognition or non-execution materializes. However, the issuing state may demand that certain formalities and procedures will be followed. The executing state is obliged to respect such a request unless formalities and procedures are contrary to the fundamental principles of law of the executing State. **All these rules are fully transposed into the CCP. Article 589zi § 1 CCP states that unless otherwise provided, the provisions of Polish law shall be applied in the execution of the EIO. However, the request of the authority issuing the EIO to apply a special procedure or formality in the execution of the investigative measure shall be complied with, if it is not contrary to the principles of the legal order of the Republic of Poland.** The reference to the term "legal order of the Republic of Poland" does not mean that the executing authority should approach the request of the issuing state in a very formalistic manner, in particular by a detailed comparison of the content of the request and national legal provisions regulating the investigative measure in question. What matters are the general principles of the Polish legal system which have to be observed, such as the right to a fair trial[104]. As a consequence, cross-examining the witness (not applicable in Polish criminal cases in its original American form) or changing the wording of the witness' commitment, for example, are fully acceptable[105].

While it is the role of the issuing authority to decide what investigative measure should be carried out, the executing authority holds a right to introduce some modifications as to the request stemming from EIO. **Poland transposed Article 10 of Directive 2014/41 allowing for a change of the investigative measure indicated in the EIO and introducing exceptions to this rule (Article 589zi CCP). While the transposition is in general full and correct, two issues have to be mentioned.**

Firstly, while transposing the exception based on information or evidence which is already in the possession of the executing authority, the Polish lawmaker adopted a

[104] Andrzej Sakowicz in Andrzej Sakowicz (ed) *Kodeks postępowania karnego. Komentarz* (C.H. Beck 2023) 1675 and case law cited therein.
[105] Andrzej Sakowicz in Andrzej Sakowicz (ed) *Kodeks postępowania karnego. Komentarz* (C.H. Beck 2023) 1675.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

provision stating that the substitute investigative measure shall not be carried out if the EIO concerns evidence already in the possession of the court or prosecutor (Article 589zi § 3(1) CCP). What is lacking in this provision is the requirement that the information or evidence could have been obtained, in accordance with the law of the executing State, in the framework of criminal proceedings or for the purposes of the EIO. Theoretically such a requirement is not necessary, as all state authorities are obliged to act according to the law (Article 7 of the Polish Constitution). However, due to various factors, not necessarily intentional, in the course of criminal proceedings pieces of evidence gathered improperly may be included in the dossier. The CCP contains provisions on the exclusion of illegally obtained evidence, which confirm that even the lawmaker admits that such situations may occur. Moreover, the sole fact that the information or evidence was collected improperly is not by itself a reason to remove them from the case file in Poland. Therefore, the Article 589zi § 3(1) CCP, understood literally, is in fact broader than the legal norm derived from Article 10(2)(a) of Directive 2014/41. Nonetheless, in practice it should be interpreted in accordance with the wording of Directive 2014/41.

Secondly, the transposition of the provision referring to the non-coercive investigative measure also raises doubts. Article 589zi § 3(4) CCP states that substitute investigative measure shall not be carried out if the EIO concerns evidence the admission, obtaining or taking of which does not require the issuance of a decision by a judge or prosecutor. As explained in 5.3.2. the change of terminology can hardly be explained, and the Polish provisions are not fully equivalent to the EU law's original terminology.

Directive 2014/41 introduces time limits for the recognition or execution of the EIO. Investigative measures shall be carried out with the same celerity and priority as for a similar domestic case. In general, the decision on execution or recognition of the EIO should be taken no later than 30 days after the receipt of the EIO by the competent executing authority. The investigative measure itself should be carried out as a rule no later than 90 days following the taking of the decision on the execution or recognition of the EIO. The time limits, depending on the circumstances, may be shortened or prolonged (Article 12 of Directive 2014/41). **Polish CCP in Articles 589zg and 589zh transposes the respective regulations of Directive 2014/41. Two minor remarks should however be made in relation to the transposition made.** First, the CCP's provisions provide only that investigative measures should be conducted without undue delay. This is not equivalent to the relevant provision of the Directive which refers to the time equivalent investigative measures are

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

undertaken in domestic investigations. However, as there are generally no binding time limits to issue decisions regarding investigative measures in Polish law, the expression without undue delay might be treated as an equivalent to the existing obligation in domestic proceedings which should also be conducted without undue delay (Article 2 § 1(4) CCP). Second, the obligation to consult with the issuing authority on the appropriate timing to carry out the investigative measure, if the competent executing authority cannot meet the initial 90 days time limit, has not been transposed to Polish law. Although there is a general provision referring to consultations (where appropriate) included in the CCP, it is not an obligation and it does not indicate the discussed specific situation related to time-limits. However, this deficiency in transposition is a minor one, and nothing prohibits the executing authority to follow the obligation stemming from the Directive.

In case of the possibility of postponement of recognition or execution of the EIO provided in Article 15 of Directive 2014/41, Polish law is in full compliance with this provision (Article 589zk CCP).

Similarly to earlier discussed issues in case of transfer of evidence, the transposition of the Article 13 of Directive 2014/41 is correct (Article 589zp CCP). Some doubts may concern the possible suspension of the transfer if a decision regarding a legal remedy is pending. However also in this case, although in an implied way, the compliance of Polish law with the provision of the Directive is full (for details see 5.3.6.).

5.3.5 Specific investigative measures

Apart from general provisions referring *en bloc* to all possible investigative actions being subject to an EIO, Directive 2014/41 contains also a set of provisions on the specific investigative measures (Chapter IV). **Articles 22 and 23 of Directive 2014/41 refer to the temporary transfer to the issuing or executing state of persons held in custody for the purpose of carrying out an investigative measure. Both these provisions are almost fully transposed into the Polish CCP (Articles 589a, 589z, 589zb § 5, 589zf, 589zj §1(7), 589zj § 2(6), 589zs CCP). There are however two minor deficiencies.** The first one refers to the possibility of presenting opinion on the transfer by the legal representative of the person in custody, because of the age or physical or mental condition of this person. Such an option is not provided in the Polish CCP. The lack of relevant domestic provision, however, does not block the possibility of acquiring such an opinion by the executing authority. Nonetheless it is not a legal obligation. The second lacuna concerns Article 22(5) of Directive

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

2014/41 which provides that there should be practical arrangements done in cases of the temporary transfer between the issuing and executing authorities. Similarly as in case of the opinion of the legal representative, the Polish CCP does not contain any explicit regulation transposing Article 22(5) of Directive 2014/41. However, such arrangements simply have to made in practice in order to secure the smooth and effective transfer. No legal regulations prohibit such a practice and in fact no specific legal basis seems to be necessary for this type of communication as it is necessary to fulfill the aims of this investigative measure.

Articles 24 and 25 of Directive 2014/41 provide for the possibility of carrying out a hearing by videoconference or other audiovisual transmission as well as hearing by telephone conference. **The CCP provides for a hearing of a witness by videoconference in domestic criminal proceedings (Articles 177 § 1a–1d CCP). These regulations apply *mutatis mutandis* in the case of EIOs, as according to Article 589zi § 1 CCP the general rule is that unless otherwise provided, the provisions of Polish law shall be applied in the execution of the EIO. The problem is, however, that there are no provisions in the Polish CCP allowing *in general* to hear a suspect or an accused person via videoconference.** The hearing of an accused person by videoconference is allowed only during trial. It is thus doubtful whether these provisions (Article 374 § 4–8 CCP) can serve as a legal basis for carrying out a videoconference with the suspect or accused during an investigation or any out-of-trial procedure. Therefore, a separate legal basis for such a hearing should be introduced in the Polish CCP.

Moreover, the provisions regarding a hearing by videoconference or other audiovisual transmission are tailored in order to fit into domestic investigations and they do not take into account the specificity of the videoconference conducted on the basis of an EIO, where the issuing authority is in fact interrogating the person and the procedure is modified in comparison to a domestic case (Article 24(3–7) of Directive 2014/41). So even though the necessary arrangements can be made between issuing and executing authority, there are no firm legal grounds for carrying out the measure as designed in Directive 2014/41. Therefore, like in the case of hearing of a suspect or accused person, a more developed body of provisions should be adopted to guide domestic authorities in executing EIOs regarding videoconference.

Hearing by telephone conference (Article 25 of Directive 2014/41) is also problematic. In this case, the main issue is that Polish criminal procedure does not provide

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

at all for the possibility of this kind of hearing. Therefore, there is no explicit legal ground to conduct it in the context of an EIO.

In contrast to video and telephone conference, provisions of Directive 2014/41 related to gaining information on bank and other financial accounts and financial operations (Articles 26 and 27) are almost fully and correctly transposed. The transposition was both explicit (Article 589w § 1 and § 5, Article 589y § 6 CCP) and implicit, as provisions regarding the obligation to provide information covered by banking secrecy preexisting in the Polish legal system the entry into force of Directive 2014/41 are also applicable to EIO cases. However, gathering of information covered by banking secrecy, soon after Poland transposed Directive 2014/41 into its legal system in 2018, turned out to be a problematic issue in judicial practice. The source of controversies was the interpretation of domestic provisions on the procedure of issuing EIOs covering banking information during criminal investigation. The relevant provisions (Article 589w § 1 and § 5 CCP) state that, in general, it is the prosecutor who is competent to issue the EIO. Moreover, if it is necessary to issue a warrant to obtain evidence (e.g., to conduct a search, to demand information from various institutions), the EIO replaces this warrant. Most importantly, however, domestic provisions on obtaining evidence shall apply accordingly in the procedure for issuing an EIO. The latter provision is very important in the discussed context because in domestic cases, if a piece of information covered by banking secrecy is needed and it does not concern a suspect, the prosecutor should, before addressing the bank, request the regional court to grant the authorization to use that information in criminal proceedings.

This led to significantly divergent practices confirmed in case law. According to the first interpretation, the EIO should be issued by the regional court as a competent authority to lift banking secrecy and it should be a separate decision than the one referring to the banking secrecy[106]. The second view implied that the warrant lifting the banking secrecy replaces the order on the issuance of the EIO[107]. The third approach was that the general rules on the authorities competent to issue EIOs are applicable, so the order is issued by the prosecutor, and it is not mandatory to obtain the regional court's permission for lifting the banking secrecy. The reasons for that are twofold. Domestic procedure is not applicable in EIO cases, as the verification of whether the information can be obtained for the purpose

[106] Judgment of the Court of Appeal in Gdańsk of 23 May 2018, II AKz 408/18, LEX nr 2553721.
[107] Judgment of the Court of Appeal in Katowice of 29 January 2019, II AKz 53/19, LEX nr 2728416.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

of criminal proceedings is conducted in the executing state. Moreover, the provisions regarding the lifting of banking secrecy concern only banks that fall under Polish jurisdiction[108]. The fourth approach was that the authority competent to issue the EIO is the prosecutor. However, before issuing an order, the prosecutor must apply for and obtain the regional court's permission to use banking information, as in a similar domestic case[109]. The latter view was accepted by the Supreme Court in an order of 2 June 2022[110], which should put an end to the dispute regarding this matter[111].

What should be underlined is that these controversies cannot be reduced solely to the interpretation of national legal provisions. While *prima facie* it may seem so, in reality the view allowing the prosecutor to issue an EIO regarding banking secrecy without judicial authorization is not compliant with Directive 2014/41 to the extent this legal act obliges the issuing authority to conduct a necessity and proportionality test on the same basis as in domestic cases. Polish law, considering the sensitive nature of information covered by banking secrecy, does not provide for the power of the prosecutor to obtain such information. An independent body, namely the court, should decide on the issue. Taking into account the wording of Article 6(1)(a) of the Directive 2014/41 assessment of necessity and proportionality is precisely what has to be done by the issuing authority. At the same time, according to Article 6(1)(b) of Directive 2014/41, the issuing authority may only issue an EIO where the investigative measure indicated in the EIO could have been ordered under the same conditions in a similar domestic case. Consequently, the prosecutor willing to issue an EIO must obtain the authorization of the court first. This authorization is an integral part of the decision-making process encompassing the assessment of the necessity and proportionality of issuing an EIO. Moreover, if the issuing state is obliged to follow the same rules in the EIO procedure as in a domestic case, judicial authorization cannot simply be

[108] Judgment of the Court of Appeal in Cracow of 23 October 2018, II AKz 524/18, LEX nr 2645341; Judgment of the Court of Appeal in Łódź of 19 September 2018, II AKz 496/18, LEX nr 2601868.
[109] Judgment of the Court of Appeal in Katowice of 4 September 2018, II Akz 645/18, LEX nr 2615563.
[110] Order of the Supreme Court of 2 June 2022, I KZP 17/31, OSNK 2022, nr 7, poz 26.
[111] Divergent views were also expressed in the legal doctrine, however, the majority view is consistent with the Supreme Court's approach. See: Hanna Kuczyńska in *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka (C.H. Beck 2023) 1694, Ariadna Ochnio, *Glosa do postanowienia Sądu Apelacyjnego w Katowicach z dnia 4 września 2018 r., II AKz 645/18*, Orzecznictwo Sądów Polskich 7–8 (2021) 101–117, 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 3 (2022) 33-41.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

dispensed with by arguing that the procedure is inapplicable as the bank is not subject to Polish jurisdiction.

Articles 28 and 29 of Directive 2014/41 regarding the investigative measures related to the gathering of evidence in real time, continuously and over a certain period of time, as well as covert investigations, are fully transposed to the Polish CCP. The relevant provisions of the CCP (Article 589zi § 1 and § 6, 589w § 7 and 589y § 6 CCP) contain a detailed regulation covering: the obligation to justify the need for the application of discussed measures in the EIO, specific grounds for non-recognition and non-execution, exchange of information and making practical arrangements as well as the authority in charge of conducting the measures.

The last investigative measure expressly indicated in Chapter IV of Directive 2014/41 is the interception of telecommunications with or without technical assistance of another Member State. In the first case the basic issues concerning the possibility of issuing EIO related to this measure, as well as the general legal framework, are provided in the Polish CCP (Article 589w § 1 and § 4, 589y § 6, Article 589zj § 2 pkt 5 and 589zr § 1 CCP). However, the Polish transposition does not include any reference to the choice of the country executing the EIO (Article 30(2) of Directive 2014/41) and technical issues mentioned in Article 30(6) and (7) of Directive 2014/41. It seems that the Polish lawmaker did not consider it necessary to adopt any explicit provision regarding these issues. Probably it was assumed that the issuing authorities are able to sort out the technical details by their own in cooperation with the executing authority. **Additionally, the regulation on costs of the application of the discussed measure is also flawed, as Article 589zr § 1 CCP does not provide explicitly that the costs arising from the transcription, decoding and decrypting of the intercepted communications shall be borne by the issuing State.** There is only an option to ask the issuing authority to cover all or part of the anticipated expenses in justified cases. This allows to demand the reimbursement if the costs of transcription, decoding and decrypting of the intercepted communications, but it is only an option. On the other hand **the transposition is full and correct when it comes to the interception of telecommunications without technical assistance of another Member State (Article 589zd CCP).** However, in this case, as rightly pointed out by H. Kuczyńska, domestic procedural provisions do not specify any rules on admissibility of evidence gathered in a case where

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

the intercepting Member State was notified about the fact that the interception would not be authorized in a similar case in the country where it has been carried out[112].

5.3.6 Cooperation issues between executing and issuing authorities

On numerous occasions the provisions of Directive 2014/41 provide for a possibility or even an obligation of cooperation between the issuing and the executing authority. As mentioned in 5.3.4. the very need for the execution of the EIO and its proportionality may be a subject of consultations (Article 6(3) of Directive 2014/41 implemented by Article 589zn § 1 CCP). The consultations are also provided for in Article 7(7) and Article 9(6) of Directive 2014/41 as a measure facilitating the efficient transmission and execution of the EIO. Polish CCP transposes these provisions in Article 589zn CCP. Paragraph 2 of this Article states that if there are doubts as to the authenticity of the documents necessary for the execution of the EIO, or there are technical obstacles to its execution, the issues at question should be discussed with the issuing authority. Although the relevant provision relates only to technical obstacles this expression should be understood broadly, as encompassing all types of obstacles, not necessarily related to strictly technical issues, that may arise in the course of executing the EIO.

The consultations are also provided in cases where the executing authority finds it appropriate to substitute the investigative measure indicated in the EIO (Article 10 of Directive 2014/41). These regulations are fully transposed into the Polish legal system (Article 589zi § 2, 5 and 6 CCP and Article 589zm § 3(4) CCP). A minor deficiency in transposition, as mentioned in 5.3.4., can be identified in case of prolonging the time limit for carrying out the investigative measure. However, domestic law does not prohibit the executing authority from contacting and consulting the issuing authority as it is provided in Article 12(6) of Directive 2014/41.

The consultations as well as the possibility of demanding information are provided in Article 11(4) of Directive, which deals with non-recognition or non-execution of the EIO. Polish CCP fully transposes this provision in the Article 589zj § 5 CCP.

The consultation and making of practical arrangements is particularly important in case of investigative measures implying the gathering of evidence in real time, continuously and over a certain period of time as well as covert investigations (Articles 28(2) and 29(4)

[112] Hanna Kuczyńska in *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka (C.H. Beck 2023) 1716.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

of Directive 2014/41). The transposition of these provisions is full and correct (Article 589zi § 1 and § 6 CCP).

Apart from consultations between the issuing and executing authorities the cooperation between these two institutions may also take other forms. The first one is the participation of the representative of the issuing authority in the investigative measure conducted by the executing authority (Article 9(4) and (5) of Directive 2014/41). Article 589zo § 1-2 CCP fully implements Directive 2014/41 and allows the representative of the issuing authority to be present during the relevant investigative measure, unless it is contrary to the principles of the legal order of the Republic of Poland[113] or the presence constitutes a threat to national security. The representative, with the consent of the court or prosecutor conducting an investigative measure, may ask questions or otherwise participate in taking evidence. The second one is a simple exchange of information. This form is provided in case of legal remedies sought against the issuing, the recognition or the execution of an EIO (Article 14(5) of Directive 2014/41). The transposition of this provision into the Polish legal system is full and correct (Articles 589zc § 2 and 589ze § 8 CCP). Polish CCP transposed also a set of provisions enlisting the information concerning the execution of the EIO, potential modifications of the investigative measure as well as delays or postponements of its execution that should be passed by the executing authority to the issuing authority (Article 16 of Directive 2014/41 and Articles 589zi § 2 and § 5, 589zl, 589zm CCP as well as Article 15(2) of Directive 2014/41 and Article 589zk § 2 CCP). The only provision of Directive 2014/41 that has not been explicitly transposed is Article 16(2), providing that upon request by the issuing authority, the information shall be confirmed without delay by any means capable of producing a written record. However, the wording of Article 589zl CCP, which deals with the confirmation of the reception of the EIO by the executing authority, clearly indicates that the written confirmation is a rule. This provision in § 3 obliges the Minister of Justice to establish the official written form of confirmation, what has been done in the Regulation of the Minister of Justice of February 8, 2018 on the model form of confirmation of receipt of the European Investigation Order[114].

Summing up, **in general the transposition of the provisions of Directive 2014/41 regarding the cooperation issues between executing and issuing authorities should be assessed positively. The deficiencies are rather minor and in practice they do not block**

[113] For the interpretation of the term 'legal order of the Republic of Poland' see 5.3.3.
[114] Dziennik Ustaw 2018, poz. 364.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

the possibility of arranging smooth and effective cooperation between the issuing and executing authorities.

5.3.7 Remedies

The relevant provisions of the Polish CCP fully transpose the Article 14(1) of Directive 2014/41, which states that Member States shall ensure that legal remedies equivalent to those available in a similar domestic case are applicable to the investigative measures indicated in the EIO. In the Polish legal system, both in case of issuing and executing the EIO the procedural decision (order - *postanowienie*) is taken by a competent authority (if necessary validated by another competent authority). In the case of orders, the CCP provides the potential remedy of an interlocutory appeal (*zażalenie*). However, articles 589zc § 1 and 589ze § 7 CCP provide that in general this remedy is not accessible neither in case of a decision to issue nor to execute the EIO, unless a special provision concerning the decision to issue or execute a measure identical to the measure indicated in the EIO provides otherwise. In case of a decision to execute the EIO in an interlocutory appeal the person appealing may only demand an examination of the compatibility of the decision on the execution of the EIO with Polish law and the correctness of its execution. The reference to Polish law should be understood as a reference to all relevant Polish provisions including those related to the protection of human rights. Articles 589zc § 1 and 589ze § 7 CCP imply that only in a very limited number of cases the interlocutory appeal can be lodged. These are e.g. the decisions regarding wiretapping, search and/or seizure of evidence.

In cases where the interlocutory appeal can be lodged the rules are equivalent to these applicable in a domestic criminal proceeding. The decision regarding the EIO should be communicated to the parties to the proceedings and their representatives (if applicable other persons – e.g. in cases of a search) with the information about a remedy (interlocutory appeal), if applicable (Articles 100 § 4 and 140 CCP). The legal information should cover the time limit and the manner of filing an interlocutory appeal (Article 100 § 8 CCP). The time limit for lodging an interlocutory appeal is 7 days from the moment the decision has been notified. Unless otherwise provided by law, an interlocutory appeal does not suspend the execution of the decision; however, the court or prosecutor that issued the decision or the court appointed to hear the interlocutory appeal may suspend the execution of the decision (Article 462 § 1 CCP). **The abovementioned provisions fully transpose Article 14(3)(4) and**

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

(6) of Directive 2014/41. The only concern, in light of the *Gavanozov II* judgment[115], that can be raised refers to calling a witness for a videoconference. There is no appeal available in Polish law in such a case, regardless of whether in the context of an EIO or a domestic one. However, if this investigative measure is believed to be disproportionate, the witness can always reach for *post hoc* remedy and claim damages in front of the civil court for loss suffered as a result of an unjustified summons. Of course, the effectiveness of such a remedy can be questioned, but it should be considered that the ECtHR in general does not exclude this type of remedy as potentially effective[116].

Apart from the limited possibility of using remedies in proceedings regarding the issuing or executing the EIO, the important issue regarding human rights protection is the admissibility of evidence gathered with the application of EIO. Article 14(7) deals with this problem, however, only in a very general and vague way. It states that without prejudice to national procedural rules Member States shall ensure that in criminal proceedings in the issuing State the rights of the defense and the fairness of the proceedings are respected when assessing evidence obtained through the EIO. Poland has not adopted any specific legal regulation transposing this provision. Moreover, the CCP does not contain any general or explicit regulation on the admissibility of evidence obtained abroad. The only provision addressing this issue directly is Article 587 CCP, stating that the reports of inspection, interrogation of defendants, witnesses, expert witnesses, or other evidentiary measures, prepared at the request of a Polish court or prosecutor, carried out by courts or prosecutors of foreign countries or authorities acting under their supervision, may be read during trial, under the rules set forth in Articles 389, 391, and 393 CCP, if the manner in which the measures were carried out does not violate the principles of the legal order of the Republic of Poland. This provision allows for an admissibility test limited only to the verification of compliance with the principles of the Polish legal order. However, the scope of Article 587 CCP is reduced only to evidentiary measures enumerated therein and does not encompass all types of evidence that can be gathered abroad, including evidence obtained with the use of the EIO. While there is a visible tendency, in practice, to apply the discussed provision *per analogiam* to other types of evidence (enlisted reports which were not drafted on request of the Polish criminal justice authorities)[117], it is nonetheless doubtful whether

[115] Case C-852/19 *Gavanozov II* [2021] ECLI:EU:C:2021:902.
[116] Depending of course on the individual circumstances of the case. See: 'Guide on Article 13 of the European Convention on Human Rights. Right to an effective remedy' <https://ks.echr.coe.int/> (accessed 30.08.2024).
[117] See: Barbara Nita-Światłowska in Jerzy Skorupka (ed), *Kodeks postępowania karnego. Komentarz* (C.H.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Article 587 CCP can be treated as a general rule in the case of admissibility of evidence obtained abroad (including within the EU). In fact, the legal doctrine perceives the situation described as deficient[118]. This flaw is systemic as the evidence gathered abroad requires special rules of admissibility. Moreover, even if the test of admissibility of evidence is limited only to the verification of whether the fundamental rights (right to a fair trial, right to defense) were observed, which may seem rational as the technicalities obviously differ in EU Member States, it does not offer much guidance in real-life situations, where determining whether the rights of defense were violated is problematic and often dependent on how the role of procedural technicalities (e.g. how a investigative measure has been conducted or documented) is treated. Therefore, at least for the sake of clarity, the lawmaker's intervention is desirable.

5.4 The coordination with Regulation 2018/1805

5.4.1 Legal basis in the national system and scope

The Polish legal framework concerning freezing and confiscation in the context of judicial cooperation in criminal matters between EU Member States has been initiated by the introduction of four separate chapters within the Section XIII to the Polish Code of Criminal Procedure, namely "Transnational Criminal Proceedings" (Postępowanie w sprawach karnych ze stosunków międzynarodowych)[119].

The first two chapters (Chapters 62a and 62b) were introduced to the Polish CCP by the Law of 7 July 2005, which implemented Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence. They are in force since 2 August 2005. Conversely, the latter chapters (Chapters 66c and 66d) were introduced to the Polish CCP by Law of 19 December 2008, which

Beck 2023) 1626–1627.

[118] Hanna Kuczyńska in Jerzy Skorupka (ed), *Kodeks postępowania karnego. Komentarz* (C.H. Beck 2023) 1698–1699.

[119] Chapter 62a – Request to a Member State of the European Union to execute orders freezing evidence or property (Articles 589g–589k CPP); Chapter 62b – Request from a Member State of the European Union to execute orders freezing evidence or property (Articles 589l–589u CPP); Chapter 66c – Request to a Member State of the European Union to execute a confiscation order (Articles 611fn–611ft CPP); Chapter 66d – Request from a Member State of the European Union to execute a confiscation order (Articles 611fu–611fze CPP).

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

implemented Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. They have been binding continuously since 5 February 2009 with almost no changes.

Importantly, the adoption of Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union did not change anything within the Polish CCP and the procedure concerning freezing and confiscation orders. The implementation of this Directive focused solely on the substantive criminal law and concerned amendments to the definition and description of forfeiture of things, benefits etc. (Articles 44-45 CC).

The adoption of Regulation 2018/1805 also had no effect on the existing normative framework in CCP concerning freezing and confiscation orders. Although there was no official reaction from the Ministry of Justice to that matter, it should be assumed that rules concerning freezing and confiscation orders arising from Polish CCP may still be used, but only in relation with those states that opted out from Regulation 2018/1805, i.e. Denmark and Ireland, and not towards any other EU Member State due to the direct applicability of Regulation 2018/1805 among them.

Certainly, for the clarity and predictability of law it would have been better if the legislator had decided to add an explanation within Chapters 62a-62b and 66c-66d stating that these rules are not binding by default among all Member States as their titles suggest right now. Regulating freezing of evidence is a good example of how it could have been done. Freezing of evidence among EU Member States originally was regulated by Chapters 62a and 62b. When the implementation of EIO Directive became necessary they were not removed and additional chapters (62c and 62d) were introduced. This allowed in relations with most of the EU Member States to use Chapters 62c and 62d in the context of EIOs. But issuing and executing freezing of evidence with Denmark and Ireland may be continuously conducted under old regime provided in Chapters 62a and 62b. However, in case of freezing and confiscation orders became less clear as the use of Regulation 2018/1805 will be direct, leaving Chapter 62a and 62b only for cooperation in criminal matters with Ireland and Denmark. This is not reflected in the wording of the Polish CCP nor explained in any other way. In result the criminal justice authorities as well as practitioners and people concerned may falsely assume that the old CCP regime provided in Chapters 62 and 62b are still applicable to freezing and confiscation orders in all EU Member States without any adjustments.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

This complex and ambiguous normative framework raises questions as to the effective use of instruments devoted to mutual recognition of freezing and confiscation orders among EU Member States. It may be suspected that, since Chapters 62a-b (freezing) and 66c-d (confiscation) coexist with Regulation 2018/1805 (the latter not being transposed in any way to Polish national scheme), the proper use of pertinent legal regime will demand specific and precise knowledge from prosecutors and judges, but also legal representatives of accused persons. As the low understanding of other EU instruments in the Polish criminal justice system has translated into their low practical use, with a notable exception of EAW, it can be assumed that freezing and confiscation orders based on Regulation 2018/1805 were and will be used at least moderately.

5.4.2 Competent Polish authorities for issuing and executing freezing and confiscation orders

Under Polish legal framework there is a strict division between authorities competent to engage with freezing orders and compensation orders both within domestic criminal justice scheme and when it comes to mutual recognition of those instruments. Thus, freezing orders, being treated as a tool to be used in a strong relation with criminal investigation[120], are vested almost entirely in hands of the public prosecution (which does not exclude ordering this measure by court in national scheme), while confiscation orders (known in Poland under the name of forfeiture[121]) are the sole responsibility of the court. The same scheme has been adopted by Poland for cross-border cases[122].

In result, **authorities competent to issue freezing orders** under Regulation 2018/1805 are all units of Polish public prosecution service including provincial public prosecution offices, district public prosecution offices and Organized Crime and Corruption Department of the National Public Prosecutor's Office and its regional departments. At the same time the only **authority competent to execute freezing orders** issued by other

[120] On the notion of criminal investigation (*postępowanie przygotowawcze*) in Poland and its forms see Karolina Kremens, *Powers of the Prosecutor in Criminal Investigation: A Comparative Perspective* (Routledge 2022) 81-83 and 158-159.
[121] See on the relation between "confiscation" and "forfeiture" in Polish criminal legal system below in subchapter 5.4.3.
[122] According to the declaration made by Poland on 18 December 2020 (SP.UE.BRUK.WWSISW.9419.60.2020.NH/2091) in accordance with Article 2 (9) and Article 24 (2) of Regulation 2018/1805.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Member State are provincial public prosecution offices. The situation is easier in case of **confiscation orders, as authorities competent to issue and execute them** are district and regional courts. In the event of any concerns concerning freezing orders, the central authority responsible is the Internal Cooperation Bureau of the National Public Prosecution Office. In the absence of a designated central authority for confiscation orders, if it proves challenging to identify the competent court (including through the contact points within European Judicial Network in criminal matters) the confiscation order may be forwarded through the Department of International Cooperation and Human Rights at the Ministry of Justice.

5.4.3 The normative framework of confiscation and freezing orders in Poland

Even though Regulation 2018/1805 is directly applicable and there are no national procedural provisions explaining how issuing and executing freezing and confiscation orders among EU Member States should be carried out (since the chapters in Section XIII of the Polish CCP are no longer relevant in that context, as discussed earlier), normative framework created by the Regulation 2018/1805 does not operate in isolation. The basic rules on confiscation are provided in the Polish CC. The law provides for forfeiture of items (Article 44 CC), forfeiture of enterprise (Article 44a CC[123]) and forfeiture of benefit (Article 45 CC). Meanwhile, the national mechanism of freezing orders is adopted in the CCP in Chapter 32 entitled "Freezing of assets" (*zabezpieczenie majątkowe*) (Articles 291-296 CCP). The way in which both mechanisms are regulated in domestic law raises several issues affecting in different ways the reception of Regulation 2018/1805 in the Polish system.

First, the Polish CC uses the term "forfeiture" (*przepadek*) instead of confiscation (*konfiskata*). Even after coming into force of Council Framework Decision 2006/783/JHA as well as Regulation 2018/1805 the wording has not changed neither in CC nor in CCP. Also, CCP remained its traditional wording in the part of the code directly related to international cooperation in criminal matters between Member States (Chapters 66c and 66d). As a result, the term "confiscation" used in EU documents was translated against its most natural translation (*konfiskata*) into traditional Polish wording - forfeiture (*przepadek*). This may be explained by the historical context. Traditionally "confiscation of property" (*konfiskata*

[123] This provision was added in 2017 as a result of implementation of Directive 2014/42/EU.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

mienia) available in Polish law under communist CC of 1969 was perceived as "contradictory to the principles of justice and individual criminal liability, and even to the concept of human rights"[124]. This instrument was abolished in 1990 and for historical reasons negative associations with the term "confiscation" remained. This led to the introducing and keeping notion of "forfeiture" in Polish legal framework with the new code of 1997[125]. There are currently no plans known to amend this divergence between the Regulation 2018/1805 also in the Polish language version and wording of CC and CCP in that regard.

Second, the scope of forfeiture as provided in Polish criminal law provides for several different forms: 1) forfeiture of items derived from the crime directly (Article 44 § 1 CC); 2) forfeiture of items used to commit a crime (Article 44 § 2 CC); 3) forfeiture of items prohibited from manufacture, possession, circulation, transmission, transfer or transportation (Article 44 § 6 CC); 4) forfeiture of the equivalent value of items directly derived from the crime or items that were used or intended to be used in the commission of the crime (Article 44 § 4 CC), 5) forfeiture of the share belonging to the perpetrator or forfeiture of the equivalent value of that share (Article 44 § 7 CC), 6) forfeiture of enterprise (Article 44a CC) and 7) forfeiture of benefit (Article 45 CC). Thus, the definition of forfeiture is broader although it seems to cover all possibilities and remain in compliance with the requirement of Article 2 of Regulation 2018/1805 to that matter.

Third, and most importantly, due to the amendment made in 2015 to the Polish CC[126] relocated from its conventional position within the catalogue of penal measures (*środki karne*)[127] to a newly established Chapter Va of the CC with so called "compensation measures" (*środki kompensacyjne*). This created a new legal category of *sui generis* measure that is neither a compensation measure (as the title of Chapter Va reads "Forfeiture and compensation measures" suggesting these are two separate categories jointly defined in one chapter) nor a penal measure (as forfeiture was excluded from Chapter V of CC entitled

[124] See Elżbieta Hryniewicz-Lach, *Poland. Report on extended confiscation in scope of the fundamental rights and general principles of EU*, https://konfiskata.web.amu.edu.pl/wp-content/uploads/2022/02/Country-Report-Poland-1.pdf (accessed 30.08.2024), p. 1 and literature quoted in footnotes 1-2.
[125] Cf. German regulations to that matter.
[126] *Ustawa z dnia 1 lipca 2015 roku o zmianie ustawy – Kodeks karny i niektórych innych ustaw* (Law of 1 July 2015 amending – Criminal Code and other laws), Dz. U. 2015, poz. 396.
[127] Penal measures are measures of penal response the aim of which is to complement the effect of the penalty imposed on a convicted person. The catalogue of penal measures is available in Article 39 CC. See briefly on penal measures in Polish criminal law in: Wojciech Jasiński, Karolina Kremens, *Criminal Law in Poland*, (Kluwer Law International 2019) 144-158.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

"Penal measures")[128]. The distinctiveness of forfeiture from compensation measures is also visible through functions that forfeiture played – and still plays – in Polish criminal law, which are primarily preventive and retributive[129]. The lack of connection between forfeiture and compensation is also seen through the fact that forfeiture is aimed at transferring an item (or equivalent value or enterprise or benefit etc) to the State Treasury and not to the victim. It is clearly stated in Article 44 § 5 CC that it is impossible to order forfeiture of items derived from the crime directly (Article 44 § 1 CC) as well as items used to commit a crime (Article 44 § 2 CC), if they are to be returned to the victim or other eligible entity. The same rule applies to forfeiture of benefit or equivalent value (Article 45 § 1 CC *in fine*). This legal framework has been functioning without change in the Polish legal order to this day having severe consequences for the role that confiscation orders play in compensation of victims under Regulation 2018/1805 (see further *infra* 5.4.4).

Finally, the shape of the normative regulation of forfeiture in Polish national law has important implications for the way in which freezing of assets is carried on. The basic provision concerning freezing of assets is provided in Article 291 § CCP. It states that if accused is charged with a crime for which such measures as fine, pecuniary payment, forfeiture, compensation or restitution to the victim may be pronounced: the execution of the confiscation order of the property of the accused may be secured. This may be only done if there is a reasonable fear that without such freezing the execution of the confiscation order would be impossible or significantly hindered. Such regulation suggests that freezing orders concerning compensation and restitution measures are separate from freezing orders concerning forfeiture. This must affect the scope of freezing orders that can be issued by Poland, or that may be executed by Poland in the process of mutual recognition among EU Member States based on discussed Regulation 2018/1805.

5.4.4 Compensation for victims through freezing and confiscation orders in Poland

The most problematic issue from the Polish perspective is the general non-compliance of the Polish normative framework when it comes to the rights of victims and

[128] See Ryszard A. Stefański in: *Kodeks karny. Komentarz*, ed. Ryszard A. Stefański, (Wolters Kluwer 2015) p. 351.
[129] Anna Płońska, *Charakter prawny instytucji przepadku po zmianach nowelizacyjnych wprowadzonych do Kodeksu karnego ustawą z dnia 20 lutego 2015 r.*, Nowa Kodyfikacja Prawa Karnego 37 (2015) 92.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

the compensative nature of the instruments provided in Regulation 2018/1805. Strengthening the rights of victims to restitution and compensation remains one of the most obvious objectives of Regulation 2018/1805. It is provided that the rights of victims should take precedence over the rights of states in that regard, and confiscation should facilitate the exercise of these rights by victims[130]. Thus, it has been argued that "it should be possible to use the recovered assets for the purposes of restitution and compensation at the stage of execution of the confiscation both in domestic and cross-border enforcement proceedings"[131].

Considering the above, it has been made clear that freezing and confiscation orders under Regulation 2018/1805 emphasize much more their restorative function, rather than just the traditional retributive and preventive functions. This aim becomes, however, impossible to achieve if the national confiscation (forfeiture in the case of Poland) mechanisms are excluding the possibility of serving compensatory purpose. Certainly, Regulation 2018/1805 directly highlights that its provisions "should apply to all freezing orders and to all confiscation orders issued within the framework of proceedings in criminal matters" and "[w]hile such orders might not exist in the legal system of a Member State, the Member State concerned should be able to recognize and execute such an order issued by another Member State"[132]. Nevertheless, freezing orders and confiscation orders that are aimed at compensation will be excluded from mechanisms provided by Regulation 2018/1805 "when the national legal order makes that State the beneficiary of the assets recovered through confiscation, not the crime victims"[133].

Taking into account the above, it should be argued that Polish law creates a contradiction in which Regulation 2018/1805 cannot exercise its task to provide restitution and compensation for victims. Under Polish law, ordering forfeiture is a concurrent mechanism to restitution and compensation and not a way to enable them (see Article 44

[130] See e.g. Recital 45 and Articles 29-30 of Regulation 2018/1805. This aim has been also highlighted in EU Commission report by Joëlle Milquet, *Strenghtening victims' rights: from compensation to reparation. For a new EU Victims' rights strategy 2020-2025*, European Union (2019) 57, https://db.eurocrim.org/db/en/doc/3204.pdf (accessed 30.08.2024)
[131] Ariadna Ochnio, *Addressing Barriers to Victim's Rights to Recovered Assets in the Mechanism for Mutual Recognition of Freezing and Confiscation Orders* in: Ariadna H. Ochnio, Hanna Kuczyńska (eds.) *Current Issues of EU Criminal Law*, ILS PAN (2022) 149.
[132] See Recital 13 of Regulation 2018/1805.
[133] Ariadna Ochnio, *Addressing Barriers to Victim's Rights to Recovered Assets in the Mechanism for Mutual Recognition of Freezing and Confiscation Orders* in: Ariadna H. Ochnio, Hanna Kuczyńska (eds.) *Current Issues of EU Criminal Law*, ILS PAN (2022) 149.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

§ 5 CC). The disconnection between the functioning of those mechanisms is confirmed through the normative regulation of freezing orders under Polish law, that allows the issue of such orders either with a purpose of forfeiture (Article 291 § 1 point 3 CCP) or with a purpose of compensation (Article 291 § 1 point 4 CCP) or with a purpose of restitution (Article 291 § 1 point 5 CCP). Thus, the forfeiture of assets simply cannot be ordered if they are to be returned to the victim or another entitled entity.

As a result, it can be argued that the rules on forfeiture and freezing in the Polish criminal legal system creates duality of the legal situation of victims of crime in domestic cases and in cross-border cases subject to the direct effect of Regulation 2018/1805[134]. If the EU legal instrument is to be directly used, it creates a different set of rights and instruments available to victims of crimes than the one that is provided to them through Polish domestic criminal legal system. Thus, to remain in compliance with Regulation 2018/1805 and to serve the compensatory purpose provided in that legal instrument, Polish law should undergo a major overhaul[135].

5.4.5 The Polish praxis in context of Regulation 2018/1805

The complicated and blurred normative regime of freezing and confiscation orders discussed above, unfortunately, cannot be explained and analyzed based on current Polish praxis as there is not enough data available and access to what is available has been made almost impossible. Although Regulation 2018/1805 has been applicable since 19 December 2020, the availability of any official data concerning the practical use of the Regulation by Polish authorities is surprisingly limited. According to the Polish Ministry of Justice, the statistics on cases involving courts concerning **confiscation orders** have been collected only since the beginning of 2023 and for the past year still underreported[136], making joint statistics unavailable at the time this report was written. However, independent research shows that, **during the first half of 2023,** numerous provincial courts reported **zero cases** in

[134] Ariadna Ochnio, *O funkcji kompensacyjnej przepadku i zabezpieczeniu wykonania środków kompensacyjnych (rozważania w perspektywie prawa UE i prawa międzynarodowego)*, Państwo i Prawo 3 (2023) 97-98.
[135] Some suggestions how to overcome this situations were already presented by Ariadna Ochnio, *O funkcji kompensacyjnej przepadku i zabezpieczeniu wykonania środków kompensacyjnych (rozważania w perspektywie prawa UE i prawa międzynarodowego)*, Państwo i Prawo 3 (2023) 100-101.
[136] Ministry of Justice, Department of Strategy and European Funds, 9 November 2023, DSF-II.082.202.2023.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

which confiscation was either issued or executed[137]. There is a very small chance that the results for the second half of 2023 will be slightly better but for that data we must wait.

At the same time the empirical research concerning issuing and executing **freezing orders** failed to provide more guidance[138]. Based on the data presented for the purpose of another project[139], it can however be confirmed that between 19 December 2020 and 31 October 2023 the Polish public prosecution offices registered just 133 cases involving Regulation 2018/1805, of which in 45 cases Poland was acting as the issuing authority and in 88 cases as the executing authority[140]. That means that Poland received twice as many requests to execute freezing orders as were issued by Polish prosecutors. Of all the countries that requested from Poland the execution of a freezing order, Germany is leading (37 orders) followed by France (10) and Austria (7). Poland issued most orders to Lithuania (8), the Netherlands (6) and Germany (5)[141]. This altogether shows very little popularity of these instruments in our country and may be considered as disappointing after five years from enactment of Regulation 2018/1805.

It should be noted that the lack of accessibility to statistical data is troublesome also in the light of Article 35 of Regulation 2018/1805. It requires that each year Member States shall send to the EU Commission (preferably at a central level) data concerning the number of cases in which a victim was compensated as well as the average time required for the

[137] Statistical reports for the first half of 2023 from: Regional Court in Radom <https://radom.so.gov.pl/sor/dzialalnosc-sadu/podstawa-dzialania/sprawozdania-statystycz/2023/10147,Sprawozdania-statystyczne-z-dzialalnosci-Sadu-Okregowego-w-Radomiu-w-I-polroczu-.html> (accessed 30.08.2024; Regional Court in Ostrołęka <https://ostroleka.so.gov.pl/sprawozdania-statystyczne-za-rok-2023-r,new,mg,289.html,404> (accessed 30.08.2024; Regional Court in Wrocław <https://www.wroclaw.so.gov.pl/sprawozdania-statystyczne-z-dzialalnosci-sadu-za-i-kwartal-2023-roku,new,mg,85,302,.html,218> (accessed 30.08.2024; and Regional Court in Warsaw <https://bip.warszawa.so.gov.pl/artykul/488/374> (accessed 30.08.2024).

[138] While gathering data for this project we approached the Provincial Public Prosecutor's Office in Wrocław requesting an access to review the only case related to Regulation 2018/1805 handled in that office in 2022 (request from other state to execute the freezing order in Poland) – the access was denied (decision of the Provincial Prosecutor of 9.10.2023, 3047-5.Ip.36.2023).

[139] See project RECOVER (JUST-2022-JCOO) https://recover.lex.unict.it (accessed 30.08.2024). Note that according to the project's website the Polish report was prepared by three lawyers working in the Polish Ministry of Justice and therefore this enabled their access to data which was unavailable for us.

[140] Poland. Questionnaire on the practical obstacles and legal issues arising in the implementation of REG, project RECOVER, https://recover.lex.unict.it/wp-content/uploads/2023/11/Poland.pdf (accessed 30.08.2024).

[141] It is however striking that in the cited report all together 11 orders (5 when Poland acted as an issuing authority and 6 as an executing authority) are shown as "no data" which means that the reporting entity did not provide sufficient information as to identify the issuing or executing authority.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

execution of freezing orders and confiscation orders under Regulation 2018/1805. However, it has been also argued that the statistics should be not only collected and reported to the European Commission according to the binding obligation but also "comprehensible and publicly available"[142]. This certainly would allow for expanding social control over this area of criminal proceedings strengthening the rights of the victims.

6 Conclusions

Transposition of EU law into domestic legal systems is a big challenge. Unlike in case of EU Directives setting minimum standards of the rights of the suspect and the accused, where there are numerous structural deficiencies in their transposition to the Polish CCP[143], in case of the EAW and EIO the situation, although not perfect, looks better.

The provisions of **FD EAW** can be considered as generally effectively implemented to the Polish legal system with two notable exceptions related to preferential treatment of own citizens and grounds for refusal.

The first of these exceptions is the distinction, not provided for in the FD EAW, between the situation of the surrender of other Member States' nationals and that of its own nationals, providing greater protection against the surrender of the latter. With regard to Polish nationals, the EAW can only concern offences committed outside of the territory of Poland and a double criminality is required.

The second exception concerns grounds for refusal to execute an EAW. Although all of the grounds provided in FD EAW have been implemented to the Polish legal order, Poland has introduced five additional mandatory grounds for refusal. Not only those grounds are not provided for in the FD EAW but some of them apply only to Polish citizens. As a result, the Commission has opened an infringement proceeding for an incorrect transposition of the FD EAW against Poland under Article 258 TFEU. But changing these rules may be problematic as some of the mandatory grounds of refusal listed in the CCP stem from Article

[142] Ariadna Ochnio, *Addressing Barriers to Victim's Rights to Recovered Assets in the Mechanism for Mutual Recognition of Freezing and Confiscation Orders* in: Ariadna H. Ochnio, Hanna Kuczyńska (eds.) *Current Issues of EU Criminal Law*, ILS PAN (2022) 144.

[143] See: Karolina Kremens, Wojciech Jasiński, Dorota Czerwińska, Dominika Czerniak, *There and back again: a struggle with transposition of EU directives* in Michele Caianiello, Giovanni Sartor, Giuseppe Contissa, Giulia Lasagni (eds.) *Effective protection of the rights of the accused in the EU directives : a computable approach to criminal procedure law* (Brill 2022) 154–169.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

55(2) and (4) of the Polish Constitution and any amendments to CCP would demand as well amendments to the Constitution. Moreover, in some cases, the nature of the grounds for refusal was changed from optional (as provided in FD EAW) to mandatory. This limits the scope of discretion of Polish executing judicial authorities. It also limits the principle set in Article 1 (2) FD EAW according to which Member States shall execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

In answer to the criticism regarding the overuse of EAWs by Poland due to a lack of the principle of proportionality in Polish law, in 2015 a general clause of 'the interest of the administration of justice" was added to Article 607b CCP. Since then, according to Article 607b CCP, an EAW must not be issued if it does not serve the interest of justice. This led to decrease in EAWs issued by Polish authorities, in particular in minor cases.

Directive 2014/41 has been transposed into the Polish CCP in 2018 and since then no amendments to the relevant rules were introduced. The two chapters devoted to the EIO (Chapter 62c and 62d CCP) should be assessed positively as offering a sufficient legal framework allowing for effective cooperation in criminal matters.

There are no systemic or structural deficiencies which put into question the overall effectiveness of the use of EIO in Poland. Most of the divergences between the provisions of Directive 2014/41 and Polish CCP are of rather minor character and, what is more important, do not prevent the correct application of EIO regulations stemming from Directive 2014/41. The deficiencies of the national transposition can be divided into two groups.

First, in several cases the Polish lawmaker decided not to transpose the provisions of Directive directly into the domestic legal system. Possibly an explicit transposition was perceived as superfluous. This concerns e.g. the obligation to consult the issuing authority on issues regarding the execution of EIO or an obligation to consult with the issuing authority on the appropriate timing to carry out the investigative measure, if the competent executing authority cannot meet the initial 90 days time limit. Hopefully, in most cases the lack of explicit transposition does not prohibit the executing authority from following the obligations stemming from the Directive. Other omissions concern e.g. consulting the legal representative on the transfer of the person in custody, because of the age or physical or mental condition of this person. Also in this case, as the Polish law does not preclude such consultations, the competent authority may and should interpret domestic provisions in

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

line with the wording of the Directive 2014/41. That being said, it nonetheless would be better if relevant CCP's regulations fully transpose the obligations stemming from the EU law.

Second, in some cases the wording of the relevant provisions of Directive 2014/41 were modified in order to adapt them in line with the conceptual framework of the Polish CCP. The most prominent example is the use of expression "interest of the administration of justice" in Article 589x (1) CCP as to conditions for the issuance of an EIO, instead of "necessity" and "proportionality" as provided in Article 6(1)(a) of Directive 2014/41. Another important modification is the reference to "investigative measure that does not require the issuance of a decision by a judge or prosecutor" as an equivalent of non-coercive investigative measure mentioned in Directive 2014/41. Again, in such cases the better option would be to follow the terminology used by the EU lawmaker. However, in practice, if the issuing authority is aware of this terminological divergence, the risk of misapplication of the EIO is rather limited.

The most important problem is the transposition of Articles 24-25 of Directive 2014/41 providing for hearing a person by videoconference or other audiovisual transmission as well as by telephone conference. The national provisions concerning these measures do not offer a sufficient legal framework to carry out hearings in such forms. This is entirely the case of telephone conference and partially the case of videoconferences. This framework is crucial, because domestic provisions are the ones according to which the investigative measures in question are conducted. If they are deficient, the aims of these investigative measures simply may not be fully achieved. Certainly, the executing authorities may be creative while using the existing legal provisions, but it would be much better if the respective CCP's provisions were more elaborated. Changes in the shape of domestic provisions concerning video and audio conferences are also necessary as they have been tailored in order to fit into domestic investigations and they do not take into account the specificity of the conference conducted on the basis of an EIO, where the issuing authority is in fact interrogating the person and the procedure is modified in comparison to a domestic case. So even though the necessary arrangements can be made between issuing and executing authority, there are no firm legal grounds for carrying out the measure as designed in Directive 2014/41. Therefore, a more developed body of provisions should be adopted to guide domestic authorities in executing EIOs regarding videoconference.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Finally, the admissibility of evidence obtained through the EIO is controversial. Polish CCP does not refer to this issue explicitly[144]. The only provision addressing this matter directly is Article 587 CCP. It introduces an admissibility test based on the verification of compliance with the principles of Polish legal order. However, the scope of Article 587 CCP is reduced only to evidentiary measures enumerated therein and does not encompass all types of evidence that can be gathered abroad, including those obtained with the use of the EIO. It is therefore doubtful whether this provision can be treated as a general rule referring to admissibility of evidence obtained abroad (including in the EU). As a consequence, for the sake of clarity, the lawmaker's intervention is desirable.

Summing up, in general the transposition of Directive 2014/41 into the Polish criminal legal system should be assessed positively. The deficiencies are, with few exceptions, minor and in practice they do not block the effective cooperation between the issuing and executing authorities. Moreover, the identified errors are easy to correct by the Polish lawmaker if only there is a will to do so.

It is difficult, if not impossible, to properly assess the functioning of **Regulation 2018/1805** within the Polish criminal legal system. The creation of the new legal framework related to freezing and confiscation orders has received virtually no response from the Polish side. It is not an exaggeration to say that it has been almost overlooked, with no reaction from the Polish parliament or the Ministry of Justice. It has also received very little attention among scholars in Polish academia. This cannot be explained by the obvious fact that the discussed Regulation 2018/1805 has a direct effect on the Polish legal order and, therefore, does not require any form of implementation or transposition. It might stem from the low level of understanding of the emerging EU legislation concerning criminal justice matters, or from the generally poor climate for cooperation with the EU between 2015 and 2023. This has serious consequences. The lack of transposition or adjustments made in the Polish CCP to meet the new perspective on freezing and confiscation as provided in Regulation 2018/1805 makes the new rules almost invisible. The untouched normative environment renders that the application of provisions concerning freezing and confiscation is no longer intuitive. While the CCP regulates the procedure for mutual cooperation concerning freezing and confiscation orders, these provisions currently apply only to Ireland and Denmark, which is at least misleading. This is confirmed by statistics that

[144] The legal doctrine perceives this as a deficiency. See eg Hanna Kuczyńska in *Kodeks postępowania karnego. Komentarz*, ed. Jerzy Skorupka (C.H. Beck 2023) 1698-1699.

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

show a little (in case of freezing orders) or none (in case of confiscation orders) use of instruments provided for in Regulation 2018/1805. This is a consequence of the existence of the current unchanged normative framework on ordering a forfeiture. Polish law makes it a concurrent mechanism to restitution and compensation and not a way to enable them. As a result, the forfeiture of assets under Polish law simply cannot be ordered if these assets are to be returned to the victim or another entitled entity. This makes the main goal of Resolution 2018/1805 unmet and calls for an immediate legislative response.

Summing up, the level of implementation of the three mutual recognition instruments in Poland varies. While the implementation of the EIO is generally correct and is almost unaffected by structural deficiencies, the same cannot be said about the EAW. In this case, the problems are fundamental and sovereignty-related (differentiation between Polish and non-Polish citizens). Serious doubts can also be raised in relation to freezing and confiscation orders. While the provisions of Regulation 1805/2018 can be applied directly, their effective execution depends on the national legal framework. When the latter is deficient it does not allow the confiscation order under Regulation 1805/2018 to achieve all the aims it should serve. The crucial deficits of the national legal framework, as they cannot be neutralized by creative interpretation of the legal provisions in practice, call for immediate legislative changes.

7 References

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 3 (2022)

Doris De Vocht, Poland in Ed Cape, Zaza Namoradze, Robert Smith, Taru Spronken (eds) Effective Criminal Defence in Europe (Intersentia 2010)

Elżbieta Hryniewicz-Lach, Poland. Report on extended confiscation in scope of the fundamental rights and general principles of EU, https://konfiskata.web.amu.edu.pl/wp-content/uploads/2022/02/Country-Report-Poland-1.pdf (accessed 30.08.2024)

Wojciech Jasiński and Karolina Kremens, Criminal Law in Poland (Wolters Kluwer 2019)

Witold Klaus, Justyna Włodarczyk-Madejska, Dominik Wzorek, In the Pursuit of Justice: (Ab)Use of the European Arrest Warrant in the Polish Criminal Justice System, Central and Eastern European Migration Review, Vol. 10, No. 1, 2021

Joanna Klimczak, Dominik Wzorek, Eleonora Zielińska, Europejski nakaz dochodzeniowy w praktyce sądowej i prokuratorskiej – ujawnione problemy i perspektywy rozwoju (Wydawnictwo Instytutu Wymiaru Sprawiedliwości 2022)

Karolina Kremens, The new wave of penal populism from a Polish perspective in Elisa Hoven and Michael Kubiciel (eds), Zukunftperspektiven des Strafrechts: Symposium zum 70. Geburstag von Thomas Weigend (Nomos Verlagsgesellschaft 2020)

Karolina Kremens, Poland in Pedro Caeiro, Sabine Gless, Valsamis Mitsilegas, Miguel João Costa, Janneke de Snaijer, Georgia Teodorakakou (eds), Elgar Encyclopedia of Crime and Criminal Justice (Edward Elgar Publishing 2024)

Karolina Kremens, Wojciech Jasiński, Dorota Czerwińska, Dominika Czerniak, There and back again: a struggle with transposition of EU directives in Michele Caianiello, Giovanni Sartor, Giuseppe Contissa, Giulia Lasagni (eds.) Effective protection of the rights of the accused in the EU directives : a computable approach to criminal procedure law (Brill 2022)

Hanna Kuczyńska in Kodeks postępowania karnego. Komentarz, ed. Jerzy Skorupka (C.H. Beck 2023)

Ariadna Ochnio, Glosa do postanowienia Sądu Apelacyjnego w Katowicach z dnia 4 września 2018 r., II AKz 645/18, Orzecznictwo Sądów Polskich 7–8 (2021)

Ariadna Ochnio, Addressing Barriers to Victim's Rights to Recovered Assets in the Mechanism for Mutual Recognition of Freezing and Confiscation Orders in: Ariadna H. Ochnio, Hanna Kuczyńska (eds.) Current Issues of EU Criminal Law, ILS PAN (2022)

Ariadna Ochnio, O funkcji kompensacyjnej przepadku i zabezpieczeniu wykonania środków kompensacyjnych (rozważania w perspektywie prawa UE i prawa międzynarodowego), Państwo i Prawo 3 (2023)

Sławomir Steinborn, O potrzebie uchwalenia ustawy o międzynarodowej współpracy w sprawach karnych in Jolanta Jakubowska-Hara, Celina Nowak, Jan Skupiński (eds.),

This project is funded by the European Union's Justice Programme (2022) under Grant Agreement no. 101089634

Reforma prawa karnego – propozycje i komentarze. Księga pamiątkowa Profesor Barbary Kunickiej-Michalskiej (Scholar 2008)

Małgorzata Wąsek-Wiaderek, Adrian Zbiciak, 'The practice of Poland on the European Arrest Warrant' in: Renata Barbosa and others, European Arrest Warrant. Practice in Greece, the Netherlands and Poland (Boom Juridisch 2022)

M. Wąsek-Wiaderek, A. Zbiciak, The practice of Poland on the European Arrest Warrant, in: R. Barbosa et al., European Arrest Warrant. Practice in Greece, the Netherlands and Poland (Boom Juridisch 2022)

Paweł Wiliński, Konstytucjonalizacja współczesnego procesu karnego in Piotr Hofmański (ed), System Prawa Karnego Procesowego. Tom I – Zagadnienia ogólne. Cześć 1 (LexisNexis 2013)